LAW AND THE MARRIAGE RELATIONSHIP IN SRI LANKA

SHIRANI PONNAMBALAM

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To

ANANDAN

LAW
AND THE
MARRIAGE
RELATIONSHIP
IN SRI LANKA

by

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PREFACE

The subject of marriage and divorce is an aspect of Family Law which has received very little attention from our law reformers. Piecemeal reform has been made but there is an urgent need for a complete overhaul of the law. Family law seeks to regulate the stability of the family unit which is so vital to our society; hence a comprehensive body of laws incorporating the mores of modern Sri Lanka is an absolute necessity.

Legal recognition of marriage in a multi-racial, multi-religious legal system like that of Sri Lanka poses many difficult problems. Moreover, the incidents of marriage such as the obligation of support and the personal and proprietary rights of spouses need to be regulated by laws which reflect the values and aspirations of contemporary Sri Lanka.

The dissolution of marriage is fast becoming a structural feature of modern life in our society and the understanding of the marriage covenant as life-long is weakening. The courts are thus called upon to uphold distributive justice in situations which by their very nature exclude wholly just solutions . Divorce has been aptly described as "a drastic piece of surgery, the unnatural severing of what should be one and indivisible."[1] Hence, to demand that neither party be hurt or unfairly treated is to ask the impossible. Nevertheless an attempt should be made to reconcile differences with minimum bitterness and recrimination.

The recent amendment to the Civil Procedure Code[2] has introduced two additional grounds for divorce which are not based on matrimonial fault. Upto 1977, whatever legal theory might have been, legal practice was moving together with the mind of society towards the concept of divorce by consent. The recent amendment to the law, therefore, is most welcome. However, many anomalous and uncertain features remain.

A liberal body of divorce laws must necessarily contain some inbuilt safeguards against the irresponsible and impulsive termination

1. *Putting Asunder, A Divorce Law for Contemporary Society* (London S.P.C.K. 1966) p. 21.
2. No. 20 of 1977.

of the marriage tie. Most Western jurisdictions, which have done away with the fault-based grounds for divorce have introduced the concept of the "breakdown theory" thereby making certain that an independent body, like the courts, ascertain the viability of a marriage, giving its sanction only to the dissolution of "empty" legal ties. It is unfortunate, therefore, that our legislature has not introduced the "breakdown theory" into our law, when facilitating the award of a decree of divorce.

Moreover, a divorce law which is not founded on matrimonial misconduct assumes that divorce is not "a reward for marital virtue on the one side and a penalty for marital delinquency on the other; not a victory for one spouse and a reverse for the other; but a defeat for both, a failure of the marital 'two-in-oneship' in which both its members, however unequal their responsibility, are inevitably involved together."[3] This philosophy must have a profound effect on the rights and obligations of the spouses in the post-dissolution era. Consequently, reform of the grounds for divorce should be accompanied by laws which embody this sentiment and the legislature should not merely give the court the discretion to act as it thinks fit but rather it should guide the court in the exercise of its discretionary powers.

When writing this book I have borne in mind not only the needs of the practitioner and the law student but the law reformers of our country as well. If this work proves to be of some benefit to them, I will be content.

I wish to place on record the debt of gratitude I owe Professor G. L. Peiris, my mentor and friend. Not only has he moulded and guided my academic career, but he has also been a friend at all times, unselfish and sincere. I need hardly say how much I appreciate the help and encouragement he has given me and to him I owe both an academic and personal debt.

I am thankful to Professor A. M. Honore, Regius Professor of Civil Law in the University of Oxford who supervised my thesis which was awarded a B. Litt. His insistence on precision and

3. *Putting Asunder, A Divorce Law for Contemporary Society* (London S.P.C.K. 1966) p. 18.

accuracy in research provided me with a firm foundation which has helped immensely in my academic career.

Miss Sharya de Soysa my colleague and friend, who is at present researching at Oxford University, spent much of her valuable time reading through the manuscript and for her criticisms and suggestions I am most grateful. A word of thanks is also due to Mr. J. H. Marikar, Assistant Librarian of the Colombo University Library for the help extended to me in the library.

I thank my parents for instilling in me the value of education and for the opportunities they have afforded me to achieve my career objectives. My mother spent many hours checking the Table of Cases and the Index, for which I am most grateful.

As a token of profound gratitude I have dedicated this book to my husband who alone is responsible for its successful publication. Had he not cheerfully borne the tremendous inconveniences that ensued when my obligations towards my family took second place to my study of law, I could not have engaged in long hours of research. On many occasions he effectively prevented me from abandoning my work and, indeed had he not provided me with the facilities he did, this book would not have been written.

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January 1982

FOREWORD

This book supplies a long felt need in the legal literature of Sri Lanka. It represents the first comprehensive treatment of all aspects of the marriage relationship, as catered for by statutory provisions and by the common law applicable in Sri Lanka. The author's exhaustive discussion of the statute law and the decided cases provides the practitioner with valuable source material, while her critical comments on the analytical framework of the law, and her assessment of possible lines of development, are of particular relevance to students.

In the context of a legal system such as ours the need for authoritative text books explaining and evaluating the principles which govern different branches of the law is especially acute. The antiquity and diversity of the sources, viewed in relation to the overall condition of the law during a formative stage of its development, have aggravated the task of judge and lawyer. In many areas of family law a variety of options continues to be available in Sri Lanka; emphasis and priorities, naturally, are conditioned by policy factors. A salient merit of Mrs. Ponnambalam's work consists of her perceptive appraisal of the sociological underpinnings of the law.

One of the objectives which inspired the establishment of the Faculty of Law in our University was the bringing into being of a body of legal literature which is typically Sri Lankan in content and approach. It is a matter for satisfaction that the Faculty has made a useful contribution over the years towards the accomplishment of this objective. The research culminating in this book was undertaken by Mrs. Ponnambalam, and the work compiled, in the midst of perennial pressures with regard to undergraduate teaching and the conduct of external law examinations. These constraints, in my opinion, enhance the measure of her achievement.

The publication of this book coincides with Mrs. Ponnambalam's departure from Sri Lanka at the end of a brief but productive career in the academic life of our country.

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January, 1982.

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CHAPTER 1

INTRODUCTION

The subject of marriage and divorce involves a discussion of several interesting issues particularly in a mixed legal system like that of Sri Lanka. Apart from the Roman-Dutch law, which is the source and foundation of our law of husband and wife, we are influenced by English law principles which have contributed to the origin and growth of certain aspects of the law of persons. In addition the personal laws, namely, the Kandyan law, Thesawalamai and Muslim law, applicable in our jurisdiction, have required a modification of Roman-Dutch and English law principles in order to ensure that the law is developed in a manner suitable to the social conditions prevalent in our legal system. It is evident from a study of this subject, therefore, that the law of marriage and divorce in Sri Lanka is an amalgam of rules drawn from different sources giving rise to a body of laws peculiar to our jurisdiction. Although reference to other legal systems is necessary for the purpose of interpretation, the Sri Lankan law of husband and wife is not a direct importation from any other legal system. Indeed many of its features are unique to this jurisdiction.

The requirements for a valid marriage in Sri Lanka are set out in the Marriage Registration Ordinance[1] which expressly declares that it will not apply to marriages contracted under the Kandyan Marriage Ordinance of 1870,[2] or by virtue of the Kandyan Marriage and Divorce Act, and between persons professing Islam.[3] Marriage among Kandyans is governed by the Kandyan law and likewise, the Muslim law regulates unions between Mohammedans. Consequently, there are three types of marriages which are recognised by statute in Sri Lanka, and this poses problems in areas of conflict. For instance, the Marriage Registration Ordinance, which recognises only monogamous unions, is inconsistent with the Moham-

1. No. 19 of 1907
2. Repealed by Act No. 44 of 1952
3. Sec. 64.

medan Code which accepts polygamy, and the concurrent application of these laws gives rise to a situation in which a person can circumvent the provisions of the Marriage Registration Ordinance and contract a second marriage by the simple expedient of changing his faith and thereby the legal system by which he is governed. Particularly since conversion to Islam is not difficult, it is submitted that the legislature ought to prohibit this flagrant contravention of the Marriage Registration Ordinance.

Problems also arise in the application of the Maintenance Ordinance No. 19 of 1899 to Mohammedans and Kandyans. Prior to the enactment of the Muslim Marriage and Divorce Act[4] the Maintenance Ordinance was the only means by which a Mohammedan woman could enforce her husband's obligation of support. This Ordinance denies support to an applicant guilty of the fundamental obligations of marriage, namely, that of fidelity and the duty to cohabit with one's spouse in the matrimonial home.[5] Different criteria, however, had to be adopted when deciding whether the applicant was guilty of matrimonial misconduct, if the defendant was a Mohammedan. For instance, a woman who refuses to live in the matrimonial home because her husband is living with another woman will not be guilty of desertion and will be entitled to support, while a woman who departs from the matrimonial home because her husband, who is a Mohammedan, is living with a second wife, will be labelled "guilty" of desertion because polygamy is permitted by the law governing Mohammedans; as such the husband's act of cohabiting with another woman during the subsistence of his first marriage will not be construed as constructive malicious desertion sufficient to justify the wife's refusal to live in the common establishment.[6] More recent judicial decisions, however, have opined that the Muslim Marriage and Divorce Act[7] vests exclusive jurisdiction in the Quazi to decide on questions relating to the obligation of support and, consequently, the anomaly referred to above will not arise.

4. No. 13 of 1951
5. Sec. 4
6. See chapter 6 *infra* sec. IV (a)
7. No. 13 of 1951, sec. 48

The Maintenance Ordinance, however, continues to apply to Kandyans who seek to enforce the duty of support *stante matrimonio* because the Kandyan Marriage and Divorce Act[8] provides only for support subsequent to a dissolution of the marriage.[8a] Substantial differences between the Kandyan law and the Roman-Dutch law are ignored in the process of giving relief to an indigent Kandyan woman under the Maintenance Ordinance. For instance, the Kandyan law distinguishes between two types of marriages, namely, the *diga* marriage and the *binna* marriage and while in a *diga* marriage the husband's obligation to support his wife has been clearly recognised, it is doubted whether the husband of a *binna* marriage is vested with an analogous obligation.[8b] Judicial decisions, however, have recognised a right of action for support against the husband of a *binna* marriage as well.[9]

Moreover, while in the Roman-Dutch law there is a substantial difference between separation and divorce and while the Maintenance Ordinance provides a remedy only to a wife during the subsistence of a valid marriage, in the Kandyan law, the distinction between separation and divorce is obscure, the mere departure from the matrimonial home being sufficient to constitute divorce. Nevertheless, a Kandyan woman who has, according to Kandyan law, divorced her husband has been permitted to invoke the provisions of the Maintenance Ordinance to obtain support from her ex-husband. Indeed, these anomalies will not come about if persons governed by different and distinct bodies of laws are not permitted to obtain redress by virtue of a statute enacted to cater to a different set of circumstances. What is required, then, is an amendment to the Kandyan Marriage and Divorce Act to include the law regulating support *stante matrimonio* and to provide an effective method of enforcing the obligation of support on divorce.[10]

Judicial recognition of customary marriages marks a significant

8. No. 22 of 1955

8a. But even this statute does not provide a means of enforcing the obligation of support. Consequently, recourse to the Maintenance Ordinance continues.

8b. F. A. Hayley, *A Treatise on the Laws and Customs of the Sinhalese (Colombo 1923)* p. 289

9. See chapter 6 *infra* sec. IV (a)

10. *ibid.*

departure from legislative policy as illustrated in the Marriage Registration Ordinance.[10a] Notwithstanding the fact that the Ordinance requires the registration of a marriage and that the provisions of the Ordinance govern all marriages except those contracted according to Kandyan law or between persons professing Islam, the Sri Lankan courts have recognised the validity of marriages contracted by the performance of customary rites and practices, thereby giving rise to a mode of solemnisation not envisaged by the Ordinance.[11] This is of course entirely consistent with the realities existing in our society in which the observance of customary practices as opposed to statutory formalities when contracting a marriage is a common occurrence. Indeed, the non-recognition of customary marriages would have resulted in serious consequences to, for instance, the children of the union and the legislature therefore, has rightly assumed that it is far better to confer validity on a practice which is ingrained and a part of the social fabric of our society rather than insist on the satisfaction of prescribed statutory formalities which are in fact alien to a large proportion of our population. Needless to say legal recognition of customary marriages is dependent on the proper performance of the essentials of a valid marriage as conceived in that particular caste or community. Hence the court is required to ascertain both the essentials of a valid marriage in the community to which the parties belong and, the fact that the rituals were actually carried out. Of course the onus of proof is on the one who asserts that a particular practice is a *sine qua non* of a valid customary marriage.

As a result of judicial recognition of customary marriages the protection conferred on registered marriages under the statute is denied to marriages solemnised outside the purview of the statute. According to the Marriage Registration Ordinance, want of consent to a marriage contracted between minors will not invalidate a marriage which has been registered in accordance with the statute. If a similar situation was to occur in relation to a customary marriage

10a. No. 19 of 1907

11. It must be noted that in relation to all other matters set out in the Ordinance, the statute takes precedence over customary law, the only exception being in relation to the mode of solemnisation. See chapter 3 *infra* sec. 1 (f)

in all probability it will be governed by the common law principle which requires the impediment to the marriage to be removed prior to its recognition. In other words, either subsequent consent or the attainment of the age of majority would be required to ratify the voidable marriage and to render it valid *ab initio*.[12] It must be pointed out that the special protection conferred on registered marriages would not have been the result of a deliberate legislative intent to exclude from its scope customary marriages. It is more likely that the judicial recognition of a form of marriage not contemplated by the statute gave rise to this anomaly.

The presumption of marriage by habit and repute is another illustration of judicial policy to administer the law in a manner consistent with the needs of our society. The Roman-Dutch law presumption in favour of marriage rather than of concubinage has been adopted alongside a statute which sets out the requisites of a valid marriage. Proof of long years of cohabitation and evidence of society's acceptance of the parties as being husband and wife give rise to a presumption that sometime in the past the parties had contracted a valid marriage. Evidence to the contrary rebuts the initial presumption and, therefore, if one party to the marriage is alive and capable of giving evidence, the court will require proof of the performance of some antecedent ceremony of marriage.[13]

Apart from the personal laws, our law has been greatly influenced by English law principles and this is best illustrated by the law regulating the proprietary consequences of marriage. Marriage, in the Roman-Dutch law, entailed serious consequences for the woman in that all her property was merged with that of her husband's in a common fund thereby giving rise to a universal community of property and the husband, by virtue of his marital power over the wife's person and property, became the sole administrator of the common estate. The wife had no independent proprietary or

12. See chapter 3 *infra* sec. 11 (c)

13. See chapter 3 *infra* sec. IV. It is doubtful, however, whether a customary "marriage" between persons, who, according to the law governing them are not competent to marry by reason of consanguinity, for instance, can be subsequently ratified under any circumstances.

contractual rights, being legally subordinate to her husband. These consequences of marriage remained a feature of our legal system till 1876 when the Matrimonial Rights and Inheritance Ordinance No. 15 of 1876, abolished the system of community of property and brought about instead a separate property regime reminiscent of that applicable in the English legal system. In addition, the Ordinance removed some of the disabilities which attached to a married woman and abrogated the Roman-Dutch law rule which prohibited donations between spouses. The concessions granted in the 1876 Ordinance were further enhanced by the Married Women's Property Ordinance No. 18 of 1923 modelled on the English Married Women's Property Acts of 1882 and 1893. This statute brought about the complete emancipation of a married woman, conferring on her full contractual and proprietary rights, so much so that her legal position was like that of a *feme sole*.[14]

These statutes, then, brought about a complete departure from the Roman-Dutch law tradition and signified the inception of the influence of English law on our law of marriage and divorce. Indeed judicial decisions are replete with reference to English law authority and certain areas of the law of support, like for instance, the right to use and enjoy the matrimonial home both *stante matrimonio* and on divorce, have been formulated by reference to English law. Hence in this area of support while the Maintenance Ordinance regulates the obligation of maintenance during marriage in relation to questions pertaining to matrimonial assets, the law is heavily influenced by the English legal system. In addition, recourse to the Roman-Dutch law is permitted in situations not provided for by the statute. It is evident, therefore, that the courts are free to resort to both the Roman-Dutch and English laws relating to husband and wife when developing our own law on the subject.[15]

The law regulating the proprietary consequences of divorce further illustrates this judicial policy. Our law appears to recognise both the Roman-Dutch law rule of forfeiture of benefits and the provisions of the Civil Procedure Code which confer on the

14. See chapter 4 *infra*
15. See chapter 6 *infra*

courts wide discretionary powers to adjust the proprietary rights of spouses so as to do maximum justice to the former spouses. Of course the two remedies are mutually exclusive and a decision to be governed by one of the above principles excludes the application of the other. The rationale underlying the two remedies and the scope of applicability of these different rules vary greatly. To begin with, the Roman-Dutch law rule of forfeiture of benefits has as its primary objective the need to avert the enrichment of one spouse as a consequence of a union he or she is responsible for putting asunder. Accordingly, an essential prerequisite for the operation of this rule is the allocation of fault. Not only is it presumed that one party is to blame for the dissolution of the marriage, but it is also presumed that the other spouse is totally blameless; consequently the "guilty" spouse is made to forfeit whatever benefits he might have derived as a consequence of the marriage. This principle, which is of Roman-Dutch law origin, is applicable with equal force to a proprietary regime of universal community as well as a separate property system. While its application in a proprietary regime of community of property has the effect of causing a departure from the normal rule of equal division of the common estate on dissolution of the marriage, to a division based on contribution, in a separate property regime, on the other hand, the rule applies to deprive the "guilty" spouse of a benefit derived by the transfer of property rights by the other spouse.

In the law of Sri Lanka, the benefit which is normally acquired by a spouse (usually the husband) as a consequence of the marriage is the dowry property given by the bride's family to the husband at the time of marriage. Conversely, the husband's family may gift property to the wife on marriage. Therefore, the "dos" or dowry property, which has a long history in our legal system, is most often the subject of a forfeiture of benefits.

In vivid contrast, the law regulating the reallocation of property rights on divorce set out in the Civil Procedure Code is not dependent for its application on the allocation of fault and is not limited to benefits but applies to all property which either spouse "may be entitled to." It is submitted, however, that the term "property" in this context should be interpreted to mean "matri-

monial property" or "family assets." To explain this further, it is indeed reasonable that the subject of an adjustment of property rights should not involve all the proprietary rights owned by the spouses, irrespective of how and when they were acquired. It should properly be confined to property which has some causal nexus with the marital relationship. In other words, judicial discretion should be exercised over property acquired by either spouse due to the joint efforts of both (a distinction not being made between monetary and non-monetary contributions), and, property acquired as a direct consequence of the marriage like, for example, dowry property. A limitation such as this is essential to ensure that property rights acquired or retained independent of the marriage, and the involvement of the other spouse, as for instance, a legacy left to one spouse which remains independent of an involvement with the other spouse, do not become the subject of reallocation. Indeed this is best understood when the rationale underlying the rule of readjustment is explained. The court proceeds to redistribute proprietary rights between the spouses on the assumption that, irrespective of who has title to the property, the other spouse's contribution towards the acquisition or retention of such property entitles him or her to a share of the beneficial interest in the property. In most instances, the husband, who is the primary wage earner, makes purchases in his name although the property is for the benefit of the family. Hence, the matrimonial home, for instance, might be in the name of the husband although the wife had contributed financially to its acquisition. Even if a monetary contribution had not been made, it has been pointed out that the non-financial contribution a wife makes by performing her functions as a wife and mother qualifies her for a share in the beneficial interest in the property. While there is no difficulty in accepting her right to a share by virtue of a financial contribution, in the case of a contribution made by services rendered it might be more difficult to justify her entitlement. But what has now been accepted in most modern jurisdictions is the fact that had the wife not performed her duties as homemaker, the husband would not have been free to manage the finances of the family. Not only will the thrift and industry of a duty conscious wife relieve her husband of the household chores but it will also save him from spending on hired labour. Justice therefore demands that the wife,

who is in fact an "unremunerated servant", shares in her husband's fortunes and misfortunes in keeping with the ideals of marriage.

In the context of our own legal system dowry property may be termed a "matrimonial asset" not only because it is acquired as a consequence of the marriage but also because its retention and improvement will in all probability be attributable to the efforts of both spouses. For example, if the matrimonial asset was dotal property, given by the wife's family on the occasion of the marriage of their daughter, the husband would in all probability have contributed towards its maintenance and retention. On the other hand, if the dowry was given in the form of money, then, too. the husband would have been involved in making wise investments. Indeed, in a union as closely knit as that of marriage it is exceedingly difficult to exclude the involvement of one spouse in the proprietary rights of the other. In all probability, therefore, dowry property will be subject to a reallocation according to the provisions of the statute.

In an evaluation of the alternative remedies available to divorced spouses it is clear that while the rule of forfeiture of benefits will ensure that dowry property remains in the possession of the donating spouse, and if it had been transferred to the other, and that spouse was guilty of matrimonial misconduct, he or she forfeits his or her rights to it, an application of the statutory provision may well result in the reallocation of dowry property. *Prima facie* this may appear to be unobjectionable but considering the sacrosant attitude to ancestral property, which is usually the subject of a dowry, the dissemination of these proprietary rights to persons outside the donor's family may well be unpalatable particularly when the recipient of such property is the ex-spouse of a marriage which has soured and broken.[16]

It must also be pointed out that the statutory provision does not require an allocation of fault and is applied on the assumption that both parties are responsible for the final repudiation of the marriage tie. The rule of forfeiture of benefits, on the other hand, requires a prior allocation of fault. Of course this does not pose

16. See chapter 10 *infra*

a problem in the Sri Lankan legal system because our jurisdiction is characterized by the co-existence of both fault and non-fault based grounds for divorce.

The recent amendment to the Civil Procedure Code[16a] enacts that a decree of separation may be converted to one of divorce after the lapse of two years. In addition, it declares that notwithstanding the absence of a decree of separation, *de facto* separation a *mensa et thoro* for seven years is sufficient to obtain a dissolution of the marriage. In relation to the first ground for divorce it must be pointed out that this was a basis for divorce which first appeared in the Administration of Justice (Amendment) law[17] which stated that the grounds for separation were the same as those for divorce. Hence a rule permitting a decree of separation to be converted to one of divorce after the lapse of a prescribed period of time in these circumstances is acceptable. The amended Civil Procedure Code, however, re-introduced the Roman-Dutch law grounds for separation according to which the plaintiff has to show that further cohabitation with the defendant is dangerous or intolerable, and that this state of affairs was brought about by the unlawful conduct of the defendant. The grounds for divorce as set out in the Marriage Registration Ordinance, however, are adultery, malicious desertion and incurable impotency. Hence a significantly lesser degree of blameworthy conduct is sufficient to sustain an action for separation which, however, according to the Civil Procedure Code, may be converted to one of divorce merely by the lapse of two years. A further liberalising of our divorce laws is effected by the rule which permits a divorce on proof of separation for seven years. It is not clear whether the circumstances in which the separation referred to in this section must be the same as those required for a judicial separation or, whether a mere mutual separation, for whatever reason, for seven years will suffice to obtain a dissolution of the marriage. If a separation by consent will suffice, there will be no doubt that Sri Lanka has liberalised its divorce laws to an extent far greater than those which apply in the South African and English legal systems. These two jurisdictions require proof of the irretrievable breakdown of the marriage as a prerequisite

16a. No. 20 of 1977
17. No. 25 of 1975

for its dissolution. In other words, the statute merely empowers the courts to give *de jure* recognition to a relationship which has utterly and hopelessly broken with no hope of reconciliation. The court, then, is the ultimate arbitrator on the state of the marital relationship and this is undoubtedly a necessary safeguard against the hasty and irresponsible termination of a marriage. The omission of this criterion in our own legal system however is indeed regretted. As the law stands today trial marriages are encouraged and spouses may put their marriage asunder impetuously.

Quite apart from the criticisms set out above the introduction of the new grounds for divorce, while leaving intact the fault based grounds entrenched in the Marriage Registration Ordinance is inexplicable and breeds uncertainty in the law.[18] Moreover, the deletion of the absolute and discretionary bars to divorce, which are the only means by which it can be ensured that a dissolution is obtained because of the misconduct of one spouse which has caused an injury to the other, is perhaps indicative of legislative intent to liberalise the laws of divorce in Sri Lanka.[19] But if that is so, the legislature ought to manifest an avowed intention to that effect and repeal the fault based grounds for divorce. Moreover, the criterion of "irretrievable breakdown" of the marriage must be introduced not only because it ensures that only empty legal ties are dissolved but also because it is obviously the "next step" in the process of a policy to move away from a stringent attitude towards divorce.

A serious criticism may be made of the piecemeal changes of our divorce laws made by the legislature. The anomalies which characterise our law on the subject may well be effaced by the deletion of the fault based grounds for divorce, set out in the Marriage Registration Ordinance, and the introduction of the need to establish an irretrievable breakdown of the marriage as an essential prerequisite for the dissolution of a marriage.

Mention must also be made of the scope and objectives of this

18. See chapter 8 *infra*
19. See chapter 9 *infra*

work, and the method of treatment adopted. As pointed out above, the subject of marriage and divorce is governed by three distinct bodies of law. Thus the Marriage Registration Ordinance, which applies to all persons governed by the general law, namely, the Roman-Dutch law, specifically excludes from its ambit persons subject to the Kandyan law or those professing Islam. No mention is made of persons governed by the Thesawalamai but since such persons do not have a separate statute regulating the subject of marriage and divorce, they, too by necessary implication are brought under the purview of the Marriage Registration Ordinance. Indeed, a comprehensive treatment of the marital relationship in Sri Lanka would have necessitated a discussion of the law governing persons expressly excluded by the statute as well. However, practical considerations have warranted the exclusion of a discussion of the personal laws, and except in specific instances where there is a conflict between the statutory provisions and the special laws, reference to the Kandyan and Mohammedan law has not been made.

A further limitation in the scope of this work is discernible. The procedure adopted in matrimonial proceedings has not been discussed. However a treatment of this topic would have made it difficult to confine the area of research within a reasonable compass.

Some inconsistency, in the method adopted in relation to the policy of referring to other jurisdictions, when analysing our own law on the subject may be detected. Besides discussing the Roman-Dutch law principles, which form the residuary common law of Sri Lanka, and the statute law on the subject, reference is made both to the South African and English legal systems. Indeed this is justified by virtue of the content of our law of marital relationships. Superimposed on a Roman-Dutch law substratum are essentially English law statutes which have given rise to a body of laws incorporating features of both legal systems. In so far as the Roman-Dutch law continues to influence the South African law of husband and wife, recourse to that jurisdiction is warranted. Likewise, the interpretation of our statutes which have been modelled on English law Acts justifies reference to the English legal system. Thus, for example, a married woman's right to pledge her husband's

credit for personal and household necessaries, and her right to contract as a *publicia mercatrix* are areas which have been heavily influenced by the South African law on the subject. Hence an analysis of recent South African judicial decisions, and the salient features of that law have been discussed fully. Likewise, the grounds for separation and divorce, and some of the financial consequences of dissolution have been discussed in relation to the modern South African law. On the other hand, an analysis of the Married Women's Property Ordinance and the reallocation of proprietary rights on divorce have warranted reference to the modern English law jurisdiction.

Traditional Roman-Dutch law principles which are of historical interest have been discussed wherever necessary. Thus the institution of "dos", for instance, has been explained by reference to Roman and Roman-Dutch law principles. Likewise, a discussion of the personal and proprietary consequences of marriage in the Roman-Dutch law has been undertaken, although the modern law on this subject is governed by a statute which is of English law origin. This method of treatment of the subject was thought to be essential to illustrate the development of the law.

Chapter 9 is concerned with a discussion of the discretionary and absolute bars to divorce which are no more a part of our statute law, having been repealed and not re-enacted in 1975 by the Administration of Justice (Amendment) Law. However, its continued relevance in our legal system because of the application of the fault based grounds for divorce, namely adultery and malicious desertion, justifies a discussion of these defences.

Throughout this work the policy considerations sustaining the different rules of law have been discussed. Emphasis has also been placed on areas in need of reform. It must also be noted that since this work is concerned with the Sri Lanka law of matrimonial relations, constant reference has been made to the social structure of our society and the mores of contemporary Sri Lanka.

CHAPTER 2

MARRIAGE IN GENERAL

1. The Contract of Marriage

"Marriage is not a mere ordinary private contract between the parties, it is a contract creating a status and gives rise to important consequences directly affecting society at large. It lies indeed, at the root of civilised society."[1] In so far as it is a voluntary agreement entered into between two consenting parties it is like any other commercial contract, but it has certain major distinguishing features. For example, a marriage cannot be entered into subject to a *dies* or *condicio*[2] and the objectives of marriage cannot be viewed merely in terms of rights and duties.[3] The mutual rights and duties of spouses are usually fixed by law and not by agreement. Though some of the obligations of marriage may be varied by consent, many of the consequences are invariable, such as, the obligation of support and the right to have recourse to the courts for financial provision. Moreover, the contract of marriage creates a status which entails certain legal consequences. In the Roman-Dutch common law the woman, on marriage, came under the marital power of her husband and she became, as it were, a minor and the husband her guardian, or curator.[4] Like a minor, she had no independent *persona standi in judicio*. Consequently the husband had full legal capacity to control and incur debts and to transact with property. The husband's marital power, however could be excluded by antenuptial contract.

In the modern Sri Lankan law, the incidents of marriage are different and the status of being married does not entail the legal disabilities of the common law. There are, however, certain restrictions such as the inability to contract a second marriage

1. *Weatherley v Weatherley* (1879) Kotze 71, *per* Kotze J.
2. H. R. Hahlo, The South African Law of Husband and Wife (4th ed. Cape Town 1975) p. 28
3. *ibid.*
4. Van der Linden 1.3.7.

during the subsistence of the first, and the obligation of fidelity. Moreover, the wife assumes her husband's rank, dignities and domicile. It is also usual for her to assume her husband's surname.[5]

II. The Promise to Marry

Unlike the early common law, which recognised the specific performance of a promise to marry, in the modern law of Sri Lanka, the only sanction for a breach of promise is the availability of a right to claim damages.[6] The General Marriage Ordinance however declares that "no action shall lie for the recovery of damages for breach of promise of marriage, unless such promise of marriage shall have been made in writing."[7] As to what constitutes a promise in writing has been considered by several judicial decisions. In an early case *Beling v. Vethacan*[8] an implied promise to marry was gathered from a letter written in the context of a previous oral promise and acceptance. The words relied on were "I won't tease you till we get married. Shall we fix the happy day for the 8th of April, the day after Easter" and the court held that these words sufficiently complied with the requirement set out in the Ordinance. Likewise in *Jayasinghe v. Perera*[9] the parties had agreed orally to marry each other but the defendant had not sent a formal written solicitation of the plaintiff's hand as requested by the plaintiff's father. He had, however, written to the plaintiff to say that he was not agreeable to her father's suggestion on the assertion that if he trusted her, she should, in turn, trust him. In the District Court it was contended by the defendant that the promise had reference to a promise to lend the plaintiff's father some money, but the District Judge disbelieved this story and declared that the allusion was to the defendant's promise of marriage. Consequently, he held that the letter contained an unqualified admission under the hand of the defendant of the existence of his promise to marry the plaintiff. This view was reiterated by the Supreme Court which upheld the plaintiff's right to claim damages. In *Gunasekera v.*

5. H. R. Hahlo *op. cit.* p. 106
6. *id.* at p. 54, General Marriage Ordinance No. 19 of 1907, sec. 20
7. Sec. 20
8. (1903) 1 A.C.R. 1
9. (1903) 9 N.L.R. 62

Amerasinghe[10] Hutchinson C.J. approved of the above decision and admitted secondary oral evidence as proof of a previous written promise to marry. According to the Chief Justice in a case where secondary evidence was being given the judge was required to be perfectly satisfied that if he had not got the very words of the document, he had, at any rate, got the substance of them. In this case the court accepted the evidence of the plaintiff and her brother who recollected the contents of the letters written by the defendant. *Jayasinghe v. Perera* was once again approved by the Supreme Court, in *Missi Nona v. Arnolis*[10a] where Lascelles C.J. declared that the letter addressed by the defendant to the plaintiff amounted to a repetition in writing of a prior oral promise and that it was not a promise in writing to marry because an oral promise had already been given. However, he cautioned that the *ratio* of that case could not be carried any further without straining the language to breaking point.[11] On this same reasoning the *ratio* in *Jayasinghe v. Perera* was held not to apply to the facts of *Karunawathie v Wimalasuriya*.[12] In this latter case damages were claimed for breach of promise and the only evidence of the promise of marriage was a letter which did not in itself contain a promise of marriage but which, when interpreted in the light of the oral evidence, could perhaps bear that meaning. Justice Keuneman declared that unlike in *Jayasinghe v. Perera*, where the whole of the promise was contained in two letters, and where there was no resort to verbal evidence as such to establish the promise, in the present case a promise to marry could be gathered only if the letter was read in conjunction with oral evidence and as such the action for breach of promise failed.

In *Cooray v. Cooray*[12a] Fisher C.J. declared that the words "promise to marry in writing" did not mean a promise in so many words and therefore to construe them with strict literal and verbal exactness, would probably be equivalent to precluding the bringing of any such actions, and quite outside the intention of the enactment.

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10. (1914) 17 N.L.R. 425
10a. (1910) A.C.R. 123
11. *id.* at p. 427
12. (1941) 42 N.L.R. 390
12a. (1928) 30 N.L.R. 310

"According to the true construction of these words, it would appear that if, from the language used in any letter or document, a promise to marry is necessarily implied, that amounts to a promise in writing within the meaning of the enactment; that is to say, the promise is embodied in writing."[12b] In this case there was a marriage settlement which contained a recital "that a marriage between the parties has been arranged and is shortly to be solemnised" and that in consideration of the said intended marriage the plaintiff and her mother had agreed to convey to the defendant certain properties and that the transfer was to take effect "after the solemnisation of the said intended marriage." This document was signed by the plaintiff, her mother and the defendant and the court held that it constituted a promise in writing.[12c]

This current of authority, namely, that confirmation or an unqualified admission of a subsisting and binding oral promise of marriage is sufficient to sustain an action for damages was confirmed by the Supreme Court in *Udalagama v. Boange*[13] but, on appeal to the Privy Council, a contrary view was declared. Lord Tucker delivering the opinion of the Board, said that the policy of the Sri Lankan legislature had been to limit the cases in which an action could be brought to those in which the promise itself was in writing. "It may be contained in one or more documents. Documentary evidence which does not in express or other unequivocal terms contain a promise to marry is insufficient even though it may afford evidence of an oral promise to marry."[14] It was pointed out by the Privy Council that some confusion seemed to have arisen with regard to the meaning of such words as "evidenced in writing" and "confirmation." "The distinction which must always be borne in mind is between writing, which contains the promise to marry and writing, which may afford corroboration of a previous oral promise. The latter which is sometimes described as writing which evidences a

12b. *id.* at p. 313

12c. In *Philip v. Wettasinghe* (1937) 38 N.L.R. 261 the words "If ever I marry anybody I assure you that it will be none other than yourself. If by any mischance I fail to do so, I will remain single" was held to mean "I will not marry anyone except you" and consequently Fernando A. J. held that the words did not contain an express promise to marry.

13. S. C. 444

14. (1959) 61 N.L.R. 25 at p. 26.

previous oral promise, is insufficient to support an action for breach of promise. The writing required to satisfy the Ordinance must contain an express promise to marry or confirm a previous oral promise to marry, *i.e.* admit the making of the promise and evidence continuing willingness to be bound by it."[15] According to the Privy Council extrinsic evidence is only admissible where such evidence is permissible on general grounds, *e.g.*, where the surrounding circumstances may explain some ambiguity or identify some person referred to in the writing but not, in order to ascertain the existence of an oral promise to marry.

According to judicial authority a notice of marriage given to a registrar of marriages does not amount to a written promise of marriage within the meaning of the Marriage Ordinance. In *Missi Nona v. Arnolis*[16] a promise to marry on the part of the defendant could be proved to the hilt but the plaintiff was nevertheless unable to recover damages because there was no promise in writing. In this case the defendant had given notice of his intention to marry the plaintiff to the registrar but it was held not to satisfy the statutory requirement of a written promise. Lascelles C.J. opined that "a 'promise' means something in the shape of an engagement from one person to another to do or not to do a specified thing. The statutory notice of an intended marriage is equivalent to the publication of banns. The notice is given or the banns are published to give an opportunity for objections to the intended marriage. It is true that notice of an intended marriage is naturally given after a mutual promise to marry has been made. But the act of giving notice of marriage or of causing the banns to be published cannot, even on the most elastic construction of the term, be held to amount to a promise of marriage made in writing. The conception of an engagement or promise has no place in such an act."[17] Of course he conceded that this case was unquestionably a hard one, "but hard cases are the inevitable result of a law which, in a transaction where the promise is not ordinarily made in writing, lays down as a rigid and inflexible rule that the promise, in order to found an action, must be in writing. Relief against

15. *id.* at p. 26
16. (1914) 17 N.L.R. 425
17. *id.* at p. 426

the hardship of such a rule must come from the legislature, not from the Courts."[18]

This case was followed with approval in *Abilinu Hamine* v. *Appuhamy*[19] where notice of marriage to a registrar and a letter written by the defendant's Proctor after the plaintiff had made a claim for breach of promise was held not to constitute a written promise of marriage. However, the signing of a betrothal register before a parish priest has been held to constitute a valid promise to marry for breach of which damages could be recovered. According to the court in *Ana Fernando* v. *Jokins*[20] the word 'betrothal' itself was held to imply the promise of marriage. The Privy Council decision in *Udalagama* v. *Boange*[21] was followed with approval in *Muthukuda* v. *Sumanawathie*[22] where the document relied on by the plaintiff as constituting a promise of marriage in writing was the *nekath* paper which was a memorandum of the astrologically auspicious times associated with the wedding fixed to take place on a specified day between the plaintiff and the defendant. More recently in *Wijeweera* v. *Nanayakkara*[23] too the Privy Council ruling was endorsed. In this case the defendant's letter to the plaintiff declared that "It is very near for our marriage" and H.N.G. Fernando C.J. declared that "without difficulty and without reference to the oral evidence in this case, it is clear that the defendant did in his letter state in writing that he will in the near future marry the plaintiff and I hold that he thus made a promise of marriage in writing."[24]

It must also be pointed out that in an action for breach of promise of marriage, proof of an express refusal to marry is not essential. A refusal may be gathered from the conduct of the defendant in conjunction with the surrounding circumstances of the case. In *Sawer* v. *Tringham*[25] the defendant, *inter alia* had

18. *id.* at p. 427
19. (1920) 21 N.L.R. 442
20. (1917) 30 N.L.R. 274
21. (1959) 61 N.L.R. 25
22. (1962) 65 N.L.R. 205
23. (1971) 77 N.L.R. 208
24. *id.* at p. 209
25. (1912) 15 N.L.R. 353

written to the plaintiff requesting her to relieve him from the engagement and suggesting that it was the most honourable course in the interest of both parties since he was living with a mistress. This evidence was held to be sufficient to infer a refusal to marry.

According to decided cases the Roman-Dutch common law relating to breach of promise of marriage continues to apply in our legal system.[26] In other words, the statute, namely, the Marriage Registration Ordinance, contains a provision which governs the form in which the promise should be made, but apart from this the common law continues to govern such actions.[27] In the common law if the plaintiff knowingly accepts a promise of marriage from a married person, neither can recover damages because both parties had contracted for performance subject to a condition which was *contra bonos mores*.[28] In *Chandrasena* v. *Karunawathie*[29] Justice Sansoni, following the South African decision in *Viljoen* v. *Viljoen*,[30] declared that since the defendant, a married man, had made a promise of marriage, an action for breach of promise was not available.

III. Breach of Promise

Several cases have discussed the legality of an agreement entered into between the plaintiff and a third party, usually a parent or guardian of a minor, to give the minor in marriage to the plaintiff and in case of default to pay a stipulated sum as damages to the plaintiff. In an early reported case,[31] the plaintiff brought an action against the father of the defendant for damages for failure to give his daughter in marriage. The court held that the contract was subject "to the implied condition that the daughter should not raise any reasonable objection to its performance and that any defence of this nature, which would have been available if the promise had

26. *Meenadchipillai v Sanmugam* (1916) 19 N.L.R. 205; *Sadrishamy v. Subehamy* (1882) 5 S.C.C. 38
27. See C. G. Weeramantry, *The Law of Contracts* (vol. 1, Colombo 1967) p. 208
28. F. P. Van den Heever, *Breach of Promise and Seduction in South African Law* (Cape Town, 1954) p. 36
29. (1955) 57 N.L.R. 298
30. 1944 C.P.D. 137
31. (1871) Vanderstraaten 177

proceeded directly from her, will also be available to the father, in an action like the present." Similarly an action by a father on behalf of his daughter "based on an agreement by and between the plaintiff jointly with his daughter Tangamma that the first defendant should marry Tangamma and in default pay Rs. 50,000 by way of liquidated damages," was held to be valid.[32] In the above two cases the fathers assumed to have power of donation in respect of the daughters and this enabled them to contract as principals. Moreover, the cases referred to a customary practice which recognised such contracts. However in *Hendrick Singho* v. *Haramanis Appu and Sirimalhami*[33] the daughter was old enough and well able to look after herself in the matter of marriage and it did not appear as if the father had ever pretended to have authority by usage or otherwise to dispose of her in marriage independently of her will. Accordingly the court held that, on the available evidence, it could not be concluded that the defendant (father) had undertaken either by way of warranty or indirect assertion to dispose of his daughter's person. It is noteworthy that the action for damages failed, in this case, not on the basis of the illegality of the contract but rather on the reasoning that there had not been an undertaking to give the daughter in marriage.

Pammodarampillai v. *Panga Muttupillai*[34] also involved the right to donate a young girl in marriage. The plaintiff alleged that he agreed to marry the defendant's daughter and the defendant, in consideration thereof, then agreed that her daughter should marry him, and he alleged that the defendant refused to perform her part of the agreement in as much as she agreed that her daughter should marry somebody else. The plaintiff, therefore, claimed damages. Burnside, C.J. delivering the opinion of the Supreme Court declared that there was nothing immoral or illegal or startling in such an agreement. The plaintiff merely sought to secure the consent of his future mother-in-law before he married her daughter, and if the plaintiff had alleged a sufficient breach, the libel would have been as good as any other libel on contract "but I cannot find that the libel does allege any sufficient breach. It says the

32. D. C. Colombo No. 68, 034, 3 Lorenz Rep. 236
33. (1879) 2 S.C.C. 136
34. (1887) 2 S.C. Rep. 51

defendant refused and neglected to perform her part of the agreement because she has proposed that her daughter should marry another young man. This does not seem to be a breach *non constat*, that the other young man will marry the young woman or that in that proposal the defendant had intended to withdraw her consent to the marriage with the plaintiff. She might have agreed to consent to the marriage of her daughter with either of the young men and not broken her contract because her daughter elected to marry one and rejected the other, or it may be the other young man and not the plaintiff, who will be the victim of the defendant's perfidy. It was the duty of the plaintiff, upon the contract on which he has declared, to allege that by something the defendant has done, he has been prevented from marrying the young lady, who he says, had agreed to marry him, or to show that he married her, notwithstanding that the defendant, contrary to her agreement to consent, had endeavoured to prevent him, in either of which cases he would be entitled to such damages only as he had incurred by the defendant's opposition. In the latter case it would be difficult to imagine what damages he could sustain beyond the pain which he could feel at being compelled to marry without his mother-in-law's consent, a source of anguish, however, which might not be diminished, even if he recovered damages against her."[35]

Once again the legality of a contract of this nature was upheld in *Fernando* v. *Fernando*.[36] The defendant in this case had entered into a contract with the first plaintiff that he could marry the first plaintiff's daughter within three months and that in the event of either party failing to fulfil the contract a sum of Rs. 2,000 should be paid as "estimated damages." The defendant committed a breach of the contract by marrying another woman and the plaintiff claimed the stipulated damages. Bonser C.J. declared: "I see no reason why a contract of this kind should be held by this court to be against public policy. The parties are Sinhalese and such a contract is one entirely in accordance with Sinhalese customs and feelings."[37]

35. *id.* at pp. 53, 54
36. (1899) 4 N.L.R. 285
37. *id.* at p. 287

Reinforcing the legality of such agreements the Supreme Court in *Abdul Hameed v. Peer Cando*[38] recognised an action for damages on account of the breach of an agreement entered into between the plaintiff and the first defendant whereby the first defendant had agreed that the plaintiff should marry his daughter within six months from the date of the agreement. According to the contract if the plaintiff refused, neglected, failed or objected to marry the first defendant's daughter within the prescribed time limit, he agreed to pay the sum of Rs. 1,000 as liquidated damages, and likewise if the first defendant refused, neglected, failed or objected to give his daughter in marriage to the plaintiff, he was obliged to pay a similar sum as damages. It was alleged in this case that the defendant had failed to give his daughter in marriage because she had refused to marry the plaintiff. Although it was contended, on behalf of the defendant, that the contract was illegal since it came within the evil of marriage brokerage contracts. Middleton J. opined that the agreement under consideration was not to procure a marriage between the parties for a money payment, but a covenant by a father of a promise to marry already made by him for and on behalf of his daughter, to which she apparently assented at the time the promise was made, and he concluded that the obligation of the father, to pay money on the breach of the promise to marry by the daughter, did not involve any greater evil and was not more reprehensible than the policy of the law which obliged the daughter herself to pay damages in case of a personal breach by her.[39] It was also contended that it was illegal for a parent to bind himself under a penalty to influence the feelings of his daughter towards a marriage, but Middleton J. pointed out that this was not so in the case before the court since the agreement to marry had already been made when the contract was entered into. "It is certainly not wrong or illegal for a parent to influence his daughter on the subject of marriage, and the presumption would be that such influence was used for her benefit by a person more experienced than herself, and where an agreement has been made apparently with the consent of both daughter and parent, that she should marry someone, I can see no evil or illegality in the parent rendering himself responsible

38. (1911) 15 N.L.R. 91
39. *id.* at p. 93

in damages if the daughter declines to keep her promise."[40] Concurring in this Judgment Lancelles C.J. pointed out that all that the agreement sought to do was to bind the father to use his *patria potestas*, which in persons of his class is very great, to have the marriage celebrated.[40a]

A view different from this current of authority was adopted by the Supreme Court in *De Silva v. Juan Appu*.[41] In this case a brother promised to give his minor sister in marriage before a special date and undertook absolutely to pay a sum of money if his promise remained unfulfilled at the expiration of the specified period. Garvin J., who expressed the majority view of the Supreme Court, declared that "the mischievous tendency of a contract whereby a parent promises to bring about a marriage between his daughter and another to whom he is bound under a penalty seems to be obvious. The prospect of having to pay the penalty is an embarrassment upon that absolute freedom to consult the best interests of his child, which parents should possess and upon which a daughter is entitled to rely on in so important a matter as her marriage. Circumstances may arise subsequent to the making of such a contract, when his duty to his child may be at conflict with his own financial interests and with the obligation he has undertaken to compel or at least to induce her marriage with a particular individual. The same considerations apply to a contract by which an elder brother enters into a similar obligation in respect of a minor sister where their father is dead. The law in England rests upon the principle that marriage should be free and without compulsion. "Every temptation to the exercise of an undue influence or a seductive interest in procuring a marriage should be suppressed."[42] Justice Garvin thus conclud-

40. *ibid.*

40a. See also *Tolleigodegamegay v. Balagamegay* (1838) Morg. Dig. p. 206 where the Supreme Court declared that "It appears, however, to have been universal in this Island, under every system of law that obtains here, to introduce the parents on these occasions (marriage contracts) and to render them responsible *in solidum* with the children, whatever their age, to marriage engagements entered into, though verbally with their consent; and there is nothing unreasonable or contrary to an express law in their usage and the court does not feel inclined to disturb it."

41. (1928) 29 N.L.R. 417

42. *id.* at p. 420

ed that while a contract under which a parent or guardian acquired a personal benefit given in order to induce him to consent to the marriage of his child was void[43] presumably a contract by which a parent or guardian bound himself under penalty to give his child or ward in marriage should be unenforceable. "Under our law no parent and *a fortiori* no brother *in loco parentis* in relation to his sister, has the power to dispose of a daughter in marriage independently of her will. No such custom or usage having the force of law, if ever there was such a custom, has to my knowledge been recognised by our Courts. While one cannot but be aware that among the Sinhalese, the parties to this action are low-country Sinhalese, a father wields greater influence over his daughters in the matter of their marriage than is perhaps the case among European people, there is no reason for supposing that it is not repugnant to their views that a parent should be bound by contract to influence and if need be to compel his daughter to marry a particular man independently of her own wishes."[44]

Dalton J., however, delivering a dissenting judgment, asserted that even if the agreement was likened to a marriage brokerage contract, it was not against public policy and unenforceable. He was of the opinion that under the Roman-Dutch law a contract for marriage brokerage is not *contra legem* or *contra bonos mores*. Moreover, he pointed out that "it seems to be a common custom in Ceylon both amongst Sinhalese and Tamils, to use the good offices of others for the purposes of arranging marriages. I understand that in a large number of cases the daughter has little to say in the choice of a husband, as is also the case in various other parts of the world including Europe. That is in no way inconsistent with a due recognition of the freedom of marriage."[45]

The above Divisional Bench decision was followed in *Bastiampillai v. Rasalingam*,[46] where a promissory note granted in consideration of a promise made by a father to give his daughter in marriage to the maker of the note, was said to be invalid for illegality

43. *Hamilton (Duke)* v. *Mohun (Lord)* 1 P. Wms. 118
44. (1928) 29 N.L.R. 417 at p. 420
45. *id.* at p. 429
46. (1936) 38 N.L.R. 89. See also *Kandiah* v. *Thambipillai* (1943) 44 N.L.R. 553 which reiterated this view.

of consideration. In *Samarasundera* v. *Perera*,[47] however, where a written agreement to pay a certain sum as damages for breach of promise to marry was entered into after the breach, Dalton, J. opined that the document was merely a reduction into writing of an agreement entered into between the parties, and, as such, evidence of the agreement was not illegal.

It must be pointed out that although in the early law a strong current of judicial authority supported the contention that an agreement to pay damages on failure to fulfil a promise of marriage was not illegal, the better view is that set out in the Divisional Bench decision in *de Silva* v. *Juan Appu*.[48] The adoption of this principle will avert the situation where a father exercises his authority harshly or tyrannically merely because he has a pecuniary interest in the proper discharge of the agreement.[49]

IV. Assessment of Damages

Damages for breach of contract are claimed as a pecuniary compensation for the loss which a person has sustained or the gain which he has missed.[50] But it has been said, of the action for breach of promise, that it is a remedy *sui generis* having features in common with an action on contract and an action in delict.[51] Damages are, therefore, awarded for :

(i) Monetary loss sustained by the plaintiff.[52] Thus, for instance, if in anticipation of the marriage the plaintiff has given up a lucrative job and is unable subsequently to obtain a comparable job, she can recover damages in respect of such loss provided of course it is specially pleaded.[53] Likewise, the plaintiff will be entitled to recover wasted expenses incurred to entertain the guests at the wedding provided this expenditure is thought to be reasonable

47. (1930) 31 N.L.R. 292
48. (1928) 29 N.L.R. 417
49. C.G. Weeramantry, *op. cit.* p. 369.
50. *Pothier, Oblig.*, sec. 159
51. F.P. Van den Heever, *op. cit.* p. 29
52. *ibid.*
53. *id.* at p. 38

taking into consideration the social position and means of the parties in addition to money spent on her trousseau and travelling.[54]

(ii) Prospective loss. In a situation in which the defendant is in a good financial position and because of the breach of contract the plaintiff is deprived of the opportunity of any participation in such financial status, damages may be awarded.[55] Hahlo[55a] points out that in such a situation although the plaintiff is not entitled to be placed in the same financial position in which she would have been had the marriage taken place, the financial status of the defendant will have a bearing on the assessment of damages. Of course it has been pointed out that in order to claim damages for prospective loss it must be established that the loss flowed directly from the breach of promise or that it was reasonably supposed to have been within the contemplation of the parties at the time the contract was entered into, as a probable consequence of the breach.[56] Moreover, a duplication of damages should be guarded against.[57]

Quite apart from the above bases, upon which a claim for damages is founded, involving the contractual component of the action for breach of promise, damages may also be claimed for the *injuria* done to the plaintiff thereby involving the delictual aspect of this action. It has been said that this remedy is *sui generis*, having features in common with an action on contract and an action in delict.[58] Damages are awarded for *injuria* arising out of the *contumelia* suffered by the plaintiff, since the breach of a promise of marriage is regarded as an impairment of the personal dignity or reputation of the other party. Regard is therefore had to the wounded feelings of the plaintiff, and the social position

54. *ibid.* See also *Guggenheim* v. *Rosenbaum* 1961 (4) S.A. 21 *per* Trollip J.; *Combrink* v. *Koch* 1946 N.P.D. 512
55. F.P. Van den Heever, *op. cit.* p. 29
55a. H.R. Hahlo, *op. cit.* p. 57
56. *Guggenheim* v. *Rosenbaum* 1961 (4) S.A. 21
57. *ibid.*
58. F.P. Van den Heever, *op. cit.* p. 29

of the parties.[59] According to Van den Heever, the *solatium* for the wrong done includes damage "for the loss of the market."[60]

It must be pointed out that though the notion "that a woman necessarily loses social position or 'face' when an engagement is broken off under non-injurious circumstances" may be said "to reflect the morals of a bygone age when espousals constituted an inchoate marriage and repudiation was equivalent to malicious desertion,"[61] it must be borne in mind that conservative attitudes towards marriage continue to be a feature of modern Sri Lankan society. Notwithstanding liberalised attitudes towards education and employment among Sri Lankan women, our society retains the system of "arranged marriages" which usually entails written agreements of marriage, the transfer of dowry deeds, and thus the involvement of the extended family in matters of marriage. Moreover, it is usual for parties to adhere to the observance of customary practices in the performance of the marriage ceremony thereby retaining many of the traditional notions of marriage which are consistent with conservative ideas in relation to marriage in general and women in particular. Hence, certain consequences attach to a woman who has been jilted and she may have a diminished opportunity of marriage in the future. Moreover, if the engagement had been broken off under humiliating circumstances so as to constitute a grave injury to the plaintiff, a delictual remedy will undoubtedly be available. Aggravated damages will be awarded if the defendant acted with fraud or malice or if he had attacked the plaintiff's character in or outside court.[62] Conversely, proof of *bona fides* will be a mitigating factor.[63]

As Voet points out, a breach of promise causes injury in respect of imponderable considerations which cannot be assessed in terms of money.[64] Consequently, factors such as the duration of the engagement, and the fact that it had been publicly announced would be relevant in assessing the quantum of damages. In

59. *ibid.*
60. *id.* at p. 30
61. *id.* at p. 30
62. *Guggenheim* v. *Rosenbaum* 1961 (4) S.A. 21 at p. 37
63. *Smit* v. *Jacobs* 1918 O.P.D. 30
64. 23.1.12

Maslin v. *de Silva*[65] the engagement was not only shortlived it was also not proclaimed publicly. Hence, Howard C.J. opined that in those circumstances it could not be asserted that the plaintiff had lost the opportunity of other suitors. Moreover, there was an absence of other aggravating circumstances. For instance, the plaintiff was not seduced, the defendant had not behaved in a disgraceful manner nor was there evidence of a deep mutual relationship between the parties. In fact it appeared to the court that the relationship was based on commercial considerations. According to the evidence adduced the plaintiff had lent some money to the defendant in order to induce him to marry her. In relation to the claim for prospective damages, the court pointed out that since the defendant and his family were impecunious, had the marriage taken place he would have lived at her expense, hence the plaintiff did not incur a prospective financial loss and only nominal damages were awarded.

In *Kuruppu* v. *Irangani Gunesekere*[66] Justice Keuneman opined that the fact that it was the plaintiff who induced the defendant to promise to marry her, was an item of evidence to be taken into account when determining whether exemplary damages should be awarded. Moreover, from the very inception of their relationship they were aware of a serious obstacle to their marriage, namely, the refusal of the defendant's mother to consent to their marriage. The final breach was mainly due to this anticipated cause, and it was pointed out by the court that had the parties not kept their engagement a secret, at the instance of the plaintiff, the engagement would have terminated earlier. The total period of the engagement was only four to five months and there was very little publicity of this fact. Hence, there was nothing to suggest that other possible suitors had been discouraged because of their knowledge of the engagement. In the light of these facts, together with the lack of evidence of dishonourable behaviour on the part of the defendant, the court refused to award exemplary damages. Similarly in *Wijeweera* v. *Nanayakkara*,[67] nominal damages were awarded because the plaintiff was thought not to have suffered substantial

65. (1942) 23 C.L.W. 107
66. (1946) 47 N.L.R. 505
67. (1971) 77 N.L.R. 208

damages because the promise to marry had been made only after a period of intimacy.[68]

In *Fernando* v. *Fernando*[69] the court had to decide whether it was appropriate to vary the penalty stipulated in the agreement. According to Voet,[70] the court has the discretion to vary the prescribed penalty so that it approximates with the actual damage caused. But this course may be adopted only if there is proof that the penalty is *ingens* and the facts of this case did not reveal that the penalty agreed upon was so disproportionate to the circumstances that it would be inequitable for the court to enforce the claim. This was also the view of Dalton J. in *De Silva* v. *Juan Appu*.[71] He declared that a pre-estimate of the plaintiff's probable or possible interest in the due performance of the marriage had been made, and it was for the parties to prove in court that the stipulated sum was out of proportion to the injury sustained, in the absence of which the stated sum would be awarded.

V. Marriage Brokerage Contracts

According to the Roman-Dutch law a person who has been employed to bring about a marriage, can claim a commission or brokerage for his services. Inasmuch as an agency for the purpose of bringing about a marriage is not an agency for an unlawful object, there is no reason why a person who has rendered services in "honourably bringing about a marriage" should not be permitted to recover the promised reward or reasonable remuneration for the work he has done, the time he has spent, and the expense he has *bona fide* incurred.[72] However, the modern South African law, adopting the rule of English law, declares that such contracts are void as being against public policy.[73] Accordingly, it has been held that marriage brokerage contracts introduce "the con-

68. See also *Cooray* v. *Cooray* (1928) 30 N.L.R. 310
69. (1899) 4 N.L.R. 285
70. 45.1.13.
71. (1928) 29 N.L.R. 417
72. Bynkershock, Quaest Jur. Priv. 11.6
73. H.R. Hahlo, *op. cit.* p. 33

sideration of a money payment into that which should be free from any such taint."[74]

This was also the view of the Sri Lankan Supreme Court in *Livera* v. *Gonsalves*,[75] a case in which the plaintiff sought to recover a stated sum from the defendant on an agreement in writing by the latter to pay him that amount if he succeeded in bringing about a marriage between him and a certain lady named in the agreement. Wood Renton A.C.J. declared that the contract was illegal and opined that "we cannot do better than bring the law of Ceylon into line with that of South Africa on this important question."[76]

A dissenting opinion, however, has been expressed by Dalton J. in *De Silva* v. *Juan Appu*,[77] and Weeramantry[78] approves of this contention on the reasoning that it accords with the customs of the country which recognises the functions of a broker in introducing parties with a view to bringing about a marriage.

VI. Dos

(*a*) Historical Background

In Roman law it was customary for both spouses to make a contribution to the joint household at the time of marriage. *Dos* or dowry was that which was contributed by the wife to the husband.[79] Corelative to the dowry but of later origin was the husband's contribution which was made before marriage and thus named *donatio ante nuptias*. Later, at the time of Justinian, it was renamed *donatio propter nuptias* since the gift could be made even after marriage.[80]

74. *Hermann v. Charlesworth* [1905] 2 K.B. 123 at p. 130, *per* Collins M.R.
75. (1913) 17 N.L.R. 5
76. *id.* at p. 6
77. (1928) 29 N.L.R. 417 at p. 428. This was a dissenting judgment.
78. C. G. Weeramantry, *op. cit.* p.368
79. D. 23. 3.3; Just. Inst., 2.7.3.
80. Just., Inst., 2.7.3.

In Roman law the giving of a dowry had far-reaching implications. In the absence of proper legal form, for instance, proof of dowry was evidence that marriage and not concubinage was intended.[81] Consequently, the father of an intended bride would insist on giving a *dos* and in time to come it became obligatory for a father to dower his daughter, and he could be compelled to do so even against his wish notwithstanding the fact that it was not a legal requirement.[82] This was a responsibility which derived from the paternal duty to secure for one's daughter the best possible marriage, and dowry was a means of achieving this objective. Indeed, independent advantages which the daughter herself may have possessed, such as wealth and beauty, did not diminish the paternal responsibility which was, in this respect, akin to his duty to give the legitimate portion to a wealthy daughter.[83] The dowry, therefore, was an accepted way of enticing a suitable son-in-law and it pressurised a harassed father to part with a life-time's, savings for this end. In order to ensure that a daughter did not remain unmarried for the lack of a dowry, the paternal obligation was extended to the paternal grandfather and to the girl's brother or mother.[84] A father, however, was not obliged to dower an ungrateful or unworthy daughter, a natural daughter,[85] or a minor who married without his consent.[86]

Apart from the enhanced opportunities a dowered woman had in contracting a suitable marriage, an undowered woman was, even in relation to the husband she finally secured, in a far more vulnerable position than her counterpart, who had contributed a substantial dowry. This is best illustrated in the words of Eubulides[87] who says "not poverty itself can tame the spirit of an ill-bred woman, nor in the slightest degree cause her to be

81. R. W. Leage, *Roman Private Law*, (2nd ed., London 1951) p. 104; W.W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian* (Cambridge 1921) p. 107.
82. Voet 23.3.1; C. 5.11; D.23.2.19
83. Voet 23.3.11.
84. Voet 23.3.14; C. 5.12.14.
85. A natural daughter had to be dowered by her mother. See Voet 23.3.14.
86. Voet 23.3.13.
87. In Aristoenetus bk. 2, epist. 12

obedient to the rule of her husband; for I married a poor woman with the idea of not suffering something worse if I had married one who was wealthy; but from the very beginning she, who was poverty stricken in every respect, beat any dowered woman you wish to have in insolence and haughtiness; in fact she hardly even kept her hands off me, and she exercised her mastership over me like a savage mistress, neither paying any respect to me as a rich man, nor reverring me as a husband. That is my *dos* from such an one."

In the Dutch law, however, the obligation of parents to dower a daughter was not in vogue.[88] It was entirely at the discretion of either parent to provide a *dos*. In fact, in case of doubt, it was presumed that the father promised a *dos* out of his daughter's property in his capacity as tutor, or administrator of the property, rather than as a gift of his property.[89] If, however, he had promised more than what the daughter possessed, he had to make good the difference.[90] Of course, if the parents had made a promise to dower a daughter, it became payable when the marriage took place. The tacit condition "if the marriage follows" underlies the promise.[91] It follows, therefore, that if the marriage does not take place the promise of the *dos* lapses and if the property had already been donated, it can be recovered. There is authority for this common law principle in early Sri Lankan decisions.[92] This right, however, was available only in situations in which the gift was made in consideration of marriage. In *Obeyesekera Hamine* v. *Jayatilleke Hamine*,[93] the defendant had undertaken, in an agreement, to convey to the plaintiff certain specified properties which belonged to her deceased husband by reason of "the joyful occasion of her marriage." The defendant, however, was legally incapable of complying with the agreement at the time of action since her husband's estate had not been administered. The

88. Van Leeuwen, *Cen.For.*, pt.1, bk.1. ch.10.
89. Voet 23.3.16.
90. *ibid.*
91. Voet 23.3.9.; Grotius 2.2.20.
92. *Appuhamy* v. *Mudalihamy* (1863-68) Ram. Rep. 225; *John Sinno* v. *Weerawardena* (1922) 1. Cey. T.L.R. 142, *Charles Poopalaratnam* v. *Sabapathy Pillai* (1921) 2 C.L. Rec. 210.
93. (1905) 1 Bal. Rep. 162

plaintiff's plea for damages was met by the contention that the object of the donation was to show that the plaintiff would not be dowerless and that it did not promise a dowry if the marriage took place. The court, therefore, held that there was no *justa causa* proceeding from the promise to sustain a claim for damages. In *Kandiah* v. *Tambipillai*,[94] however, the plaintiff's claim for damages was upheld on the reasoning that according to the agreement entered into a dowry was to be given in consideration of the marriage. Failure to fulfil the obligation, therefore, gave rise to a cause of action.

(*b*) The Husband's Rights over Dotal Property

The husband's rights in relation to dotal property underwent considerable changes in the course of Roman history. There was much controversy on the nature and extent of the rights vested in the husband but it was generally accepted that in early Roman law the husband had *dominium civile* and the wife *dominium naturale*, which was suspended during the tenure of the marital relationship.[95] The husband's right of absolute and sole ownership was illuminative of the legal status of a married woman during this period of Roman history, and with the sanctity of marriage and the consequent infrequency of divorce, which were all prominent features of this era. Moreover, it accorded with the rules regulating a child's right of succession to the father rather than to the mother.[96]

The rights vested in the husband involved *inter alia* the authority to administer the property and the right of alienation even without the consent of the wife.[97] On a dissolution of the marriage on account of the wife's death *dos profectitia* went to the donor, and if the donor was not alive, to the husband, and the *dos adventitia* too devolved on the husband.[98] Likewise, on the husband's death, the wife took the *dos*.[99]

94. (1943) 44 N.L.R. 553.
95. C. P. Sherman, *Roman Law in the Modern World* (3rd ed., New York 1937, vol. 11) p. 178; B. Nicholas, *An Introduction to Roman Law* (Oxford 1962) p. 88.
96. B. Nicholas, *op. cit.* p. 88
97. R. W. Leage, *Roman Private Law* (2nd. ed. London 1951) p. 104
98. W.W. Buckland, *op. cit.* p. 110
99. *Id.* at p. 109

On termination of marriage by divorce, due to the misconduct of the wife, the husband took the property absolutely if there were no children, and if there were children, he was given a life interest in the property.[100] If, on the other hand, the husband had been guilty of matrimonial misconduct, the *dos* reverted to the donor and the period within which the *dos* had to be returned was shortened.[101] Consequently, in classical Roman law the husband benefited considerably by the *dos*.

The wife's position, however, was vastly improved in the time of Justinian. The dissolution of marriage by divorce was more frequent and the need to provide for the wife in the event of a termination came to be recognised.[102] Consequently, a total prohibition was imposed on the husband's right of alienation of dotal property[103] and although the husband was theoretically still the owner, he had little more than a usufruct in the property during the subsistence of the marriage.[104] On a termination of the marriage both *dos profectitia* and *dos adventitia* devolved on the wife's heirs rather than on the husband, who, therefore, apart from agreement, took nothing of the *dos*.[105] The only instance when the husband could benefit from the *dos* was when the divorce was due to the matrimonial guilt of the wife.[106] In the time of Justinian the wife could secure her right of restoration by means of a *tacita hypotheca* over her husband's estate.[107] Thus, on dissolution of marriage the wife acquired full ownership of the *dos* and she could claim compensation for any loss incurred by the husband due to fraud or negligence.[108] The husband, on the other hand, could claim a rebate for expenses incurred in the preservation of the property.[109]

The above principles applied *mutatis mutandis* to the *donatio propter nuptias* and Justinian enacted that this contribution should

100. Just., Inst., 2.7.3.
101. W.W. Buckland, *op. cit.* p. 109
102. B. Nicholas, *op. cit.* p. 88
103. Just., Inst., 2.8.pr; W.W. Buckland, *op. cit.* p. 108
104. B. Nicholas, *op. cit.* p.88
105. C. 5. 13. 1.6.13.
106. B. Nicholas, *op. cit.* p. 89
107. Just., Inst., 4.6.37
108. Voet 23.3.19; R.W. Leage, *op. cit.* p. 106
109. *ibid.*

be equal to the *dos*.[110] When marriage was terminated by the death of the husband the *donatio propter nuptias* benefited the wife if she had issue,[111] and if divorce was due to the fault of the husband, the wife acquired full ownership of the property.[112] If, however, the wife died, or divorce was due to her misconduct, the husband's gift reverted to him or to the constitutor.[113] If the wife became entitled to the *donatio* she had a tacit hypothec over her husband's property in order to secure its ownership.[114]

In the Roman-Dutch common law the wife was not provided with any additional safeguards in order to preserve intact the dowry given at the time of her marriage. According to the matrimonial property regime of Holland, on the solemnisation of a marriage all movable and immovable property of the spouses was brought into a common fund and thus was created a community of goods and of profit and loss which was owned jointly by the spouses.[115] The object of the institution of *dos* was to make contributions towards the expenses incurred in sustaining the burdens of marriage[116] and as such, once given, the *dos* and the *donatio* could not be reclaimed during the tenure of the marriage. Moreover, a restitution would have amounted to a donation between spouses, which was absolutely prohibited by the common law.[117]

On termination of marriage by death, the community was dissolved[118] and the property was divided equally between the survivor and the heirs of the deceased spouse, after the debts of the joint estate had been satisfied.[119] Moreover, dowried daughters were bound to collate the *dos* in order that the surviving spouse could take an equal share out of the common assets prior to the division.[120] However, a prerequisite to this duty to collate was

110. C. 5. 3.20 pr. 5.12.29.
111. C. P. Sherman, *op. cit.* p. 68
112. C. 5.17.8.7; 5.17.11
113. C 5.3.18; 5.12.31. 3(1); 5.17.8.3.
114. C. 5.12.29.
115. Voet 23.2.65; 23.4.1; Grotius 2.11.8
116. Voet 24.3.2; 24.1.1-19.
117. Voet 24.3.2.
118. Voet 23.2.90; 24.3.28; Grotius 3.21.11.
119. Voet 24.3.21; Grotius 2.11.13
120. Voet 23.3.15; 17.2.4.

the acceptance of a share of the paternal inheritance. In an early Sri Lankan case *Soysa* v. *Weerasuriya*,[121] there was doubt whether or not the daughter had agreed to share in the father's inheritance. While Bonser C.J. opined that there was no evidence of her agreement, Moncrieff J. and Browne A.J. declared that the daughter's presence and contention in the testamentary and administrative proceedings were indication enough of her acceptance of the inheritance and she was therefore obliged to collate what had been received by her as dowry. When collating the property received, the heirs are free to collate either what was actually received or its value.[122]

In *Theodoris Fernando* v. *Rosalin Fernando*[123] a widow transferred to her daughter, certain properties in consideration of marriage and the creditor of the deceased testator purported to sell the land in order to set off the debts of the testator. The defendant, however, resisted the creditor's claim on the assertion that the conveyance in her favour was for valuable consideration since it was conveyed to her on the occasion of her marriage and, as such, it was not liable to be sold. The court upheld this contention. The view that a transfer of property by way of dowry was a conveyance for valuable consideration was further reinforced by Hutchinson C.J. in *Jayasekere* v. *Wanigaratna*.[124]

On divorce, too, an equal division of the joint estate was made, with the difference that a forfeiture of benefits could be ordered. According to this rule, the injured spouse had the right to claim the forfeiture of all financial benefits the guilty spouse had derived from the marriage.[125] This principle, however, did not have the effect of denying the guilty spouse of his or her right to the dotal property because such property usually remained the separate property of the donating spouse and, as such, it was outside the operation of the rule of forfeiture. The only instance in which dotal property was forfeit was when the innocent spouse had made an outright transfer of the dowry property to the guilty spouse. This situation

121. (1899) 5 N.L.R. 196
122. *Jainudeen* v. *Murugiah* (1952) 47 C.L.W. 81
123. (1901) 5 N.L.R. 230.
124. (1909) 12 N.L.R. 364.
125. Voet 24.2.9; 24.3.19. See also chapter 10, B *infra*. for a discussion of the reallocation of property on divorce.

warranted a forfeiture of dotal property which constituted a benefit derived as a consequence of the marriage.

(*c*) Dotal Agreements

In the Roman-Dutch common law it was usual for parties to enter into antenuptial agreements setting out the terms and conditions by which their marriage was to be governed.[126] A dotal agreement could be entered into by the spouses themselves or by their parents[127] and it was not essential for such agreements to be in writing except where the dowry exceeded five hundred solidi in which event the agreement had to be registered. In the Sri Lankan law the courts have had to decide whether dotal agreements which involve immovable property transactions have to comply with the Prevention of Frauds Ordinance,[128] according to which:

(*a*) no sale, purchase, transfer or assignment or mortgage of land or other immovable property;

(*b*) no promise, bargain, contract or agreement for effecting any such object . . . ; nor,

(*c*) any contract or agreement for the future sale or purchase of any land or other immovable property . . . shall be of force or avail in law unless . . . it is notarially executed.[129]

In *Thamby Lebbe* v. *Jamaldeen*[130] Justice Hearne declared that an agreement made upon consideration of marriage to give the plaintiff immovable property was not a promise, bargain, contract or agreement for effecting one of the objects referred to in subsection (*a*) and that the words "promise, bargain, contract or agreement for effecting any such object" referred to a means of, and a stage in, the formal effectuation of a sale, purchase, transfer, assignment or mortgage. He opined that the draftsman of the Ordinance

126. Grotius 2.12.3;
127. Voet 23.4.10.
128. No. 7 of 1840.
129. Sec. 2
130. (1937) 39 N.L.R. 73

had deliberately omitted agreements made in consideration of marriage, unlike the English Statute of Frauds, [131] which provided for such agreements, and this difference was said to have been necessitated by the social conditions of Sri Lanka. In the context of our society it was thought to be impracticable to insist on notarial attestation in every case. This view was reiterated in *Lila Umma* v. *Majeed*[132] but departed from in *Noorul Hatchiha* v. *Noor Hameem*.[133] In the latter case five judges of the Supreme Court overruled the above decisions and declared that an agreement to transfer immovable property in consideration of marriage was governed by clause (*b*) of the Prevention of Frauds Ordinance and, as such, the notarial execution of dotal agreements was imperative.[134]

In the common law a woman could be assured of the right to reclaim her *dos* not only on dissolution of her marriage but also during the subsistence of the marriage, provided she reclaimed it for a just cause.[135] Thus, for example, in times of need, in order to support a member of the family, the wife could reclaim the *dos* and acquire the rights of detention, administration and acquisition of profits, but not the right of alienation. The wife could also exercise these rights in the event of her husband being reduced to poverty, either due to unfavourable circumstances or due to his own extravagance and imprudence, lest she runs the risk of losing her property if she waits to claim it on a termination of the marriage.[136]

An antenuptial contract could also stipulate the right to recover the *dos* unimpaired on dissolution of the marriage and the wife could reserve the right to choose whether she wants to recover the *dos* or whether she wishes to share in the profits and losses occurring during the marriage.[137] If the wife chooses to recover the *dos*, she could claim a tacit hypothec in order to get priority over

131. 29 Car. 11 Chap. 3, sec. 4
132. (1943) 44 N.L.R. 524
133. (1950) 51 N.L.R. 134
134. This was also the view of the court in *Levvai* v. *Pakeer Tamby* (1915) Bal. N. of C. vol. VI, 46; *Perera* v. *Pakeer Abedeera* (1910) 2 Matara Cases 112; *In re Insolvency of J.A. Hume* (1863-68) Ram. Rep. 222.
135. Voet 24.3.2.
136. *ibid.*
137. Voet 23.5.7; 23.4.53

subsequent creditors.[138] The husband would be obliged to restore not only the original property but all subsequent accessories as well.[139]

It must also be pointed out that although the *donatio propter nuptias*, as understood in the Roman law, was not applicable in the Dutch law,[140] it was possible for the husband to make a contribution and to stipulate in an antenuptial contract the terms and conditions by which the donation was made and to secure his right of recovery.[141]

(*d*) The Modern Law

In 1876, far-reaching changes were made in relation to the proprietary rights of spouses. The Matrimonial Rights and Inheritance Ordinance[142] abolished the common law system of community of goods and declared that while all movable property was to vest in the husband absolutely,[143] the wife could not alienate her immovable property without the written consent of her husband. The limited proprietary rights conferred on a married woman by this statute were thought to be unsatisfactory and the agitation for further reform led to the repeal of this statute and the enactment of the Married Women's Property Ordinance,[144] which established a separate property regime thereby doing away with the last vestige of proprietary disabilities attendant on a married woman.

According to the statute law regulating the reallocation of property on divorce, the court is given the discretion to order a settlement of property as "it thinks fit". While the Sri Lankan statute does not provide the courts with any guidance in the exercise of its discretionary powers, the English law may serve as a useful model to our courts. According to that legal system matrimonial property, that is, property acquired by the joint effort

138. V. d.k. 263.
139. Voet 23.3.12.
140. Voet 23.3.22.
141. *ibid.*
142. No. 15 of 1876
143. Sec. 7
144. No. 18 of 1923

of both parties, or acquired in consideration of the marriage, is subject to an equitable division between the spouses on divorce. Since dowry property is acquired at the time of the marriage, in order to help, sustain the financial burdens of marriage, it is the type of property that will probably be the subject of a reallocation on divorce. If, however, the spouses desire to be governed by the common law and, if a forfeiture of benefits is claimed, dowry property will be excluded from the scope of the rule of forfeiture unless it had been transferred to the other spouse who was responsible for wrecking the marriage.[145]

VII. Donations between Spouses

In the Roman-Dutch law although husbands and wives were permitted to make and accept gifts of affection such as jewellery, trinkets and articles of clothing, donations between spouses were absolutely prohibited.[146] "This was mainly with the object that they (spouses) should not be robbed on either side in borrowed love, putting no check at all on donations through a lavish good nature towards each other. It was also desired that harmony should not appear to be wooed at a price and wedlocks be things of sale and purchase, as when it might happen that they would be shattered if one who had the means did not make a donation; and thus the better of the two would fall into poverty, the worse of the two become the richer and honourable love be gauged not by affection only but by freedom of giving."[147] The prohibition applied only to donations between spouses and it did not extend to gifts given to concubines because "the liberality is excused under the influence of 'discreditable affection.' "[148] Consequently, a man could give houses, farms and shares to his mistress but not to his wife.[149] However, according to Creasy C.J. in *Parasatty Ammah* v. *Setupulle*[150] if it is proved that the gifts were made by the man in order to induce the woman to live in illicit intercourse with

145. See for a discussion of this, chapter 10, *infra* B.
146. Grotius 3.2.9; Voet 24.1.1.
147. Voet 24.1.1.
148. *Parasatty Ammah* v. *Setupulle* (1872) 3 N.L.R. 271. *per* Creasy C.J.
149. H.R. Hahlo, *op. cit.* p. 129, note 3.
150. (1872) 3 N.L.R. 271

him, she being otherwise desirous to break it off, it would be the duty of the judge to pronounce it to be a contract *ex turpi causa* and to refuse the support of the law to it.[150a] In *Silva* v. *Ratnayake*[151] the court pointed out that if a gift was made to a paramour during an illicit relationship, the gift was not recoverable.[152] This was further reiterated in *Wanigaratne* v. *Selohamy*[153] where it was pointed out that while a concubine could not sue for anything promised to her in consideration of an illicit relationship, if the thing promised had been transferred, it could not be taken from the concubine because the courts would not assist a party to take advantage of her moral turpitude in order to recover the property gifted. Moreover, a deed of gift made in consideration of past cohabitation was not invalid.[154]

It must however be pointed out that, though prohibited, a donation between spouses, if made, was not absolutely void. Consequently, if the donor died without revoking the gift, the donation was retrospectively validated.[155] Likewise, a donation made in contemplation of death or divorce was valid because such a transaction contemplated a time when the parties were no longer spouses.[156] A donation was presumed to have been revoked if the marriage was dissolved and no subsequent reconciliation between the spouses took place.[157] Moreover, if the donor made a voluntary alienation of the thing donated, a revocation was presumed.[158] If the donee predeceased the donor, the donation was deemed to be void.[159]

It has also been said that a donation is valid if, as a consequence of it, the donor did not become poorer and the donee richer.[160] Thus, for instance, if a wife donated property to her husband in order

150a. See also *Karonchihami* v. *Angohami* (1896) 2 N.L.R. 276.
151. (1935) 37 N.L.R. 245
152. See also *Sendris Appu* v. *Santakahamy* (1910) 13 N.L.R. 237.
153. (1941) 42 N.L.R. 353
154. *Sendris Appu* v. *Santakahamy* (1910) 13 N.L.R. 237
155. Voet 24.1.4; See also *Charisa* v. *Condert* (1914) 17 N.L.R. 397 at p.400.
156. Voet 24.1.9.
157. Voet 24.1.6.
158. *ibid.*
159. Voet 24.1.7.
160. Voet 24.1.12.

that after the husband's death the property donated should be given to their children, the donation was not prohibited.[161] Finally, it must be pointed out that if marriage was in community the prohibition was of little significance because everything was owned in common. But if, however, one of the spouses had property which had been excluded from the common fund, the prohibition applied.[162]

In the modern law of Sri Lanka, however, the common law prohibition is only of historical interest because it has been expressly swept away by statute. The Matrimonial Rights and Inheritance Ordinance[163] declared that:

"It shall be lawful for any husband or wife, whether married before or after the proclamation of this Ordinance, notwithstanding the relation of marriage and notwithstanding the existence of any community of goods between them, to make or join each other in making, during the marriage, any voluntary grant, gift or settlement of any property, whether movable or immovable, to, upon, or in favour of the other; but all property so granted, gifted or settled and all acquisitions made by a husband or wife out of or by means of the moneys or property of the other, shall, except as otherwise provided by section 10, be subject to the debts and engagements of each spouse in the same manner and to the same extent as if such grant, gift, settlement or acquisition had not been made or occurred".[164]

In *Umaitai* v. *Thamotharampillai*[165] a husband, married in community of property, donated to his wife, subsequent to the enactment of the above Ordinance, "the exact half" of all the specified common properties belonging to him and the Supreme Court held that "as a partner can give all his interests in any of the partnership property to his co-partner, so a husband can, since the Ordinance of 1876, give to his wife, married in community of property, all his interests in any of the common property. The deed should

161. *ibid.*
162. See H.R. Hahlo, *op. cit.* p. 129
163. No. 15 of 1876
164. Sec. 12.
165. (1910) 14 N.L.R. 26

be construed, if its language will allow of it, so as to have some effect; no effect can be given to it except by construing it as a gift of all the husband's interests: that was its obvious intention."[166] In *Poronchihamy* v. *Davithamy*[167] the court held that a donation made by a wife to her husband did not require the prior written consent of the husband, as set out in the Ordinance[168] and in *Louis* v. *Dingiri*[169] a Full Bench of the Supreme Court held that a gift made to a spouse *inter vivos* was subject only to the debts and engagements of the donor that existed at the time of the alienation. Wood Renton C.J. elucidating the rationale of section 12 of the Ordinance declared that the object of the Legislature was to relax the common law in favour of the spouses. Consequently, "it cannot reasonably be supposed to have intended that property donated by one spouse to another should be earmarked for all time with a liability to meet all the debts and engagements incurred by the donor at any subsequent period, and that the spouses should be in a worse position than that which they occupied under the old law of community."[170] Hence, debts of the donating spouse at the time of the donation were a charge on the property gifted and was not affected by any subsequent transaction that may be effected by the donee. If, then, the donee were to mortgage such property, the mortgagee would take the property subject to the charge on the basis that no one can give a better title than what he himself has.[171]

The Married Women's Property Ordinance[172] abolished section 12 of the Matrimonial Rights and Inheritance Ordinance and did not enact an analogous section sanctioning donations between spouses. It may be presumed, however, that the effect of the repeal was not to revive the common law provision but rather to continue to recognise the freedom of a spouse to make a donation without it being liable to the debts and engagements of the donating spouse. Consequently, no distinction is to be made in the modern law of

166. *id.* at p. 29
167. (1910) 14 N.L.R. 35
168. Sec. 8
169. (1915) 18 N.L.R. 161
170. *id.* at p. 163. See also *Fernando* v. *Silva* (1922) 23 N.L.R. 249 where this principle was further reiterated.
171. *Anohamy* v. *Hanifa* (1923) 2 Cey. T.L.R. 96
172. No. 18 of 1923

Sri Lanka between a donation made to a spouse and one made to a third party.

VIII. Domicile

"The domicile of a married woman is the same as, and changes with, the domicile of her husband."[173] Having thus acquired the domicile of her husband a married woman possesses no capacity whatsoever of acquiring a separate domicile of her own, not even if she is judically separated,[174] or if the husband has deserted her and established himself in a foreign country, or if he has committed a matrimonial offence sufficient to enable her to petition for a dissolution of the marriage.[175] The rule that the wife retains her husband's domicile notwithstanding a valid decree of separation has been much criticized and it has been described as "the last barbarous relic of a wife's servitude."[176] The rule that a wife's domicile is that of her husband's is not merely founded on the fact that in the vast majority of cases her home is her husband's, and on the legal duty of a wife to live with him, but is rather "a consequence of the union between husband and wife brought about by the marriage tie."[177] Moreover, the domicile of the husband, once acquired, continues till such time as it is changed by her own act.[178]

According to Dicey and Morris[178a] a marriage is formally valid when any one of the following forms of celebration is complied with:

(1) if the marriage is celebrated in accordance with a form required or recognised as sufficient by the law of the place where the marriage was celebrated;

(2) if the marriage is celebrated in accordance with the requirements of the English common law in a country where the use of the local form is impossible; or

173. Dicey and Morris, *The Conflict of Law*, (London 1967) Rule 13.
174. *Alberta* v. *Cook* [1926] A.C. 444.
175. G.C. Cheshire, *Private International Law*, (Oxford 1947) pp. 237-238.
176. *Gray* v. *Formosa* [1963] P. 259, 267.
177. *Lord Advocate* v. *Jaffrey* [1921] 1 A.C. 146 at p. 158, *per* Lord Cave.
178. Voet 5. 1.95; See for a further discussion of this chapter 8 (V) *infra*.
178*a*. *op. cit.* p. 232

(3) if the marriage is celebrated in accordance with the requirements of the English common law in a country in the belligerent occupation of military forces and one of the parties is a member of those forces or of other military forces associated with them; or

(4) if the marriage is celebrated in accordance with the provisions of the Foreign Marriage Act 1892, sec. 22 between parties of whom at least one is a member of Her Majesty's Forces serving in any foreign territory or employed in such territory in such other capacity as may be prescribed by Order in Council; or

(5) if the marriage, being between parties of whom at least one is a British subject, is celebrated outside the Commonwealth in accordance with the provisions of, and the form required by, the Foreign Marriage Acts 1892 to 1947.

In relation to the capacity to marry, Dicey[179] declares that it is governed by the law of each party's antenuptial domicile. However, Dr. Cheshire,[180] criticizing this view submits that the basic presumption is that capacity to marry is governed by the law of the husband's domicile at the time of the marriage but that this presumption is rebutted if it can be inferred that the parties at the time of the marriage intended to establish their home in a certain country and that they did in fact establish it there within a reasonable time. Dicey opines that any rule under which it is impossible to predicate at the date of the marriage with knowledge of all material facts whether it is valid or invalid is undesirable, especially in view of the fact that the destination of interests in property may depend on the validity of a marriage. Moreover, he doubts the validity of a rule which gives preference, in matters of capacity, to the law of the husband's domicile.[181]

No marriage is valid if by the law of either party's domicile one party does not consent to marry the other.[182] The nature of

179. *op. cit.* Rule 31.
180. *op. cit.* pp. 276 *et. seq.*
181. *op. cit.* p. 258
182. Dicey and Morris, *op. cit.* Rule 32

the ceremony according to the law of the place of celebration, and not of either party's domicile, determines whether a marriage is monogamous or polygamous. Hence:

(1) A marriage celebrated in a form which is monogamous under the law of the place of celebration is a monogamous marriage, whatever the personal law of the parties at the time of the marriage or at any subsequent time.

(2) A marriage celebrated in a form which is polygamous under the law of the place of celebration is a polygamous marriage, whatever the personal law of the parties at the time of the marriage, and even if the husband takes only one wife.[183]

A marriage celebrated in England in accordance with polygamous forms and without any civil ceremony as required by English law is invalid, whatever the domicile of the parties.[184] A man or woman whose personal law does not permit polygamy has no capacity to contract a valid polygamous marriage.[185] A marriage which is polygamous under Rule 33 and not invalid under Rule 34 or 35 will be recognised in England as a valid marriage unless there is some strong reason to the contrary.[186]

183. *id.* Rule 33.
184. *id.* Rule 34
185. *id.* Rule 35
186. *id.* Rule 36

CHAPTER 3

THE CONTRACT OF MARRIAGE

1. Introduction

Legal recognition of a marriage depends on the satisfaction of the requirements imposed by the particular legal system. Consequently, the marriageable age, capacity to marry and the formalities to be observed, are determined generally by statute. Apart from these specific requisites, there are general impediments to the formation of a valid contract of marriage. The essential ingredient of a contract being voluntary consent, proof of factors such as insanity, intoxication, duress, mistake and fraud, vitiate consent and render the marriage *invalid.*[1]

The relative importance of these requirements depends to a large extent on the ultimate effect that non-compliance has on the status of the marriage. For instance, the observance of certain requirements may be so important that proof of non-compliance would render the contract of marriage a total nullity. Examples of such absolute incapacity are the prohibition against contracting a second marriage during the subsistence of a previous valid marriage,[2] factors which vitiate consent such as insanity,[3] marriage within the prohibited degrees of relationship,[4] and a marriage contracted by persons below the marriageable age.[5] There are, however, other requirements, non-compliance of which do not strike at the root of the contract, but merely render the marriage voidable. Thus if for instance the parties are above the marriage-

1. See C. G. Weeramantry, *The Law of Contracts* (Colombo 1967) vol.1, part iii; H. R. Hahlo, *The South African Law of Husband and Wife* (4th ed., Wynberg 1975) ch.5.
2. H. R. Hahlo, *op.cit.* p. 64
3. *id.* at p.65
4. *id.* at p. 68. See also The Marriage Registration Ordinance No.19 of 1907 (Cap. 112) sec.16
5. Marriage Registration Ordinance No. 19 of 1907 (Cap. 112) sec 15. See H. R. Hahlo, *op. cit.* p. 88.

able age but are nevertheless minors, the consent of the parents or guardians is required both in the common law[6] and in the law of Sri Lanka.[7] However, even if such a marriage was contracted without the required consent, the parents would have the right to ratify the union giving it retrospective validity.[8] Moreover, after the minor comes of age if there is proof of continued cohabitation, the marriage would be deemed valid.[9] Likewise, in the Sri Lankan law there is judicial authority for the view that non-registration of the marriage is not fatal to its validity. It follows, therefore, that compliance with certain requirements are more important than with others and as such the end effect of non-compliance would vary.[10]

II Impediments to a Marriage

(*a*) Marriages which are Null and Void

According to the Marriage Registration Ordinance,[11] "If both the parties to any marriage shall knowingly and wilfully intermarry under the provisions of this Ordinance in any place other than that prescribed by this Ordinance, or under a false name or names, or except in cases of death-bed marriages under section 40, without certificate of notice duly issued, or shall knowingly or wilfully consent to or acquiesce in the solemnisation of the marriage by a person who is not authorised to solemnise the marriage, the marriage of such parties shall be null and void."[12] In *The Queen* v. *Kanter Chinnatamby*[12a] the Supreme Court stressed the importance of proving the requisites of knowledge and wilfulness to render the marriage null and void by virtue of this provision. In this case the validity of the prisoner's first marriage was in issue as he had been indicted for bigamy. Although there was evidence of the fact that a certificate of the marriage notice had not been issued to the parties, as required by section 7 of Ordinance No. 13

6. Voet 23.2. 11.
7. Marriage Registration Ordinance No. 19 of 1907 (Cap. 112) sec.22
8. H. R. Hahlo, *op. cit.* p. 92
9. Voet 23.2.39.
10. See C. C. Turpin, "Void and Voidable Acts". 1955 (72) *S.A.L.J.* p. 58; A. M. Honore, "Degrees of Invalidity," 1958 (75) *S.A.L.J.* p. 32.
11. No. 19 of 1907 (Cap. 112)
12. Sec.46

12a (1884) 6 S.C.C. 121

of 1863 and, notwithstanding the fact that the marriage had been solemnised at an unauthorised place, the first marriage was deemed to be valid. Burnside C.J. delivering the opinion of the Supreme Court declared that it "lay upon the party seeking to defeat such a marriage to establish affirmatively, that both parties had knowingly and wilfully intermarried contrary to the provisions in question... It was, in fact, for the defendant to meet the presumptive case in favour of marriage and against fraud which the register and the *de facto* marriage raised..." [12b]

There is authority in the common law, too, for the view that a marriage solemnised without due compliance with the prescribed formalities renders the union null and void.[13] Nevertheless, Hahlo[14] points out several exceptions to this general rule. Although failure to solemnise a marriage in the presence of two competent witnesses is fatal to the validity of a marriage, Hahlo declares, that the fact that a marriage is not solemnised in a prescribed place may not render it void because the courts always *in favorem matrimonii*, would be inclined not to invalidate a marriage because of a formal irregularity. The Marriage Registration Ordinance, however, specifically refers to the elements of "knowledge" and "wilfulness", thereby distinguishing the Sri Lankan law from that applicable in South Africa.

In relation to a marriage contracted by parties under false names, Hahlo[15] submits that proof of this fact *per se* does not render a marriage invalid because the parties agree to marry each other as the physical entities before the person solemnising the marriage and not as bearers of certain names. This is nevertheless a statutory ground on which a marriage may be rendered void in Sri Lanka.[15a]

In the English Law, there are several defects which may

12b *id.* at p. 124. See also *Arumogam Vairamuttu* v. *Seethampulle* (1885) 7 S.C.C. 56

13. Van Leeuwen, *Cen. For.* 1.1.14.1. 6; Van der Linden 1.3.6.3.

14. H. R. Hahlo, *op.cit.* p.79

15. H. R. Hahlo, *op.cit.* p.80

15a Sec.46

invalidate a marriage[16] provided both parties are aware of the irregularity at the time of the ceremony.[17] The English statute also refers to the requirement of "knowingly and wilfully intermarrying." Bromley points out that "it is not clear whether both parties should know as a question of fact that the formality is not complied with or whether, in addition, they must know as a question of law that the defect will invalidate the marriage" and he opines that "The former construction seems the more natural even though its adoption would have the effect of invalidating more marriages.[18]

It must be pointed out that on the one hand public policy demands that not every marriage which has been irregularly solemnised should be rendered void because of the harmful consequences that can ensue to innocent parties, namely, the children of the marriage, on the other hand, it is important that both parties are compelled to satisfy certain prescribed formalities when entering into a contract as important as marriage. Hence it may be asserted that the policy of restricting void marriages to situations where there is proof of knowledge and wilfulness is a convenient way in which marriages which are to be invalidated are restricted. Proof of subjective facts such as knowledge and wilfulness as grounds on which the validity of a marriage may be defeated, however poses considerable difficulty. Dishonest persons for instance who may wish to invalidate a marriage could well plead in court that they had knowledge of the law at the time of non-compliance. Consequently, the Law Commission in England has recommended that an objective rather than a subjective criterion should determine the regularity of a marriage.[19]

In the modern South-African law, provided there is proof of the performance of some form of solemnisation of the marriage, if one or both of the parties can prove *bona fides* as to any impediment to the marriage the marriage will be treated as a putative marriage and, as such, some of the consequences of a valid

16. See P. M. Bromley, *Family Law* (5th ed. London 1976) p.78
17. See Matrimonial Causes Act 1973 sec. 11.
18. P. M. Bromley, *op.cit.* p. 78
19. See Law Com. No. 53 (Report on Solemnisation of Marriage in England & Wales), 1973, Annex, para 121.

marriage would prevail.[19a] Consequently, children born of such a marriage are declared to be legitimate provided the spouses were *bona fide* not only at the time of the marriage but at the time of conception, too.[19b] As always, however, good faith is presumed.[19c]

The doctrine of putative marriage was recognised in Sri Lanka in *Fernando* v. *Fernando*.[19d] In this case the petitioner had contracted a marriage with the first respondent concealing the fact that she had been previously married and that she had had eight children by that marriage. The first respondent was ignorant of this fact at the time of marriage and when he did become aware of the previous marriage he asked for a decree of nullity or, in the alternative for a decree of divorce on the ground of constructive malicious desertion. Justice Weeramantry in the course of his judgment declared that in the absence of evidence to the contrary the first respondent must be presumed to have entered into the marriage *bona fide* and as such the law in regard to putative marriages would apply and the children of the union would be deemed to be legitimate. Moreover, he recognised the father's right to the custody of the children although, in fact, because of the special circumstances in this case, the custody of the children was given to the mother.

Apart from the above consequences of legitimacy and custody of the children, a putative marriage may also entail the normal proprietary consequences of a valid marriage. Therefore if, according to the common law, the parties had married without an antenuptial contract, they would be deemed to have been married in community of property and as such on dissolution of the marriage the common estate would be shared in equal proportion between the two parties; if only one party was *bona fide* community of property will take place only if it was to the advantage of the innocent party.[19e] Likewise, if the parties had married with an antenuptial contract the terms of the contract would be valid and

19a H. R. Hahlo, *op.cit* p. 493.
19b *id.* at p. 496
19c *id.* at p. 494
19d (1968) 70 N.L.R. 534
19e Voet 23.2.89.

binding on both parties, but if only one party was *bona fide* only that party could enforce the obligations under the contract.[19f]

(*b*) Solemnisation of Marriage by Means of a False Document

If a valid marriage is contracted under the Marriage Registration Ordinance "by means of any wilfully false notice, certificate, or declaration made by either party to such marriage or to any matter to which a notice, certificate or declaration is required, it shall be competent for the proper District Court to inquire therein, upon the application of either of the parties or, if the marriage shall have been had without the consent of the person whose consent was by law required, upon the application of such person or of the Attorney General.

"After due inquiry the court may order and direct that all estate and interest in any property accruing to the offending party by the force of such marriage shall be forfeited, and shall be secured under the direction of the court for the benefit of the innocent party or of the issue of the marriage or of any of them, in such manner as the said court shall think fit for the purpose of preventing the offending party from deriving any interest in any real or personal estate or pecuniary benefit from such marriage.

"If both the contracting parties shall in the judgment of the court be guilty of any such offence as aforesaid, it shall be lawful for the court to settle and secure such property or any part thereof immediately for the benefit of the issue of such marriage, subject to such provision for the offending party by way of maintenance or otherwise as the court may think fit.

"The order of the District Court shall be subject to appeal to the Supreme Court.

"All agreements, settlements, and deeds entered into or executed by the parties to any such marriage in contemplation of, or before, or after, or in relation to, such marriage shall be absolutely void, and have no force or effect so far as the same shall be inconsistent

19f H. R. Hahlo, *op. cit.* p. 497.

with the provisions of the security and settlement made by the court as aforesaid."[20]

It must be pointed out that the statute adopts an inconsistent attitude to marriages which are a total nullity[21] and those which are valid but which entail certain sanctions.[22] For instance, section 46 of the statute declares that a marriage under a false name or without certificate of notice shall be null and void. Section 47 however refers to a *valid* marriage contracted by means of any wilfully false notice, certificate, or declaration made by either party to such marriage. This latter section governs any false notice, certificate or declaration and would therefore necessarily include a false declaration relating to the names of the parties or a false certificate of notice. In these circumstances, then, there would be difficulty in determining whether the marriage is null and void according to section 46 or whether it would be valid though liable to certain penalties as set out in section 47 and 48.[23]

Apart from this anomaly, the provisions relating to the protection of the innocent party, as far as pecuniary advantage is concerned, is unassailable. In addition, the statute declares that "Any person who shall knowingly or wilfully make any false declaration or sign any false notice required by this Ordinance for the purpose of procuring the registration of any marriage, and every person who shall forbid the granting by any registrar of a certificate for marriage by falsely representing himself or herself to be a person whose consent to such marriage is required by law, knowing such representation to be false, shall be guilty of the offence of giving false evidence under chapter XI of the Penal Code, and be liable to the penalties therein prescribed."[24]

20. Marriage Registration Ordinance No. 19 of 1907 (Cap. 112) sec. 47 (1) (2) (3) (4) ; 48.
21. See sec. 46
22. See sec. 47
23. See also sec. 45.
24. Sec 45 (a) (b).

(c) Prohibited Age of Marriage

The Marriage Registration Ordinance[25] enacts that: "No marriage shall be valid, the male party to which has not completed sixteen years of age or the female twelve, or if a daughter of European or Burgher parents, fourteen years of age,"[26]

In addition, the statute makes it incumbent on a person under twentyone years of age, but above the marriageable age, to obtain the prior consent of his or her father.[27] If, however, the father be dead, under a legal incapacity or beyond the reach of the party, the consent of the mother must be obtained.[28] Should the mother, too, be dead, incapacitated or unable to make known her will, consent of the guardian or guardians is a necessary prerequisite.[29] Moreover, the court has been vested with overriding powers of authorising the marriage of a minor if there is no parent or guardian, or if the consent of such parent or guardian is unreasonably withheld.[30] The court, however, will not overrule the decision of a parent or guardian to refuse consent to an impending marriage unless it is satisfied that the refusal of consent is without cause and contrary to the interest of the minor.[31] In *Gunerishami* v. *Gunatilaka*[32] the girl's father had refused his consent to his daughter's marriage because, according to the evidence, the man wished to marry his daughter merely to shield his brother who was responsible for seducing the girl. When the applicant sought the consent of court, the Supreme Court, upholding the decision of the District

25. No. 19 of 1907 (Cap. 112)
26. Sec.15. The marriageable age in Sri Lanka is below the age required in South Africa which is eighteen years for males and sixteen years for females. See the Marriage Act No. 25 of 1961, Sec. 26(1). In *Thiagaraja* v. *Kurukal* (1923) 25 N.L.R. 89 at p. 92 Schneider J. declared that the marriageable age in the Sri Lanka Ordinance was the same as in the Roman-Dutch common law. It must be pointed out, however, that this is not so. In the common law it is fourteen for males and twelve for females. See R. W. Lee, *An Introduction to Roman-Dutch Law* (3rd ed. Oxford 1937) p. 51.
27. Sec. 22 (1) (a);
28. Sec. 22 (1) (b);
29. Sec. 22 (1) (c)
30. Sec. 22 (2);
31. Voet 23.2.21, 22; Schorer, Note 14; Van der Keesel *Th. 76*.
32. (1904) 7 N.L.R. 219.

Judge, held that in the circumstances it had no authority to overrule the objections of the father.

Minority, it must be pointed out, is an impediment only to a first marriage.[33] Consequently, a minor contracting a second marriage, if the first marriage was terminated either by death or divorce, does not require the prior consent of a parent or guardian. This was the position under the common law, too,[34] and it derives from the fact that on marriage a minor becomes a major and is freed from his or her natural or legal guardians.[35]

Several cases have considered the question whether, notwithstanding the breach of the statutory provisions relating to the marriageable age and the requisite of consent, proof of cohabitation between the parties after the minor spouse has become a major, should render the marriage retrospectively valid. The consensus of judicial opinion has been that "it is better to recognise what had taken place irregularly rather than impair the value of the marriage state or affect the legitimacy of the children."[36]

In view, then, of the consequences of a refusal to recognise the *status quo*, particularly when children have been begotten of an irregular union, the courts have been reluctant to withhold recognition of a marriage contracted in breach of a statutory condition. It must, however, be pointed out that in order to vest such a union with legal validity it is essential that the impediments to the marriage are first wiped out. Consequently, in the case of the marriage of a minor without parental consent, for instance, for the court to recognise the union it is necessary for the parents first to give their consent and that sanction would act retrospectively and render the marriage valid *ab initio*.

The position in the common law is no different. The parents of the minor have the right to set aside the marriage,[36a] but if cohabitation continues after the minor has attained majority this

33. See proviso to sec. 22(1)
34. Voet 23.2.17; Van Leeuwen *Cen. For.* 1.1.13.11.
35. Voet 1.7.13; 4.4.6,7,9; 27.10.15; Gr. 1.6.4; 1.10.2.
36. Voet 23.2.11.
36a Voet 23.2.11

right comes to an end.[37] Moreover, it has been authoritatively laid down in *Willenberg* v. *Willenburg*[38] that a minor cannot contest the validity of the marriage after he has attained majority.[39]

The Marriage Registration Ordinance enacts that all marriages contracted under the Ordinance cannot be defeated for want of consent. According to the statute: "After any marriage shall have been registered under this Ordinance, it shall not be necessary, in support of such marriage, to give any proof...of the consent to any marriage having been given by any person whose consent thereto was required by law..."[40] In other words, provided the marriage has been registered the non-compliance with certain statutory requirements will not render the marriage invalid. On the contrary, it authorises the courts to shut its eyes to the fact that certain requisites have not been satisfied. The essential difference, then, between the statutory provision and the common law is that while the common law requires the impediment to the marriage to be removed, as a prerequisite for recognition, the statute demands that the marriage be registered according to the terms of the Ordinance, if it is to enjoy an analogous protection.[41]

It is interesting to note that by virtue of this insistence on registration, as an essential prerequisite for the protection conferred by the statute, it necessarily follows that customary marriages, which have gained recognition in our legal system, will not enjoy the same privilege because they would not have satisfied the requirement of registration.[42] Perhaps then, in the case of unregistered marriages the common law will apply and as such the marriage will be treated as voidable and capable of subsequent rati-

37. *Lee* v. *Donlon* (1884) 5 Natal L.R. 270 at p. 273; *Van der Westhuizen* v *Engelbrecht* 1942 O.P.D. 191

38. (1909) 3 Buch. A.C. 409

39. See R.E.G.Rosenow, "*Engelbrecht's Case* v. *Willenberg's Case*" in 1944 (61) *S.A.L.J.*14; Aquilius "*Engelbrecht's Case* v. *Willenberg's Case*" in 1944 (61) *S.A.L.J.* 229;
"The Marriage of Minors Without Consent of Parents", 1914 (28) *S.A.L.J.* 478.

40. Sec.42

41. See *Selvaratnam* v. *Anandavelu* (1941) 42 N.L.R. 487; *Ekanayake Mudiyanselage Dayawathie* v. *Wijesinghe Gunaratne* (1965) 70 C.L.W. 96.

42. *Selvaratnam* v. *Anandavelu*(1941) 42 N.L.R.487 at p.493, *per* de Kretser J.

fication either on attaining majority,[43] or on obtaining parental consent. A possible rationale for this difference in attitude to want of consent in relation to registered and unregistered marriages was suggested by de Kretser J. in *Selvaratnam* v. *Anandavelu*[44] when he declared that "It seems to me that the Ordinance povides for a number of safeguards and that the cases which will escape the precautions so taken are so few that it was considered better to recognise what had taken place irregularly rather than impair the value of the marriage state or affect the legitimacy of the children."[45]

It is, however, submitted that considering the serious consequences of an annulment, a customary marriage, which does not have the benefit of all the safeguards provided for in the Ordinance, has a better claim to protection from attack. It is, therefore, not likely that the legislature entertained the deliberate intention of rendering a registered marriage valid notwithstanding the fact that it was contracted by a minor without consent while it intended an analogous customary marriages to be treated as merely voidable. Perhaps it is more likely that the legislature did not intend to draw a distinction between registered and customary marriages but that such a distinction flowed from the judicial recognition of marriages contracted outside the purview of the Ordinance and from the fact that the relevant section specifies that this benefit is available only to marriages "registered under this Ordinance."[46] It must be pointed out that the first statute enacted to regulate the contract of marriage in our legal system declared that registration of a marriage is a compulsory prerequisite for validity.[47] This provision, however, was observed more in the breach and it was only because subsequent statutes omitted to enact an analogous section[48] that the court gave recognition to marriages contracted outside the statute. Hence, it is more likely that section 42 of the

43. *Selvaratnam* v. *Anandavelu* (1941) 42 N.L.R. 487 at p. 494, *per* Wijeyewardene J.
44. (1941) 42 N.L.R. 482
45. *id.* at p. 493.
46. See sec. 42
47. See Regulation No. 9 of 1822.
48. See however Ordinance No. 2 of 1895, sec. 15 which declared that registration was compulsory. This section, however, was repealed the following year by Ordinance No. 10 of 1896.

Ordinance, which was initially drafted at a time when only registered marriages were recognised, did not specifically intend to confine its protection to marriages registered under the Ordinance.

In *Selvaratnam* v. *Anandavelu*,[49] when notice of marriage between the first respondent and the third respondent was given by the first respondent, the second respondent filed a caveat objecting to the proposed marriage alleging that the first respondent had previously contracted a marriage with her according to Hindu rites and ceremonies. The Supreme Court, which had to decide on the validity of the first customary marriage, held that the union between the first respondent and the second respondent was invalid for, *inter alia*, want of consent. The court, however, was not prepared to hold that such a marriage was absolutely void and stressed that the subsequent consent of the parents could render the marriage valid *ab initio*.[50] In *Ratnamma* v. *Rasiah*[51] Dias J. was of the opinion that want of consent would not invalidate a Hindu customary marriage after it had been consummated,[52] thus emphasising the need to recognise the *status quo* rather than permit the children of the union to suffer the consequences. Moreover, if the spouses were allowed to attack the validity of a marriage, they could well take advantage of proof of lack of consent to the marriage to avoid the responsibilities accruing from a valid marriage. For instance, in *Ratnamma* v. *Rasiah*[53], the wife applied for maintenance from the man whom she alleged was her husband and the respondent sought to disclaim liability on the footing that the marriage was invalid for want of consent. The court, however, pointed out that in such a situation it would be reluctant to insist on strict proof of compliance with the requisites of a marriage provided there was evidence that the parties had gone through a ceremony of marriage and that they had regarded themselves, and society had looked upon them, as husband and wife.

49. (1941) 42 N.L.R. 487

50. *id.* at p. 492, *per* de Kretser J. See also Wijeyewardene J. at p. 494 where he queried whether want of consent could invalidate such a marriage especially where the marriage had been consummated. See also Drieberg J. in 202, P.C. Point Pedro, 3, 994 (S.C.Mts. April 5, 1936) where the same doubt was raised.

51. (1947) 48 N.L.R. 475

52. *id.* at p. 477

53. (1947) 48 N.L.R. 475

In the light of the foregoing, then, the judgment of the Supreme Court in *Thiagaraja* v. *Kurukal*[54] cannot be accepted. In this case, a Brahamin, married a girl of eleven years and one month according to Hindu customary rites. After the girl had attained puberty, however, the parties continued to cohabit and live together as husband and wife for some years and they were received as such by their relatives and friends. Schneider J., however, refused to accept the contention that as in the Roman-Dutch common law, cohabitation of persons married during non-age after the party had attained puberty, rendered the marriage valid *ab initio*. He declared that if the legislature had specifically adopted certain Roman-Dutch law provisions in its statute, the omission of this provision must be treated as having been deliberate.[55] It is submitted, however, that the statute does not deal with customary marriages at all and that the common law principles adopted by the statute relate only to marriages registered under the Ordinance. This fact, however, does not detract from the validity of customary marriages in our law and such marriages, being outside the purview of the Ordinance, are in all probability governed by the common law.

(*d*) Prohibited Degrees of Marriage

Marriage between persons too closely related by consanguinity or affinity was prohibited by the Roman-Dutch law.[56] While in the case of consanguinity, the prohibition is founded on both moral and eugeinic grounds, marriage between persons already related too closely to one another by marriage is probably prohibited because of the tensions that might well be created by such a union.[57] In the law of Sri Lanka, prohibited degrees of relationship have been statutorily enacted. According to the Marriage Registration Ordinance:[58]

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54. (1923) 25 N.L.R. 89
55. *id.* at p. 92
56. Voet 23.3.29
57. See P.M. Bromley, *Family Law* (5th ed. London 1976) p. 31.
58. No. 19 of 1907 (Cap.112)

"No marriage shall be valid;

(*a*) Where either party shall be directly descended from the other; or

(*b*) Where the female shall be sister of the male either by the full or the half-blood, or the daughter of his brother or of his sister by the full or the half-blood, or a descendant from either of them, or daughter of his wife by another father, or his son's or grandson's or father's or grandfather's widow; or

(*c*) Where the male shall be brother of the female either by the full or the half-blood, or the son of her brother or sister by the full or the half-blood, or a descendant fom either of them, or the son of her husband by another mother, or her deceased daughter's or grand-daughter's or mother's or grand-mother's husband."[59]

"Moreover, "any marriage or cohabitation between parties standing towards each other in any of the above enumerated degrees of relationship shall be deemed to be an offence, and shall be punishable with imprisonment, simple or rigorous, for any period not exceeding one year."[60]

In the common law a man could not marry his wife's sister since it was a prohibited relationship by affinity.[61] Nevertheless, in South-Africa, this prohibition was removed by statute in 1961.[62] In the English law, too, the Deceased Wife's Sister's Marriage Act of 1907 permitted a man to marry his deceased wife's sister.[63] Likewise, in the law of Sri Lanka, there is no such prohibition.[63a] Thus in *Valliammai* v. *Annammai*,[64] a 1900 decision of the Full Bench of the Supreme Court, it was authoritatively declared

59. Sec.16.
60. Sec.17.
61. Pol. Ord. art. 8.
62. Marriage Act 25 of 1961, sec.28 (a), (c).
63. The Marriage (Enabling) Act 1960 which significantly relaxed the prohibition against persons marrying within degrees of affinity.
63a See *Fernando* v. *Fernando* (1859) 3 Lorenz Rep. 235
64. (1900) 4 N.L.R. 8.

that "by the law of this Colony there is no objection to a man marrying his wife's sister... "

The continued relevance of the Roman-Dutch common law relating to prohibited degrees of relationship in Sri Lanka, subsequent to the enactment of our statutory law, was decided on by the Supreme Court in *Karonchihami* v. *Angohami*.[65] In this case, the appellant, after the death of his wife, married a woman with whom he had had an adulterous union during the subsistence of his first marriage. According to the early Roman-Dutch law, following Canon law, such a marriage was not forbidden unless a promise of marriage had passed between the guilty parties during the lifetime of the innocent spouse or unless they had been guilty of an attempt against such spouse's life.[66] Nevertheless, by a Placaat of July 18, 1674, such marriages were altogether prohibited.[67] According to the majority judgment of the Supreme Court, Ordinance No. 6 of 1847 did not contain the whole law of marriage in force in this legal system and the Roman-Dutch law was still in force in certain respects. Bonser C.J. declared that "it cannot be assumed that the legislature intended tacitly to abolish a provision so well calculated to protect the lives of innocent spouses and to discharge immorality."[68] This view was reiterated by Justice Withers but Lawrie J. delivered a dissenting opinion. He declared that the Ordinance contained the entire law on the subject "because there was no reservation or reference to some unexpressed law."[69] Moreover, he was of the firm view that the Dutch did not impose their Christian views on law of marriage on the native population. Therefore, he condoned a marriage of this nature where the woman would be made "an honest woman" which would not have been possible if the "puritan legislation of Hollanders" was to apply.[70] This dissenting opinion was upheld by the majority of the Supreme Court when it sat in review preparatory to an appeal to the Privy

65. (1896) 2 N.L.R. 276
66. *id.* at p. 278
67. Voet 23.2.27; Van der Linden, Inst. of Holland, p. 19
68. (1896) 2 N.L.R. 276 at p. 279
69. *id.* at p. 282
70. *id.* at p. 283

Council.[71] In a well discerned judgment, Justice Middleton and De Sampayo A.J. concluded that there was no evidence of the applicability of the common law principle in our jurisdiction.[72]

The view that past adultery by the parties did not affix indelibly the disability to contract a subsequent marriage was upheld by the Supreme Court in *Rabot* v. *de Silva*[73] and reiterated by the Privy Council.[74] Their Lordships based their decision on the statutory provision which denies the status of legitimacy to children of an adulterous union although the parents had subsequently married.[75] It was thus concluded that "the necessary contemplation of the Ordinance is that adulterers may lawfully marry, and the fact that this is assumed, and not enacted, gives to the Ordinance authority as an exposition of the law."[76] The 1907 Ordinance contains a similar provision[77] and more recently the legislature has given statutory recognition to the legitimisation of illegitimate children "whether or not such child was so procreated in adultery".[78]

It is clear, therefore, that as regards the prohibited degrees of marriage, the Ordinance of 1907 is conclusive.

(*e*) (*i*) The Right to Contract a Second Marriage

Polygamy is expressly prohibited by the Marriage Registration Ordinance which enacts that "No marriage shall be valid where either of the parties thereto shall have contracted a prior marriage which shall not have been legally dissolved or declared void."[79]

"Marriage", according to the Ordinance, "means any marriage, save and except marriages contracted under and by virtue of the

71. (1904) 8 N.L.R. 1.
72. Justice Moncreiff dissented.
73. (1907) 10 N.L.R. 140
74. (1909) 12 N.L.R. 81
75. Ordinance No. 6 of 1847, sec. 31
76. (1909) 12 N.L.R. 81 at p. 83
77. Sec. 21
78. Legitimacy Act No. 3 of 1970, sec. 3.
79. Sec.18

Kandyan Marriage Ordinance, 1870,[80] or the Kandyan Marriage and Divorce Act, and except marriages contracted between persons professing Islam."[81]

This definition of "Marriage" was the subject of judicial interpretation in *Katchi Mohamed* v. *Benedict*[82] where a man belonging to the Muslim faith had contracted a marriage, according to the Muslim law and subsequently married a person not professing Islam under the Marriage Registration Ordinance, was convicted of bigamy. Counsel for the accused opined that in each of the expressions "no marriage" and "a prior marriage", the term "marriage" had to be understood to exclude marriages contracted between persons professing Islam, and that, therefore, the second marriage was not rendered invalid by reason of the fact that it was contracted while the first marriage was subsisting. This contention, however, was disputed by the Supreme Court. According to T.S. Fernando J. the expression "marriage" which occurs twice in section 18 does not bear the same meaning in each instance. While the term "marriage" must be understood to exclude a Muslim marriage or one registered under the Kandyan law, the expression "prior marriage" is not limited to the same meaning. It must be given its ordinary and natural meaning and interpreted as denoting any legally recognised marriage.[83] In support of this interpretation, Justice T.S. Fernando declared that any other view would give rise to a situation in which the Kandyan marriage and divorce Act,[84] which renders invalid a second marriage contracted under the aegis of the statute, could be circumvented by the simple expedient of registering the second marriage under the Marriage Registration Ordinance.[85] In this instance, if the expression "prior marriage" in the Marriage Registration Ordinance was interpreted to exclude a marriage contracted according to the Muslim or Kandyan law the offence of bigmay would not be committed in the illustration set out above.

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80. Repealed by Act No. 44 of 1952
81. Sec. 64
82. (1961) 63 N.L.R. 505
83. *id.* at p. 509
84. No. 44 of 1952, sec. 6
85. (1961) 63 N.L.R. 505 at p. 509

It is submitted that the above argument would apply *mutatis mutandis* even if the first marriage was one contracted according to the Muslim law and the second registered under the Marriage Registration Ordinance, with the difference that in this instance, the party would be defeating the prohibition contained in the Marriage Registration Ordinance.

It is clear, therefore, that the interpretation adopted by the Supreme Court in *Katchi Mohamed* v. *Benedict*[86] cannot be assailed, and that the definition of "marriage" in section 64 of the Marriage Registration Ordinance should be confined to the meaning given "unless the context otherwise requires." Consequently,[87] the expression "prior marriage" is an instance where "the context otherwise requires."

(ii) **Bigamy**

The Penal Code[88] declares that "Whoever having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to a fine. *Exception:* This section does not extend to any person whose marriage with such husband or wife has been declared void by a court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years and shall not have been heard of by such person as being alive within that time—provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts, as far as the same are within his or her knowledge."

In *King* v. *Perumal*[88a] the accused was a Hindu who was a native

86. (1961) 63 N.L.R. 505
87. Sec. 64
88. Sec. 362. B
88a (1911) 14 N.L.R. 496

of Tinnevelly in South India and had settled in the Central Province of Ceylon. He had an Indian domicile and by the law of British India polygamy was permitted. Nevertheless, as he had contracted a second marriage in Ceylon, during the life-time of his former spouse, the validity of the second marriage was called in question before the Supreme Court of Ceylon. The unanimous decision of the Full Bench was that in view of the fact that our marriage laws present an insuperable bar to the solemnisation of a polygamous marriage, except in the case of Muhammedans, the accused had been rightly convicted of bigamy. The fact that polygamy was valid according to the law of the country in which the husband had his domicile was held to be irrelevant to the issue before the court.

An interesting exception to the prohibition set out in section 18 of the Marriage Registration Ordinance and to the criminal sanction contained in the Penal Code is to be found in our legal system which is characterised by the existence of a multiplicity of laws governing the different communities in our country. While the general law of Sri Lanka confers recognition only on a monogamous union the Muslim law, which governs adherents of Islam declares that: "A man is according to the law of Mahomet permitted to marry four wives, that is to say, only such men as are uncommonly addicted to the fair sex, who have abilities enough to acquit themselves of their duty, and who are possessed of wealth enough to maintain the same properly."[89]

Indeed, there would be no problem if a Muslim man contracts more than one marriage according to the Muslim law, polygamy being expressly recognised in that legal system. The situation, however, is more complex if the first marriage is one registered under the Marriage Registration Ordinance and then, during the subsistence of this union, a second marriage is contracted according to Muslim rites and customs. This situation can arise either by a non-Muslim being converted to the Muslim faith subsequent to the first marriage or, alternatively, by a Muslim contracting the first marriage under the general law. In both the situations envisaged

89. Muhammedan Code 1806, sec. 100

above the second marriage, though contracted duirng the subsistence of the first, would be valid according to the Muslim law. In *Reid* v. *Attorney General*,[90] however, the Supreme Court and the Privy Council were called upon to decide on the legal consequences of the second marriage from the stand point of the Marriage Registration Ordinance applicable in our legal system. According to the facts of this case the appellant, who was a Roman Catholic, contracted a marriage under the Marriage Registration Ordinance. While the first marriage was subsisting, he converted to the Muslim faith and married under the Muslim Marriage and Divorce Act a woman who had also embraced Islam. The Acting District Judge, convicting the appellant of bigamy, declared that "Monogamy is an unalterable part of the status of every person who marries under the Marriages (General) Registration Ordinance, and a change of religion cannot affect that status. Conversion to the Muslim faith, even if genuine, cannot enable one who has married under the General Marriages Ordinance to contract a polygamous marriage; such a marriage is void in the lifetime of a former wife."

On appeal, however, the Supreme Court, in a brief judgment, reversing the decision of the District Court declared that a marriage registered under the Muslim Marriage and Divorce Act is not a marriage within the definition of the expression "marriage" in the Marriage Registration Ordinance.[91] In the instant case, the Muslim priest testified to the fact that he converted to Islam both the appellant and his second wife and that he registered their marriage, which according to the notice given to the Quazi of the area under the Muslim Marriage and Divorce Act, was a notice of intention to contract a second or subsequent marriage. The evidence of the Quazi and the priest who registered the marriage indicated that the requirements of the Act as to registration of the marriage had been observed. Consequently, the appellant was held not to be guilty of bigamy.

On appeal to the Privy Council, Counsel[91a] for the appellant argued that a person who entered into a monogamous Christian

90. (1963) 65 N.L.R. 97
91. Sec. 64
91a (1964) 67 N.L.R. 25

marriage not only entered into a contract but acquired as a result a status recognised throughout Christendom; that it was the voluntary union for life of one man and one woman to the exclusion of all others, and that status could not be changed and no new marriage of any sort could be contracted by either spouse until the marriage was dissolved by a procedure recognised as applicable to monogamous marriages even if both parties changed to the Muslim religion. According to this submission, then, a marriage under the Marriage Registration Ordinance, being admittedly monogamous precludes either party, during its subsistence, from validly entering into another marriage even subsequent to a change of faith.[92]

Assailing this contention, Mr. Gratiaen for the respondent submitted that the status arising out of a contract of marriage was one to which each country was entitled to attach its own conditions both as to its creation and duration. He submitted that in determining what status the law conferred on parties to a marriage under the Marirage Registration Ordinance one had to have reference only to the relevant statute law. If the marital rights of the first wife had been violated, as admittedly they had been, then the Marriage Registration Ordinance provides a remedy in section 19, but there was nothing in any statute which rendered the second marriage invalid and nothing in the general law of the country which precluded the husband from altering his personal law by changing his religion and subsequently marrying in accordance with that law, if it recognised polygamy, notwithstanding an earlier subsisting monogamous marriage.[93]

Lord Upjohn, delivering the opinion of the Judicial Committee, was in total agreement with the contention that there was an inherent right in an individual to change his religion and thereby the personal law by which he was governed, and to contract a valid polygamous marriage if recognised by that code of laws, notwithstanding an earlier valid marriage. He cited with approval the judgment of Innes J. in *Skinner* v. *Skinner*[94] who declared that "If in becoming a Christian, a man took upon himself the obligation of monogamy,

92. *id.* at p. 28
93. *id.* at p. 29
94. (1898) L.R.25 Ind. App. 34

i.e. if the Christian religion restricted him, on his embracing it, to one wife, then I should say that if such a person married while still a Christian he could not afterwards throw off his obligations by a mere change of profession. But I do not think that a profession of Christianity *ipso facto* imposes any such obligation although doubtless the tendency of Christianity is adverse to ploygamy."

The main contention advanced by the Judicial Committee was that in a multi-racial and multi-religious country like that of Sri Lanka a change of faith and of personal law could not be prohibited except by statute, and in the absence of such legislation in Sri Lanka, the second marriage which was validly contracted under the Muslim law could not be treated as void merely by reason of the subsistence of an earlier Christian monogamous marriage.

A further point must be noted in this connection. Although there was no doubt as to the validity of the second marriage contracted under the Muslim law, it was felt in the lower court that the proximity of the date of the second marriage to the date of conversion gave room for the suspicion that the change of faith was with a view to overcoming the provisions of section 18 of the Marriage Registration Ordinance. In the Supreme Court, Basnayake, C.J. declared that this fact did not affect the validity of the second marriage.[95] Nevertheless, the Privy Council expressly declared that the appeal was being argued before their Lordships upon the express admission of Counsel for the appellant that the conversion of the respondent to the Muslim faith was sincere and genuine.[96] Consequently the *ratio* of the judgment delivered by the Privy Council must necessarily be confined to a situation in which the conversion was accepted as having been *bona fide*, which leaves unanswered the position that would be adopted if the conversion is thought to be manifestly colourable. It is submitted that if the marriage contracted under the Muslim law is said to be valid according to that law the reasons for the conversion should in fact be unrelated to the question.

Unlike in *Reid* v. *Attorney General*, where the first marriage

95. (1963) 65 N.L.R. 97 at p. 99
96. (1964) 67 N.L.R. 25 at p. 27

was contracted under the Marriage Registration Ordinance and the second union according to Muslim law, and the second marriage was treated as not amounting to a bigamous union by the courts of Sri Lanka, in *Katchi Mohamed* v. *Bendict*,[97] a man who had contracted a marriage under the Muslim law was held not to be entitled to enter into a second union under the Marriage Registration Ordinance, on the reasoning that a prior valid marriage was in existence at the time of the second marriage. The appellant, who was a Muslim, married a Muslim woman according to Muslim rites. Subsequently, the appellant went through a ceremony of conversion to Catholicism, changed his name and contracted a second marriage under the Marriage Registration Ordinance. Basnayake C.J. declared that although under our law it was legal for a Muslim to have more than one wife, when the appellant became a Roman Catholic he was no more a follower of the Prophet and did not, therefore, enjoy the rights and privileges of a Muslim.[98] According to the Marriage Registration Ordinance "No marriage shall be valid where either of the parties thereto shall have contracted a prior marriage which shall not have been legally dissolved or declared void,"[99] and it was contended on behalf of the appellant that the word "marriage" in the Marriage Registration Ordinance means any marriage save and except marriages contracted under and by virtue of the Kandyan Marriage Ordinance, 1870, or the Kandyan Marriage and Divorce Act, and except marriages contracted between persons professing Islam.[100] According to this view, then, in each of the expressions "no marriage" and "a prior marriage" the term marriage must be understood to exclude marriages contracted between persons professing Islam and, therefore, the second marriage is not rendered invalid by reason of the fact that it is contracted while the first is subsisting. T.S. Fernando J., however, opined that "the expression 'marriage' which occurs twice in section 18 does not bear the same meaning in each instance. What is, in section 18, declared not to be valid is a 'marriage' as defined in section 64; but a marriage in the expression 'a prior marriage' in the same section 18 is, in my opinion, not limited to a

97. (1961) 63 N.L.R. 505
98. *id.* at p. 506
99. Sec. 18
100. See Marriage Registration Ordinance, sec. 64.

marriage as defined in section 64, and the context requires that it be given its ordinary and natural meaning and interpreted as denoting any legally recognised marriage."[101]

(iii) **Exception to Section 362B**

According to the exception, the offence of bigamy will not be constituted in the following situations:

(*a*) where the marriage has been declared void by a court of competent jurisdiction;

(*b*) where the former spouse has been continually absent for the space of seven years and has not been heard of by such person as being alive within that time. Provided the person contracting the subsequent marriage informs the person with whom such marriage is contracted of the real state of facts, as far as the same are within his or her knowledge.

This latter provision was pleaded as a defence to a charge of bigamy in *Pattison* v. *Kalutara Special Criminal Investigation Bureau*.[102] According to the accused, he did not know whether his first wife was alive, and had been unable to trace her whereabouts. He had made inquiries regarding her from her mother and others in her village and the mother had told him that she herself did not know her daughter's whereabouts. The Magistrate, in convicting the accused, founded his decision on the ground that the defence had not placed before the court any evidence that the wife of the accused was continuously absent for a space of seven years, and that she was not heard of as being alive in that time. The Supreme Court, however, reversing the decision of the lower court, held that what had to be proved was *absence from the accused* for a continuous period of seven years and not *absolute non-existence*. In other words, the exception does not require proof that the former wife had not been heard of as being alive even by other people.[103]

101. (1961) 63 N.L.R. 505 at p. 509. See also the judgment of Justice Gunasekara at p. 507.
102. (1970) 73 N.L.R. 399
103. *Id.* at p. 401, *per* H. N. G. Fernando C.J.

H.N.G. Fernando J. declared that "the harshness, and even the absurdity, of any other view is demonstrable. If, as in the instant case, it turns out that a man's first wife was in fact alive when he contracted a second marriage, proof that no one knew of that fact would be impossible unless the wife had led a hermit's existence." [104] In other words, the burden is on the prosecution to prove knowledge on the part of the accused that his first wife was alive when he contracted the second marriage. This view also accords with the Evidence Ordinance[105] which states that when a person has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to those who affirm that he is alive.[106] This provision of the Evidence Ordinance can be availed of only to repel a charge of bigamy and not for a declaration from a court that the missing person is dead.[107]

(*f*) Non-Observance of Statutory Formalities

Prior to contracting a marriage under the Marriage Registration Ordinance,[108] notice of the marriage must be given to the Registrar of the division or to the District Registrar in whose district the parties have dwelt.[109] The notice must contain details such as the name, race, age, profession, civil condition and dwelling place of each of the parties in addition to the name, rank or profession of the father of each party.[110] In addition, the written consent of any person whose consent is required by law should be given.[111] A declaration by the party giving the notice testifying to the truth of the statements made must accompany the notice[112] and both the notice and the declaration must be signed by an attesting officer

104. *id.* at p. 401
105. No. 14 of 1895 (Cap. 14)
106. See also G.L. Peiris, *Offences Under the Penal Code of Ceylon*, (Colombo 1973) p. 250 *et. seq.*
107. See *In re the Application of Josephine Ratnayake* (1921) 23 N.L.R. 191.
108. No. 19 of 1907 (Cap. 112)
109. See sec. 23 (1) (2) (3) (4) (5)
110. See sec. 24 (1)
111. Sec.24 (2)
112. See sec. 24 (3) (a) (b) (c)

and two witnesses.[113] Every Registrar to whom notice of an intended marriage is given is required to enter the notice in "The Marriage Notice Book" which is available for inspection by the public.[114] The Registrar will then issue a certificate and a licence of marriage.[115] On the production of the certificate a marriage may be solemnised by or in the presence of a Minister in a registered place of worship or other authorised place, or by the Registrar in his office, station, or other authorised place.[116] A marriage in a registered place of worship may be solemnised according to the rules, customs, rites and ceremonies of the church, denomination or body to which such Minister belongs.[117] Both in relation to marriages solemnised by a Minister and those solemnised by a Registrar, the statute requires that a statement of particulars of the marriage be sent to the District Registrar who will in turn send it to the Registrar General to be filed and preserved in his office.[118] It is evident, therefore, that registration of the marriage is provided for irrespective of the mode in which the marriage is solemnised. Moreover, the statute ensures the validity of registered marriages in certain situations by shutting out proof of requisites such as that the actual dwelling or of the period of dwelling of either of the parties previous to the marriage within the division stated in any notice of marriage was the place of his or her residence, or of the consent to any marriage having been given by any person whose consent was required by law, or that the place or hour of marriage was the place or hour prescribed by the Ordinance, nor shall any evidence be given to prove the contrary in any suit or legal proceedings touching the validity of such marriages.[119]

According to this provision, then, the Ordinance will not permit the validity of a marriage to be questioned for non-compliance with any one of the requisites set out above. Consequently, as regards registered marriages there would be an irrebuttable presumption, as it were, that the above mentioned formalities have

113. See sec. 24 (4) (5) (6)
114. See sec. 25 (1) (2) (3)
115. See sec. 26 (1) (2) and sec. 27 (1) (2) (3) (4) (5)
116. See sec. 33
117. See sec. 34 (1)
118. See the following sections: 34(2); 34(5); 34(6); 35(5); 37(1); 37(2); 40
119. See. 42

been satisfied and any evidence to the contrary is *ipso facto* shut out. In the light of this total protection conferred on registered marriages it is indeed difficult to reconcile the subsequent statutory provision which declares that: "If both the parties to any marriage shall knowingly and wilfully intermarry under the provisions of this Ordinance in any place other than that prescribed by this Ordinance... the marriage of such parties shall be null and void."[120] If any evidence pertaining to the place of marriage will not be entertained in relation to a registered marriage[121] how can proof of the knowledge and wilful intention to contract a marriage in a place other than that prescribed in the Ordinance render the marriage a nullity?

Apart from ensuring the validity of a marriage in certain situations, the statute also provides that: "the entry made by the Registrar in his marriage register book...shall constitute the registration of the marriage, and shall be the best evidence thereof before all courts and in all proceedings in which it may be necessary to give evidence of the marriage."[122]

This provision warrants a discussion of two related issues. Namely,

(*a*) what is meant by "best evidence"?

(*b*) is registration a *sine qua non* of a valid marriage?

(*a*) The consensus of judicial opinion is that the phrase "best evidence" is not synonymous with "the only admissible evidence." While an entry in the marriage register book is conclusive proof of a marriage, in the absence of such evidence, oral evidence of the fact of marriage is admissible. In *The King* v. *Nonis*[123] the appellant was convicted of bigamy and the sole point in issue was whether his first marriage was properly proved. The prosecution did not produce an entry in the marriage

120. Sec. 46
121. Sec. 42
122. Sec. 41 (1)
123. (1947) 35 C.L.W. 84

register book as proof of the appellant's first marriage but they proved the marriage *aliunde*, calling in evidence the first wife herself and the officiating Catholic priest, both of whom testified to the marriage. Windham J. who delivered the opinion of the Supreme Court construed the expression "best evidence" thus: "The Registrar's entry of the marriage in the register shall prevail over any other evidence as to the marriage in case of conflict, *i.e.* conflict as to whether the marriage was celebrated at all or as to its character or any particulars regarding it. It would thus prevail as a matter of law over the evidence of an accused in a bigamy charge who denied the marriage. But if the registrar's entry is not produced, whether or not the marriage was in fact registered and whether or not (if registered) the non-production of the entry is satisfactorily accounted for, then the marriage may be proved by any other evidence affording strict proof, and this would include (as in the present case) the evidence of an eye- witness." [124]

This view, it must be noted, is further reinforced by the fact that the Marriage Registration Ordinance does not enact that non-registration of a marriage renders the marriage null and void. Consequently, the interpretation of the phrase "best evidence" in the Kandyan Marriage Ordinance,[125] for instance, which has been judicially interpreted to exclude all evidence of an inferior character,[126] cannot be extended to the Marriage Registration Ordinance because under section 11 of the Kandyan Marriage Ordinance, registration is the only valid form of marriage for Kandyans and, further, because section 39 of that Ordinance itself indicates the exceptional case in which oral evidence may be admitted.[127]

(*b*) Legislative intent, as manifested in the 1907 Ordinance, appears to be that registration of a marriage is not essential for its validity. According to the Marriage Registration

124. *id.* at p. 85
125. No. 3 of 1870, sec. 39
126. *Mampitiya* v. *Wegodapola* D.C. Kandy, 27,829 (S.C. Minutes, June 20, 1921)
127. See *Seneviratna* v. *Halangoda* (1921) 22 N.L.R. 472

Ordinance No. 9 of 1822,[128] which was the first statute on the subject, registration of a marriage was a *sine qua non* for its validity. Nevertheless, by 1847 it was obvious that this provision was being observed more in the breach and consequently while reiterating the need to register a marriage, the 1847 Ordinance[129] provided that the lack of registration should not render invalid a marriage contracted after 1822.[130] Ordinance No. 2 of 1895, which followed[131] once again treated as valid only marriages registered in the manner and form prescribed by the Ordinance but this section was repealed by Ordinance No. 10 of 1896 and was not reintroduced in the present Marriage Registration Ordinance No. 19 of 1907. It has, therefore, been said that "the intention of the legislature that registration should no longer be a requisite for the validity of marriages could hardly have been more clearly expressed than it is by repealing the sections of the old Ordinances requiring registration and omitting to re-enact them in the amending Ordinance".[132]

Quite apart from this legislative intent, as manifested in the 1907 Ordinance, there is abundant judicial authority in support of this contention. In *Kattadige Babina* v. *Kattadige Dingy Baba*[133] the effect of non-registration of a marriage under the 1863 Ordinance was in issue. According to the evidence led, notice of the marriage had been given to the Registrar of marriages and the banns had been published but there was no proof of registration of the marriage. Moreover, there was evidence that the parties had lived together as man and wife and were reputed to be man and wife. The Supreme Court therefore, held that this was sufficient evidence of a marriage having taken place, the presumption under such circumstances being in favour of marriage rather than of concubinage.

Different shades of opinion were expressed, on this issue, by

128. Sec.3
129. No. 6 of 1847
130. Sec.3
131. Sec.15
132. *Kattadige Babina* v. *Kattadige Dingy Baba* (1882) 5 S.C.C. 9 at p. 10 *per* Cayley C.J.
133. (1882) 5 S.C.C. 9

the Supreme Court in *Arumogam Vairamuttu* v. *Seethampulle*.[134] In this case, too, there was evidence of cohabitation subsequent to a ceremony of marriage according to Hindu rites. Fleming A.C.J. however held that the presumption of marriage could not be availed of in support of a marriage because there was positive evidence of the non-fulfilment of the statutory formalities. According to this judgment a presumption of marriage can be relied on only if evidence to the contrary is not forthcoming. In the light of the admission made by both parties that the marriage was not contracted according to the form prescribed by the Ordinance, and that it was not registered, the presumption in favour of marriage was held to be inapplicable.

Moreover, Fleming A.C.J. doubted the validity of the proposition advanced by Chief Justice Cayley in *Kattadige Babina* v. *Kattadige Dingy Baba*,[135] according to which the omission of a provision rendering registration of a marriage compulsory in the 1863 Ordinance was indicative of legislative intent to do away with the necessity of registration. He declared that "If Chief Justice Cayley meant that the omission of certain words in the Ordinance of 1863 rendered it unnecessary that the formalities of that Ordinance should be gone through, and changed the general policy of the law with regard to marriages, I fear that I cannot agree with him. Can it be that in the year 1822, more than forty years before the Ordinance of 1863 was passed, the legislature thought fit to cause marriages to be contracted in a certain way, that it again did so by the Ordinance of 1847, and yet in 1863 it intended to abandon a policy, the object of which had been to provide against what has been deemed so inexpedient not only in England but also in almost every civilized country, *viz;* irregular and clandestine marriages? I cannot bring myself to believe that in the year 1863 the legislature of this country should have taken the retrograde step of sweeping away what it had for so long a time encouraged and enforced; at all events, its intention to do so should, to my mind, have been expressed in no uncertain or ambiguous terms. I am unable to discover in our laws on the subject any such clear intention; on the contrary, the Ordinances of 1863 and 1865 seem to me to provide, as did the

134. (1885) 7 S.C.C. 56
135. (1882) 5 S.C.C. 9

former Acts, that certain formalities must be gone through and marriages celebrated in a certain way in order to make them legal." [136]

This mode of reasoning was founded primarily on a finding of knowledge and wilfulness on the part of the parties to the marriage in disregarding a specific statutory provision. "If two parties have in good faith gone through a form of marriage in some place other than the office of the Registrar or registered place of worship, such a marriage might be a valid one; but this is a very different thing from two parties having taken certain steps under the marriage laws and then gone through a form of marriage according to their religious rites well knowing that they are disregarding the other requirements of the law. Such a course seems to me to prove that the parties knowingly and wilfully intermarried contrary to the provisions of the law and, if this be so, their marriage is null and void under section 6 of Ordinance No. 8 of 1865... It is not on the mere fact of registration that I lay any particular force, although such may be an important item in the marriage procedure and the best evidence that a marriage has taken place; but what I do consider that the law requires in order that a marriage may be validly contracted is either that parties should be married at the office of the Registrar or at a registered place of worship, or if they enter into the contract of marriage at any place that they do so in good faith and not with a knowledge that they are acting contrary to law." [137]

Justice Lawrie was also of the view that the marriage was invalid but his decision was founded on a different reason. He explicitly declared that registration was not essential for the validity of a marriage in our legal system under the 1863 Ordinance, nevertheless he opined that because the "so-called marriage was not celebrated either before a Christian Minister or a Registrar, in conformity with the requirements of our law" the marriage was null and void. [138]

Dias J., on the other hand, delivered a dissenting opinion. He declared that "If registration was an essential part of the contract

136. *id.* at pp. 58, 59
137. *id.* at p. 59 *per* Fleming A.C.J.
138. *id.* at p. 60

of marriage, it is somewhat singular that a section corresponding to section 3 of Regulation 9 of 1822 and section 6 of Ordinance 6 of 1847 did not find its way into the Marriage Ordinance of 1863. I can hardly believe that the omission was a mere accident because the Kandyan Marriage Ordinance No. 3 of 1870 contains such a clause." [139]

Indeed, it is manifest from a reading of the judgments that both Lawrie J. and Dias J. were clearly of the view that registration was not essential for the validity of a marriage. Fleming A.C.J., too conceded that if the omission to register the marriage was *bona fide* the marriage might have been treated as having been validly contracted. [140] But some inconsistency is discernible in this judgment which also declared that if the intention of the legislature was to do away with this requirement it should have been clearly expressed, [141] thereby advancing the proposition that registration was a mandatory provision of the statute.

Reference to this case was not made by the Full Bench of the Supreme Court in *Valliammi* v. *Annammai* [142] which unanimously held that failure to register a marriage was not fatal to its validity. [143]

In *Gunaratna* v. *Punchihamy* [144] Justice Perera declared: "I am inclined to the opinion that it was open to parties to contract a marriage according to native rites and customs quite independently of the Ordinance, and that marriages contracted according to such rites and customs, which of course, had to be strictly proved where necessity for the proof of a marriage so contracted arose, were not invalid by reason of the provisions of the Ordinances of 1863 and 1865 being disregarded." [145] It must be pointed out, however, that the statute provides that if certain acts are knowingly and wil-

139. *id.* at p. 60
140. *id.* at p. 59
141. *id.* at p. 59
142. (1900) 4 N.L.R. 8
143. This view was further reiterated in *Mirando* v. *Nagamuttu* (1902) 3 Browne's Rep. 45; D.C.Kandy 16,724 reported in Lem. and Asir. 76
144. (1912) 15 N.L.R. 501
145. *id.* at p. 504

fully disregarded, the marriage would be rendered null and void. [146] Failure to register, however, is not one of the requisites specified. [147] Consequently, customary marriages which are contracted by the performance of religious rites and ceremonies have been accepted as being valid notwithstanding that they were not registered in accordance with the statute. [148] Moreover, the Marriage Ordinance has been declared to be applicable to such marriages in relation to all other matters about which it contains express provisions. [149] According to Schneider J. in *Thiagaraja* v. *Kurukal* [150] "The reason why customary marriages are recognised is that the Ordinance does not render registration or solemnisation according to the provisions of the Ordinance compulsory. The recognition of such customary marriages is a recognition only of the custom as to the mode of solemnisation and nothing else. The Ordinance must be regarded as applicable to all marriages in regard to all other matters about which it contains express provisions. Customary law must cede to statute law." [151] According to the facts of this case a Brahmin married a girl when she was eleven years and one month according to Hindu customary ceremonies. The Supreme Court declared the marriage to be void on the reasoning that the prohibited age of marriage was applicable to the parties although they had contracted a marriage outside the purview of the statute in relation to the mode of solemnisation.

The Marriage Registration Ordinance contains an exception to the requisite of compliance with statutory formalities in relation to a person who is believed to be on the point of death; [151a]

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146. Sec. 6 of the 1865 Ordinance

147. *Mirando* v. *Nagamuttu* (1902) 3 Browne's Rep. 45 at p. 48, *per* Moncreiff J. *Chellappa* v. *Kumarasamy* (1915) 1 C.W.R. 104; *Sophia Hamine* v. *Appuhamy* (1922) 23 N.L.R. 353 *Chellappa* v. *Kumarasamy* (1915) 18 N.L.R. 435; *Laddu Adirishamy* v. *Peter Perera* (1948) 38 C.L.W. 87; *Nicholas de Silva* V. *Shaik Ali* (1895) 1 N.L.R. 228; *The King* v. *Nonis* (1947) 35 C.L.W.84; *Kathrina* v. *Nonis Appu* (1923) 1 Cey. T.L.R. 156; *Poopalaratnam* v. *Sabapathy Pillai* (1921) 2 C.L.Rec. 210; *Selestina Hamine* v. *Karthelis* (1913) 4 C.A.C.28.

148. *ibid.*

149. *Thiagaraja* v. *Kurukal* (1923) 25 N.L.R.89

150. (1923) 25 N.L.R.89

151. *id.* at p. 91

151a Sec. 40 (1)

provided of course that such person is of sound mind, memory, and understanding.

The statute has also excepted from the normal rules of solemnisation a female who belongs to a class of people that considers it contrary to their customary practice to permit a female member to appear in public before wedlock. In these circumstances the District Registrar is empowered to issue a special licence empowering a Registrar to solemnise the marriage at such place and hour as the parties may prefer, and as may be named in the licence.[151b] In every other respect, however, the requirements of the Ordinance must be complied with.

III. Customary Marriage

In a multi-racial multi-religious country such as Sri Lanka, it is indeed inevitable that the courts will have considerable difficulty in determining whether a valid customary marriage has been contracted. Customary practices, which are considered to be essential for the performance of a nuptial ceremony, vary greatly not only among the different races in Sri Lanka but also among the numerous castes within the different communities. Consequently, it is not possible to set out in explicit terms all the essentials of a valid customary marriage. For instance, while the tying of the *thali* is an essential part of a Hindu customary marriage for Tamils of the Northern Province, it is unimportant to Hindu Tamils resident in Batticaloa.[152] Accordingly in *Ponnammah* v. *Rajakulasingham*[153] because the parties were natives of the Eastern Province, proof of the *thali* ceremony was not insisted upon. In *Ratnamma* v. *Rasiah*[154] the Priest alleged that he had performed all the rites of a "second rate" Hindu wedding, which were the *Pilliayar Poojah*, the tying of the *thali kody* in the presence of aged people by a priest, and the presentation of the *koorai*. Although an upper class Hindu wedding would have involved the performance of many more rituals and ceremonies

151b Sec.38

152. See Muthukisna's *Thesawalamai* p. 214; *Senien Tamby* v. *Annama* (1900) 1 Brownes Rep. 28

153. (1948) 50 N.L.R.135

154. (1947) 48 N.L.R. 475 at p. 476

in this case the rites performed were considered adequate in view of the particular caste to which the parties belonged.[155] Likewise in *Sinnaval* v. *Nagappu*[156] there was evidence only of the eating of rice and betel before the family, but according to the Maniagar, who gave evidence among people of the Nalava caste, to which the parties belonged, this was sufficient to constitute a valid marriage. It is clear, therefore, that the validity of a customary marriage is very much a question of fact. In *Sophia Hamine* v. *Appuhamy*[157] there was evidence of a *poruwa* ceremony in the bride's house when, in the presence of relatives the fingers of the bride and bridegroom were tied together by a thread and water poured over them, and other customary rites performed. Thereafter, the parties lived together as man and wife and were recognised as man and wife by their relatives, friends and others. The Supreme Court held on this evidence that a valid customary marriage had been contracted. In *King* v. *Perumal*,[158] although there was no affirmative evidence that the *koorai* ceremony had been observed, the whole body of evidence adduced by the prosecution contained sufficient material on which the jury could base their finding that a valid marriage had taken place. Moreover, Lascelles C.J. pointed out in this case that the fact of a marriage ceremony having been proved, it was incumbent on the accused, if he relied upon the omission of any essential detail in the ceremony, to make good his point and to show that the omission had in fact taken place.[159] The Sri Lankan courts have emphasised the need to adduce cogent proof of an intention to marry.[160] In *Selvaratnam* v. *Anandavelu*[161] there was no evidence that the *thali*, which is usually tied at Hindu marriages, was tied. Moreover, a priest had not been present at the alleged ceremony and neither a dhoby nor a barber had taken part in the rituals. There was no evidence of camphor being burnt or coconut being broken nor of the presence of a brass pot with mango leaves, all of which were thought to be necessary for a Hindu marriage ceremony. Consequently, De Kretser J.

155. See Muthukisna's *Thesawalamai*, p. 190
156. (1916) 1 Bal. N. of C. 26
157. (1922) 23 N.L.R. 353
158. (1911) 14 N.L.R. 496
159. *id.* at p. 503
160. *Chellappa* v. *Kumarasamy* (1915) 1 C.W.R. 104
161. (1941) 42 N.L.R. 487

held that "the account of the marriage reads more like a farce than a reality",[162] and as such the court concluded that the evidence established nothing more than an abortive attempt at a rudimentary form of marriage ceremony. It is submitted that where there is substantial evidence of the non-compliance with several customary rites, it is relatively easier to conclude that a valid customary marriage has not been contracted. The situation, however, is more difficult in a case like that of *Ratnamma* v. *Rasiah*[163] where it was conceded that the tying of the *thali* was an essential requisite of a Hindu customary marriage and the court had to decide whether the tying of a piece of turmeric, in lieu of the *thali*, which could not be tied because the conjunction of the planets was considered unfavourable, constituted a valid customary marriage. The Supreme Court was of the opinion that the tying of the symbolic *thali* was sufficient because "it is the spirit and the intention behind the act which matters."[164] This is entirely consistent with the view adopted by the court in *Ponnammah* v. *Rajakulasingham*[165] where there was no evidence of the tying of the *thali* at a Hindu marriage ceremony. Nevertheless, Justice Basnayake declared that that fact alone could not rebut the presumption of a valid marriage based on the fact of the celebration of the marriage followed by cohabitation between the parties. He opined that a custom, being a question of fact, must be proved by the one who alleges it to exist. Consequently, a person who alleges that the *thali* ceremony is essential for a valid marriage in the community to which the parties belong should prove it as a question of fact and in the absence of such proof it must be presumed that all the marriage ceremonies had been complied with.[166] In other words, if evidence is forthcoming of some ceremony in the solemnisation of the marriage according to native custom sufficient to show an intention to marry, the court will presume the marriage to have complied with all the essentials of the customary practices prevalent in that particular community to which the parties belong. The onus of impeaching the *factum* of a marriage and the presumption of law "*semper*

162. *id.* at p. 491
163. (1947) 48 N.L.R. 475
164. *id.* at p. 477, *per* Dias J.
165. (1948) 50 N.L.R.135
166. *id.* at pp. 137, 138. See also *King* v. *Perumal* (1911) 14 N.L.R. 496.

praesumitur pro matrimonio" lies upon the impeaching party.[167] This view has been further reiterated by the Privy Council in *Sastry vailaider Aronegary* v. *Sembecutty Vaigalie*.[168] Moreover, if a marriage has been contracted in a foreign jurisdiction it is not incumbent on the party who alleges the marriage to lead expert evidence to prove that the marriage was duly celebrated according to the legal formalities in force in that jurisdiction. The onus is clearly on the one who disputes it to discharge this burden.[169]

IV. Presumption of Marriage by Habit and Repute

It is indeed a noteworthy feature of our law that not only has it recognised customary marriages, thereby giving rise to a mode of solemnisation which exists side by side with the statutory requirement of registration, but also that in addition it has given effect to a Roman-Dutch law presumption in favour of marriage rather than of concubinage.[170] Consequently, when a man and woman are proved to have lived together as husband and wife, the law presumes, unless the contrary is clearly proved, that they are living together in consequence of a valid marriage. It must be pointed out that this presumption is relied on even where concubinage is considered not to be immoral. Hence, if in a particular district or community of people concubinage is an accepted practice, a presumption in favour of marriage may nevertheless be made.[171]

An essential prerequisite for the adoption of this presumption is proof of some antecedent ceremony of marriage. In other words, proof of cohabitation, habit and repute give rise to a presumption only. It does not prove the fact of marriage.[172] Proof of this requisite, however, is insisted on only if one or both of the parties to the marriage are alive, for then it would

167. *Ponnammah* v. *Rajakulasingham* (1948) 50 N.L.R. 135 at p. 138 *per* Basnayake J. See also *Gunaratne* v. *Punchihamy* (1912) 15 N.L.R. 501

168. (1881) 2 N.L.R. 322

169. *Sivakkolunathu* v. *Kamalambal* (1953) 56 N.L.R. 52; *Wijesekera* v. *Weliwithigoda* (1958) 61 N.L.R. 133.

170. See *Sastry Valaider Aronegary* v. *Sembecutty Vaigalie* (1881) 2 N.L.R. 322 (P.C.)

171. *Tisselhamy* v. *Nonahamy* (1897) 2 N.L.R. 352

172. See *Kandiah* v. *Thangamany* (1953) 55 N.L.R. 568

be reasonable to expect them to recollect and adduce some evidence of the solemnisation of the marriage followed by evidence of habit and repute. This is best illustrated in *Gunaratna* v. *Punchihamy*. [173] The respondent, in this case, was unable to show any evidence of the solemnisation of a marriage between herself and the deceased man according to native rites and customs. On the contrary, her evidence unmistakably pointed to the fact that there was no such marriage. Consequently, Pereira J. declared that "Marriage by cohabitation, habit and repute is an expression that I do not quite understand. No marriage can be contracted or constituted by cohabitation, habit and repute. Evidence of cohabitation, habit and repute merely gives rise to a presumption of marriage, and this presumption, as has been held in numerous cases, is a presumption that can be displaced only by means of strong and cogent evidence to the contrary. In the present case whether the respondent was married to the deceased is best known to her... she gets into the witness box to prove the affirmative of the issue; but she does not take upon herself to say in plain language that she was married to the deceased according to native rites and customs... That being so, I consider that the presumption arising from evidence of cohabitation and habit and repute ... has been effectively rebutted." [174]

This view was further reiterated by the judgment of Sinnetamby J. in *Fernando* v. *Dabrera*. [175] In this case the District Judge had refused to presume a marriage because evidence of the solemnisation of the marriage was not forthcoming. Justice Sinnetamby, however, reversing the decision of the District Court held that if one of the parties to the marriage was alive it would be necessary to establish the existence of a marriage ceremony, for a party to the marriage must necessarily be aware of it and be able to give evidence in regard to it. When, however, as in this case, neither party was alive, evidence of past customary or religious rites would be difficult if not impossible to obtain and should, therefore, not be insisted on. It is in fact precisely for this reason that the

173. (1912) 15 N.L.R. 501
174. *id.* at pp. 504-505.
175. (1961) 65 N.L.R. 282

law presumes the existence of a valid marriage on proof of cohabitation, habit and repute in these circumstances.

In *Tisselhamy* v. *Nonahamy* [176] the parties were dead and there was no evidence of a marriage ceremony but the Supreme Court presumed the existence of a valid marriage on the evidence that the parties had cohabited together for a very long time and that after the woman's death, the father had given the daughter away in marriage "publicly and on a big scale." In *Dinohamy* v. *Balahamy*, [177] according to the evidence led, the parties had lived together for twenty years in the same house, and eight children were born to them. According to the evidence of the Registrar of the district, for very many years the parties were regarded as married and family functions and ceremonies which the parties hosted were conducted on the footing that they were man and wife. Moreover, there was evidence of the performance of customary rites at the time of the marriage. The Privy Council, therefore, held that this evidence "comes up to the full measure of what would be demanded either in England or in Scotland or Ceylon, namely, it is unanswerable and conclusive evidence." [178]

It is interesting to note that the presumption of marriage by evidence of habit and repute may be drawn not only from positive evidence of general acceptance in society, and evidence of the parties having socialised on the footing of husband and wife, but also from evidence which shows that the parties had been ostracised from society and treated with much hostility because of the refusal to accept the fact of marriage between the two parties. In *Sediris* v. *Roslin* [179] the parties belonged to two different castes and according to the evidence relatives and friends of the man had treated him as an outcaste, not inviting him to their social functions. The Supreme Court rightly pointed out that "this negative conduct is exhibited only if the parties are married and not if they live in concubinage. Had Andiris Appu kept Dingihamy, who was of an inferior caste, as a mistress only, he would have been admitted

176. (1897) 2 N.L.R. 352
177. (1927) 29 N.L.R. 114
178. *id.* at p. 117, *per* Lord Shaw
179. (1977) 78 N.L.R. 547

in the society of his relatives and friends though Dingihamy would have been kept out. But, if Andiris Appu had married Dingihamy, then of course he would have been ostracised by his relatives and friends... This animosity of Andiris Appu's relatives and friends can be appreciated only in the context of an inter-caste marriage between Andiris Appu and Dingihamy." [180] Consequently, recognition of a union by society may be manifested either by evidence of acceptance and approval, or by hostility and animosity. Evidence of either kind is equally acceptable as it only serves to establish society's "recognition" of a union.

In *Thiagarajah* v. *Karthigesu* [181] the court stressed that the presumption of marriage is applicable only if there is evidence of cohabitation, habit and repute. In this case the parties were alive and there was conflicting evidence on the nature and validity of the customary rites purported to have been performed at the marriage. There was no evidence, however, of the parties having lived together under the same roof or of having cohabited even for a single day. Consequently, the question of a presumption in favour of marriage did not arise. The fact of marriage had to be proved by evidence of the performance of customary rites thought to be essential in the community to which the parties belonged.

In *Punchi Nona* v. *Charles Appuhamy*,[182] the petitioner alleged that there was a valid marriage between herself and her husband's brother, who she considered to be an associated husband. The District judge held in favour of a presumption of marriage on the reasoning that effect should be given to the so-called custom of having associated husbands. The Supreme Court, however, reversing the decision of the lower court, held that a presumption of marriage could not be made from evidence of cohabitation alone. Justice Akbar, approved of the judgment of Pereira J. in *Gunaratna* v. *Punchihamy*, [183] where he declared that "No marriage can be contracted or constituted by cohabitation, habit and repute. Evidence of cohabitation, habit and repute merely gives rise to a

180. *id.* at p. 550
181. (1966) 69 N.L.R. 73
182. (1931) 33 N.L.R. 227
183. (1912) 15 N.L.R. 501

presumption of marriage." [184] In the present case the petitioner gave evidence, and the fact of a marriage according to customary rites, subsequent to her first husband's death, was one peculiarly within her knowledge and the burden of proving this fact was on her. [185] Nevertheless, she was unable to adduce any proof of a marriage according to Sinhalese rites and customs. Accordingly, this was not a situation in which the presumption of marriage from habit and repute could legitimately be relied upon.

It is clear then that the presumption of marriage can be made only in situations where there is evidence of the performance of customary rites or, where there is no evidence to prove the performance of such customary rites and nothing to negate the presumption of marriage. In other words, if there is an obvious impediment to a marriage, however long continued cohabitation has been, a presumption of marriage will not arise. In *Weerapperuma* v. *Weerapperuma* [186] the Supreme Court held against a presumption of marriage because at the time of the so-called union, the respondent was unable to contract a valid marriage as the decree *nisi* granting her a divorce from her first husband had not been made absolute at the time of the solemnisation of the second union. This fact was held to invalidate the second union and, consequently, the question of a presumption in favour of a valid marriage could not arise.

Likewise in *Kandiah* v. *Thangamany*, [187] A, pending a divorce action, purported to marry C according to Hindu rites and lived with her as husband and wife. There was no doubt as to the invalidity of this second marriage because it took place at a time when the defendant was a married man having a lawful wife living. According to the evidence, however, after the dissolution of the marriage, that is, after the legal impediment to the second marriage was removed, the parties continued to cohabit and they were recognised by relatives and friends as man and wife. The question before the Supreme Court, therefore, was whether this fact would enable the applicant to gain the

184. *id.* at p. 502
185. See Evidence Ordinance sec. 106
186. (1938) 39 N.L.R. 433
187. (1953) 55 N.L.R. 568

status of a lawful wife. Counsel for the applicant relied on the case of *Breadelbane Peerage Claim* [188] where it was held that the living together of parties subsequent to the removal of the impediment which rendered their marriage invalid, was sufficient to vest the union with legality. Nagalingam A.C.J., however, declared that that was a Scottish case and that the judgment quite clearly indicated that under the Scottish law no previous ceremonies were required for the validity of a marriage, and the mere consent of the two parties was all that was required for a valid marriage, and where the two parties continued to live together as a result of such mutual agreement, a valid marriage was deemed to subsist between them. "Under our law, however, some antecedent public ceremony, public in the sense of a ceremony in the presence of relatives, friends or third parties, has to take place before the mere circumstance of the parties living together as man and wife, followed by recognition of their living together as man and wife by friends and relations, can form the basis of a deduction that there was a lawful marriage between the parties. It is not unimportant to stress that the fact of two parties living together as man and wife and their being recognised as such by friends and relations gives rise to a presumption, and a presumption only, of marriage. It does not prove the fact of marriage, and the presumption is not an irrebuttable presumption but one which may be disproved." [189]

In the present case, however, the only evidence of any antecedent religious ceremony was one which was invalid by reason of the fact that it was contracted prior to the dissolution of the first marriage. Moreover, after the legal impediment was removed, there was no evidence of the solemnisation of a marriage. Consequently, the mere living together of the parties in these circumstances was held not to give rise to a presumption of marriage.

188. L.R. (1872) 2 H.L. 269
189. (1953) 55 N.L.R. 568 at p. 570. *per* Nagalingam A.C.J.

CHAPTER 4

THE LEGAL STATUS OF A MARRIED WOMAN

I. Introduction

The consequences of marriage for a woman in modern Sri Lanka bear no comparison with what attached to her counterpart in the early common law. Matrimony in the early law imposed several legal disabilities on a woman thereby relegating her to a status significantly inferior to that of her husband. According to established authority the superiority of the husband was justified on three grounds: Firstly, that by virtue of both Biblical authority and by the law of nature, the husband as the moral and intellectual superior, was destined to be the head of the family and the decisive authority on all matters pertaining to the family. Secondly, it was believed that a woman was biologically and intellectually weaker than a man. Consequently, she was deemed to require the protection of her husband and this inevitably placed her in the position of a legal inferior; and thirdly, according to Christian dogma, the woman was responsible for the commission of Original Sin for, by partaking of the forbidden fruit, Eve had caused the expulsion of mankind from paradise. [1]

Indeed, the above rationale can have no relevance in a modern legal system in which women have attained equality with men, both socially and legally.

In the common law, as a consequence of the marital power of the husband, the wife suffered several disabilities both in relation to her person and her property. The husband's authority over the wife's person included his right to determine questions pertaining to the common life of the spouses and this was considered an invariable incident of the husband's marital power which could

1. See H. R. Hahlo, *The South African Law of Husband and Wife* (4th ed. Cape Town 1975) pp. 7, 8.

not, therefore, be the subject of an antenuptial contract.[2] In addition, the wife lacked *locus standi in judicio* and, as such, she could not sue, or be sued, without the consent of her husband. Moreover, she could not bind herself or her husband by contract,[3] nor could she accept or repudiate a legacy or inheritance[4] or release a debtor from liability.[5] Without her husband's consent in writing she could not be appointed an executrix or administratrix of an estate, or bind herself *quasi ex contractu*, as a *negotiorum gestor*.[6]

As a consequence of the husband's marital power he had extensive proprietary rights, as well. If the spouses were married in community of property, he administered the common fund, and, if community of property had been excluded by antenuptial contract, he could administer her separate property.[7]

The marital power of the husband was terminated only on a dissolution of the marriage by death or divorce.[8]

While the incidents of marriage set out above were the usual consequences of marriage contracted in the common law, it was always open to the wife to exclude certain aspects of the husband's marital power by antenuptial contract.[9]

In the law of Sri Lanka, reform of the law introduced by legislation gradually did away with the common law incidents of marriage and secured for a married woman the same status enjoyed by a *feme sole*. The Matrimonial Rights and Inheritance Ordinance[10]

2. H. R. Hahlo, *op. cit.* p. 153
3. Voet 12.6.19; 23.2.42; Grotius 1.5.23
4. Voet 29.2.9, 34.
5. Voet 23.2.50
6. H. R. Hahlo, *op. cit.* pp. 156, 157.
7. Grotius 1.5.22; 3.21.1.
8. Voet 23.2.90; 24.3.28.
9. H. R. Hahlo, *op. cit.* chapter 16
10. No. 15 of 1876

conferred on a married woman full legal status in a court of law [11] but in relation to her proprietary rights she continued to suffer limited restrictions. Therefore, for example, she could not dispose of her immovable property without the written consent of her husband. [12] Moreover, certain categories of movable property vested exclusively in the husband. [13] In 1923, the rights conferred on a married woman were enlarged by the Married Women's Property Ordinance [14] which removed the last vestige of marital power exercised by the husband. [15]

Notwithstanding a married woman's lack of contractual capacity in the common law, she had the right to enter into contracts binding on her husband provided the goods purchased were household necessaries required for herself and her family living in the matrimonial home. This was a right separate, and distinct from her right of support and was dependent on the fact of marriage and the establishment of a common household. In these circumstances then, the wife could purchase goods necessary for the household and bind her husband's credit, thereby giving a trader the right to recover the debt incurred from the husband. In this connection the *pro semisse* rule becomes relevant and this chapter seeks to set out a possible rationale for the rule that a trader can sue the contracting spouse for the full amount due, and, if the debt is not satisfied, proceed against the non-contracting spouse for at least half of the debt. The related question — the availability of the right of recourse a wife may or may not have against her husband for whatever money paid by her to the trader— is also discussed. [16]

The common law also recognised a married woman's right to bind herself and her husband when she contracted as a *publica mercatrix*. In this situation the wife was presumed to be acting with the husband's implied consent, provided the contracts were

11. See section III *infra*
12. See section iv. *infra*
13. *ibid*.
14. No. 18 of 1923
15. Certain aspects of the husband's marital power over the wife's person, such as his authority as head of the household, continues even in the modern law.
16. See sec. IV. B. *infra*

made in the course of a public trade or business. The husband for his part, could rebut the presumption of consent, in which event he would not be liable for the wife's trade debts. [17]

II. Marital Power

In the early Roman-Dutch law marriage entailed serious consequences for the woman who suffered several legal disabilities as a consequence of her change of status. The legal superiority of the male was an idea that permeated the marital relationship so much so that it has been asserted that although upon marriage husband and wife were deemed to be one, that one was undoubtedly the husband. [18]

A male minor acquired majority on marriage [19] but a woman, even if a major, was reduced to the position of a minor under the guardianship of her husband, [20] with the added disadvantage of not even enjoying the legal safeguards normally available to a minor. [21] An interesting feature of the marital power of the husband over the wife was that although it was a species of guardianship, [22] very different rationales sustained the two concepts. Clearly a paternalistic attitude motivated the concept of guardianship in relation to minors whose legal incapacity was cured and their interests safeguarded by the guardians. In other words, this was an innovation of the law primarily for the benefit of minors.

In vivid contrast, the marital power of the husband over his wife served the interests of the husband. [23] The concept of marital power was not dependent on the minority of the wife. In fact, even if the woman was a major, and thus a *feme sole* enjoying rights and privileges analogous to those enjoyed by her male counterpart, on marriage she was stripped of all those rights and

17. See sec. IV. C. *infra*
18. Theron G. Strong, *Joseph M. Choate* (New York 1917) 22, cited by H. R. Hahlo, *op. cit.* p. 6.
19. Grotius 1.6.4; 1.10.2; Voet 1.7.13; 4.4.6.
20. Grotius 1.4.6; 1.5.19; 20; Voet 1.7.13; 23.2.23; 4.
21. Voet 23.2.63; Van der Keesel, *Th.* 9.
22. Van der Keesel, *Th.* 91.
23. H. R. Hahlo, *op. cit.* p. 161

was reduced to the position of a legal inferior in relation to her husband. Thus she was rendered vulnerable and dependent on her husband although she was previously a legal entity. If, on the other hand, prior to marriage the woman was a minor, on marriage, she became a major but, of course, she could not exercise any rights independent of her husband.[24] Hence, irrespective of the age of a woman if she came under the marital power of her husband she was denied legal recognition.

It is clear, therefore, that the foundation of the marital power of the husband over his wife was not the same as that which sustained the concept of guardianship. The basis of the husband's privileged position appears to have been founded on the inferior status relegated to a woman when she entered the state of matrimony. In other words, it did not derive from the need to confer protection on a woman who was thought to be otherwise incapable of looking after her interests. This is further illustrated by the rule that if a woman minor, who became a major on marriage, divorced, she enjoyed the rights of a *feme sole.*[25] In other words, while within the bonds of matrimony, the woman was denied the legal recognition which she would otherwise have been given.

Historically, the legal status of a married woman has undergone several changes in the common law. Unlike her counterpart in the early Greek period, who was totally subjugated to the marital power of her husband, so much so that her husband was even free to take away her life,[26] in the Roman-Dutch law her position was improved. There were in the main two aspects to the marital power of a husband. One involved his power over his wife's person while the other related to his control over her proprietary rights.

According to Hahlo, there were two facets to the husband's control over the wife's person. By virtue of his marital power the husband assumed the right to determine questions pertaining to the common life of the spouses. Consequently, he decided on the style and standard of life they were to enjoy and had, in effect,

24. *id.* at p. 107
25. Voet 1.7.14
26. See H. R. Hahlo, *op. cit.* p. 1 *et. seq.*

the decisive say in all related matters.[27] This aspect of his marital power was accepted as being invariable and beyond the purview of an antenuptial contract.[28] Another consequence of the husband's power over the wife's person was her lack of *locus standi in judicio* by virtue of which she had to be represented by her husband in all legal proceedings.[29] This however, was a variable power that could be excluded by antenuptial contract.[30]

The modern Sri Lankan law has, by statute, emancipated a married woman from this latter common law disability and as such her present position is no different from that of a *feme sole*.[31] In relation to the husband's authority to decide on all questions pertaining to the common life of the spouses, too, the wife in modern Sri Lanka is not without a remedy if the decisions made are unreasonable or intolerable. For instance, if the husband decides on a standard of living well below that which the spouses can in fact afford, she can sue him for maintenance,[32] and if by virtue of his unreasonable decisions she finds life together with him intolerable she can petition for a dissolution of the marriage on the ground of constructive malicious desertion.[33]

The common law proprietary rights of the wife too were materially affected by virtue of the husband's marital power. If marriage was in community of property the husband became the sole administrator of all assets and debts of the spouses and if community of property had been excluded by antenuptial contract, he had the right to administer the wife's separate property.[34] Consequently, he could deal with the property as he pleased. He could, *inter alia*, alienate or encumber the property without the consent of his wife,[35] he was not liable to render accounts of his

27. *id.* at pp. 152, 153
28. *ibid.*
29. Voet 2.4.34; 2.13.14; *Beukes* v. *Administrateur-General, Su idwes Afrika En Andere* 1980 (2) S.A. 664
30. H. R. Hahlo, *op. cit.* at pp. 152, 153
31. See Section III *infra*
32. See Chapter 6 *infra*.
33. See also H. R. Hahlo "The case of the Patriarchal Husband" 1963 (80) S.A.L.J. 554; *Palmer* v. *Palmer* 1955 (3) S.A.56.
34. Grotius 1.5.22; 3.21.10.
35. Grotius 1.5.22; Voet 20.3.7; 19.2.17.

administration, nor was he liable for damages due to maladministration or destruction of the property.[36]

The wife, however, was provided with certain safeguards. In the event of the husband spiriting away joint property to a third party with the intention of defrauding his wife, she could either have recourse against him when the marriage was dissolved, or in the alternative, she could proceed directly against the donee for the value of the gift.[37] The wife could also ask for and obtain an interdict restraining her husband from donating property to third parties. Moreover, if she feared that she would be impoverished as a consequence of his maladministration she could ask for a *boedelscheiding separatio bonorum* by virtue of which the community would be terminated and she would have the right of administering her own property. As for the rationale which sustained this overwhelming control the husband had over his wife's property it has been suggested that the purely practical consideration of avoiding "dual and conflicting control" prompted the allocation of full rights of administration to the husband.[38] but according to Heimstra C.J in a recent South African case "if his privileged position is not due to the marital power it is not possible to see where else it derives from."[39]

In the modern South African law it is usual for spouses to contract a marriage with an antenuptial contract excluding the marital power of the husband.[40] Consequently, the legal status of the woman remains unaffected by the fact of marriage and she does not suffer any disadvantages by virtue of her change of status.[41] In the Sri Lankan law, on the other hand, the exclusion of the marital power of the husband has been achieved by the Matrimonial Rights and Inheritance Ordinance,[42] and the Married Women's Property Ordinance,[43] which removed the common law disabilities both in relation to her person and her property.

36. Voet 23.2.56, 63; Van der Keesel, *Th.* 91
37. Voet 23.2.54
38. Hosten, Edwards, Nathan and Bosman, *Introduction to South African Law and Legal Theory* p. 307.
39. *S.* v. *Tilhoele* 1979 (2) S.A. 328 at p. 332
40. H. R. Hahlo; *op.cit.* p. 287
41. *ibid.*
42. No. 15 of 1876
43. No. 18 of 1923

III. Locus Standi in Judicio

(a) Common Law

A married woman's inability to sue or be sued in legal proceedings, except when assisted by her husband was an aspect of the personal disability suffered by her as a consequence of the husband's marital power.[44] It was not dependent on whether the marriage was contracted with or without community of property[45] although the nature of the proprietary rights of the spouses had a bearing on the manner in which the liability entailed by the wife could be satisfied.[46] It followed then that all actions had to be brought by, or against, her husband, alternatively, she could be sued provided she was assisted by her husband.[47] Any judgment obtained against the wife in the absence of the husband was null and void because she was always *in statu pupilari.* Moreover, she did not cease to be under the marital power of her husband merely because she lived apart from him by virtue of a mutual agreement without a deed of separation *a mensa et thoro.*[47a] In *Babapulle* v. *Rajaratnam*[48] both the husband and wife were sued on a joint promissory note, and the husband had obtained leave to appear and defend the action. When the wife did not appear in court, decree was entered against her. When the case ultimately came up for trial against the husband he raised as an issue of law between himself and the plaintiff the point that since judgment had already been obtained against his wife, the plaintiff was estopped from recovering anything against him. In other words, he pleaded the judgment as a bar to further action against him. The court, however, held that such a rule of law could apply only where the judgment pleaded was a binding one. The decree entered, however, was not binding on the wife since her legal guardian had appeared

44. Voet 2.4.34; 2.13.4; 5.1.14; 23.2.41. *Gunatilleke* v. *Simon Appu* (1918) 2 C.L. Rec. 11; *Sovis* v. *Kurera* (1923) 7 Leader L. R. 174; *Meera Lebbe* v. *Ragganana Ahamado* (1837) Morg. Dig. 186; *Babapulle* v. *Rajaratnam* (1899) 4 N.L.R. 348

45. Voet 5.11.14-19; *Caruppen Chetty* v. *Dona Annie* (1924) 8 Leader L. R. 47 ; *Pathberiya* v. *Kachohamy* (1923) 24 N.L.R. 487

46. See chapter 5 sec. II *infra* on community of property.

47. Voet 23.2.41

47a. *Pathberiya* v. *Kachohamy* (1923) 5 C.L. Rec. 83 See also Voet 24.2.19

48. (1899) 4 N.L.R. 348

and defended the action when it was obtained. The decree against the wife therefore was said to have been entered *per incuriam* and, consequently, it had no validity.

It must be pointed out that the courts will not permit this disability to be pleaded as a defence by a husband who endeavours to collude with a third party to defraud his wife. Therefore, in *Helena Hamine* v. *Nonahamy*, [49] the court held that although under the Roman-Dutch law a married woman had no *locus standi in-judicio*, where she was, rightly or wrongly, brought in, as a separate party, to a case along with the husband, and judgment entered in favour of both, she had all the rights and privileges of a joint judgment-creditor. Consequently, it was not open to the husband, as in this case, to enter into a compromise with the judgment-debtor or to receive payment from him to her prejudice.

There were, however, several situations in which a married woman had *locus standi in judicio*.

(*a*) In criminal matters a married woman was free to sue or be sued without the assistance of her husband. [50] Expenses incurred in criminal proceedings were met by the husband by reason of his duty of support. [51] In *Rex* v. *Asiaumma* [52] the accused was the wife of a man against whom proceedings had been taken in respect of certain property stolen from a temple. The court rejected the contention that there was a presumption, almost amounting to a conclusion of law, that the wife was not a free agent and was therefore exempt from liability. According to De Sampayo J. under our law the wife, like any other person, was responsible for her acts, and could only free herself by proof that she was merely acting on the orders of her husband, and had no knowledge that she was committing a criminal offence.

49. (1914) 17 N.L.R. 447
50. Voet 5.1.17; Grotius 1.4.1.
51. H. R. Hahlo, *The South African Law of Husband and Wife* (4th ed.) Cape Town 1975) p. 202.
52. (1919) 21 N.L.R.101

(*b*) If a woman had been deserted by her husband she was not powerless to institute or defend a lawsuit. In *Lokuhamy* v. *Abeyhamy* [53] a married woman, whose husband had deserted her, wished to recover damages from a third party for an unlawful seizure of property. The Supreme Court recognised her right to defend the common estate. Before she instituted an action, however, the court held that she was bound to summon the husband, thus giving him an opportunity either to take up the suit himself or to allow her to go on with the case without his assistance. If, however, the husband could not be found, or unreasonably refused to assist the wife, or was incapable of managing his own affairs, the wife could apply to court for *venia agendi* [54] that is, leave to institute or defend proceedings unassisted.[55]

(*c*) If the wife carried on a trade or business, she was then deemed to have *locus standi in judicio*. [56] When a married woman conducted business as a *publica mercatrix* it was presumed that she did so with the consent of her husband. Consequently, if the husband withdrew his consent the wife became liable to creditors for any debts incurred. However, this rule was not applied to the prejudice of the trader if he did not know that the husband's consent had been withdrawn. [57]

(*d*) A married woman's disability in this regard did not extend to depriving her of the right to sue her husband in matrimonial actions. [58] Consequently, in all matters relating to divorce, judicial separation, nullity, maintenance and custody she had *locus standi in judicio*. [59]

53. (1882) Wendt Rep. 211
54. Hahlo *op. cit.* p. 206;
55. See *Pathberiya* v. *Kachohamy* (1923) 24 N.L.R. 487; *Tel Peda Investigation Bureau (Pty) Ltd.* v. *Laws* 1972 (2) S.A.1.
56. Voet 2.4.36; 5.1.15.
57. See Hahlo, *op. cit.* p. 204.
58. Hahlo, *op. cit.* p. 204
59. Hahlo, *op. cit.* pp. 204-206

(*e*) Finally, on the basis that the wife's incapacity derived from the husband's marital power if the marital power had been excluded by antenuptial contract, or suspended or terminated by court, she then had *locus standi in judicio*.[60]

(*b*) Statutory Changes

Far-reaching changes were effected by the Matrimonial Rights and Inheritance Ordinance[61] in relation to the *locus standi in judicio* of a married woman. Having established a separate property regime,[62] the Ordinance declared that:

> "A married woman, whether married before or after the proclamation of this Ordinance, may maintain or defend in her own name any action or other legal proceeding in respect of any property belonging to her as her separate property, and shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and securtiy of such property and of any other property purchased or obtained by means thereof for her separate use, as if she were an unmarried woman. Provided always, that her husband may, with her consent in writing, maintain or defend any such action or legal proceeding in her behalf."[63]

In *Hettiakandage Joseph Fernando* v. *Maria Felsinger and D. J. Fernando*[64] the Supreme Court was called upon to decide on the right to sue a married woman without making her husband a party to the action subsequent to the enactment of the 1876 Ordinance. Chief Justice Burnside was of the opinion that the Matrimonial Rights and Inheritance Ordinance did not dispense with the need to join the husband as a party to an action against the wife. The Ordinance specifically declared that "A married

60. H.J. May; "Wife's Locus Standi in Judicio when Marital Power is Excluded" 1952 (69) *S.A.L.J.* 94.
61. No. 15 of 1876. See Legislative Enactments of Ceylon 1870-1879
62. Sec. 8 (Sec. 7 of the 1956 revision)
63. Sec. 20
64. (1884) 6 S.C.C. 34

woman... may maintain or defend in her own name any action or other legal proceeding in respect of any property belonging to her as her separate property ..."[65] and it was contended in court that the insertion of the words "or defend" was intended to avoid the old rule of law, and that it was no longer necessary to join the husband in a suit against his wife in respect of her separate property. Nevertheless, the Chief Justice opined that "the words 'or defend' do not disturb the old rule of law rendering it obligatory to join the husband in all actions intended to affect the property or person of the wife ... The words 'or defend' in my opinion is inserted for purposes of enabling the wife, sued with her husband, to appear and defend such action separately—a privilege which under the old law she did not possess and which would appear to be necessary for the full protection of her rights in respect of her separate estate. It was intended to put her beyond the power of her husband in cases where the husband might choose for his own purpose, not to appear or join with her in defence of such estate or where their defences might be antagonistic or conflicting. The words 'or defend' are not equivalent to the words 'or may be sued'; they are words intended to confer a privilege on the wife and not to give to suitors as against her or her husband a right which did not exist before."[66]

It is submitted, however, that this interpretation is not tenable in view of the explicit wording of the section which confers on a married woman the right to sue and be sued in her own name "as if she were an unmarried woman."[67] Moreover, in the common law a married woman was not without a remedy in the event of her husband maliciously or unreasonably refusing to institute or defend an action on her behalf. The wife could apply to court for *venia agendi*, that is, leave to institute or defend proceedings unassisted,[68] thus curing her lack of *locus standi in judicio*. Consequently, there was no need, as Burnside C. J. appeared to think, to confer on a married woman a benefit she already enjoyed in the common law.

65. Sec. 20
66. (1884) 6 S.C.C. 34 at pp. 36, 37
67. Sec. 20
68. Voet 5. 1.14.16; 2.4.34; Schorer note 21; *Manuel Vedarala* v. *Ana Hamy* (1898) 3 N.L.R. 240

Justice Dias reiterated the judgment of Burnside C.J. but departed from this view a year later when the same case came before the Supreme Court consisting of Dias and Lawrie J.J.[69] The court purported to depart from the earlier ruling on the reasoning that this case really involved an application of section 21 of the Ordinance and not section 20 as decided by the previous bench of the Supreme Court. Section 21 declared that:

> "A husband, married after the proclamation of this Ordinance, shall not by reason of his marriage be liable for the debts, defaults or engagements of his wife contracted or arising before marriage, except to the extent of the property derived by him from his wife; but the wife shall be liable to be sued for, and any property belonging to her for her separate estate shall be liable to satisfy and make good such debts, defaults or engagements, in the same manner as if she had continued unmarried.
>
> Provided that nothing in this Ordinance contained shall render her person liable to arrest on civil process."

According to the facts of *Hettiakandage Joseph Fernando* v. *Maria Felsinger and D. J. Fernando* the plaintiff's right to sue a married woman on a mortgage bond executed by her before her marriage was in issue. This case, therefore, involved the right to sue the wife for an antenuptial debt contracted by her, and indeed section 21 did specifically refer to the liability of a married woman for debts contracted prior to her marriage, but the essential point to be noted is that this section does not depart from the general provision pertaining to the right of a married woman to be sued as if she were a *feme sole*, as set out in section 20 of the Ordinance. In other words, section 20 was a general section removing the common law disability of a married woman, whereas section 21 referred to the husband's exemption from liability and the corresponding liability of the wife for antenuptial debts contracted by her. If the interpretation adopted by Dias and Lawrie J.J. were to be carried to its logical conclusion, a married woman would be compelled to join her husband when suing or being sued for postnuptial debts,

69. (1885) 7 S.C.C. 102

although she could be sued alone for antenuptial debts. Clearly, the statutory provisions do not justify this interpretation which makes a distinction in the wife's *locus standi in judicio* depending on the time at which the rights and obligations were incurred. Just as much as the wording of section 21 was clear and unambiguous[70] when it conferred full legal status on a married woman in court, so also was the language of section 20, the only difference being that section 20 was of wider and more general applicability than was section 21.

Both sections 20 and 21 of the 1876 Ordinance were repealed by the Civil Procedure Code[71] in 1889. According to section 2 of the Code:

> "On and from the date on which this Ordinance comes into operation, the Laws, Ordinances, sections of Ordinances, and Rules of Court, respectively mentioned in the first column of the first schedule hereto, shall be severally repealed to the extent mentioned in the third column thereof, but such repeal shall not affect:
>
> 1. The past operation of any enactment hereby repealed nor anything duly done or suffered under any enactment hereby repealed; nor
>
> 2. Any right, privilege, obligation or liability acquired, accrued, or incurred under any enactment hereby repealed ;

nor shall such repeal revive any enactment, right, office, privilege, matter or thing not in force or existing at the commencement of this Ordinance. Where any unrepealed Ordinance incorporates or refers to any provision of any Ordinance hereby repealed, such unrepealed Ordinance shall be deemed to incorporate or refer to the corresponding provision of this Ordinance." [72]

Schedule I of the Ordinance contained in its list of repealed Ordinances the Matrimonial Rights and Inheritance Ordinance

70. (1885) 7 S.C.C. 102 at p. 103
71. No. 2 of 1889
72. Sec. 2.

No. 15 of 1876, ss. 15, 20, and 21. The consequences of this repeal on the legal status of a married woman were adjudicated upon in *Fernando* v. *Amal*.[73] According to the facts of this case a judgment had been obtained against the husband in respect of property belonging to the wife's separate estate and the Supreme Court had to decide whether the judgment was binding on the wife. The parties had married after 1876 and were thus governed by the Matrimonial Rights and Inheritance Ordinance. The right of action, however, accrued after 1889, that is, subsequent to the repeal of sections 20 and 21 of the 1876 Ordinance.

It was argued by the Solicitor-General that the repeal of section 20 and the absence of a section to take its place had the effect of reviving the common law disability attendant on a married woman. Justice Middleton, however, declared: "I cannot believe that this was the effect of that repeal, or that it was the intention of the Legislature that it should be so. The Legislature in passing Ordinance No. 15 of 1876 were emancipating women from the thraldom of the Roman-Dutch principle of the community of property on marriage. The immovable property of a woman married after June 29, 1877, belongs to her ... She has full power of disposing of it and dealing with such property by any lawful act *inter vivos* with the written consent of her husband but not otherwise, or by last will without such consent as if she were unmarried, and her receipts alone are a good discharge for the rents arising from such property. These rights, in my opinion, must of necessity have conferred on the woman a right to appear in Court as a party to an action concerning such immovable property and defending or asserting her rights to her separate estate, but I think in conjuntion with her husband, without whose written consent she could not alienate it. This, I think, must therefore have been the view of the Legislature when it repealed section 20."[74] He further declared that when the doctrine of community of property was abolished, with it went the theory of partnership involved in it. Having thus declared that the husband did not represent the wife in matters concerning her separate immovable estate, he opined that "in the case of an action she must sue and be

73. (1909) 12 N.L.R. 200
74. *id.* at p. 205

sued in conjunction with him,"[75] but, if the husband was sued alone in respect of her separate estate, he was not privy to the wife so as to bind her. "He is neither privy in blood, in representation in estate, in respect of contract, or in law.[76]

Justice Wendt, in a separate judgment, emphasised that the repeal of section 20 alone did not revive the law which it had repealed because section 2 of the Civil Procedure Code expressly declared that such repeal "shall not revive any enactment, right, office, privilege, matter, or thing not in force or existing at the commencement of this Ordinance."[77]

It is submitted that the judgment of the Supreme Court in regard to the *locus standi in judicio* of a married woman subsequent to 1889 cannot be assailed, but a fallacious reasoning in the judgment of Middleton J. must be commented on. According to this judgment, the marital power of the husband was a direct consequence of the proprietary regime, namely, the community of property; when, therefore, community of property was abolished in 1876, the marital power of the husband was also swept away.[78] It must be pointed out, however, that in the common law, no doubt marital power was a feature of community of property however it was also possible to retain this power in a separate property regime.[79] Moreover, having asserted that the 1876 Ordinance gave a married woman full legal status, Justice Middleton declared that subsequent to the repeal of section 20 of the Matrimonial Rights and Inheritance Ordinance a married woman could assert or defend her rights "in conjunction with her husband."[80] This conclusion appears to have been influenced by the provision in the 1876 Ordinance which required the husband's written consent for immovable property transactions. It is submitted, however, that the necessity to obtain the husband's written consent related to a married woman's contractual rights and it cannot be, therefore, extended to her right to sue and to be sued unassisted in a court of law.

75. *ibid.*
76. *ibid.*
77. (1909) 12 N.L.R. 200 at p. 201
78. *id.* at p. 205
79. Hahlo *op. cit.* p. 153
80. (1909) 12 N.L.R. 200 at p. 205

If then, we adopt the view that the repeal of sections 20 and 21 of the Matrimonial Rights and Inheritance Ordinance by the Civil Procedure Code of 1889 [81] did not have the effect of reviving the legal disabilities attendant on a married woman under the common law, it must then follow that the Married Women's Property Ordinance of 1923[82] did not make a significant change in respect to her *locus standi in judicio*. According to this statute "A married woman shall be capable of entering into, and rendering herself liable in respect of, and to the extent of, her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme-sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; nor shall he be liable, merely on the ground that he is her husband, in respect of any tort committed by her, and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise".[83]

A significant feature of the 1923 Ordinance is that it repealed sections 4 to 19 (both inclusive) of the Matrimonial Rights and Inheritance Ordinance relating to persons married on or after June 29, 1877:

> "Provided, however, that such repeal shall not affect any act done or right or status acquired while such sections were in force, or any right or liability of any husband or wife, married before the commencement of this Ordinance, to sue or be sued under the provisions of the said repealed sections, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Ordinance."[84]

81. Sec. 2
82. No. 18 of 1923 (Cap. 56)
83. Sec. 5(2)
84. Sec. 4.

In *Gaintote Nona* v. *Manuel*[85] the issue involved the interpretation of section 4 of the Married Women's Property Ordinance and its proviso. The plaintiff, a woman married before the Married Women's Property Ordinance of 1923 came into operation, sued the defendants without the assistance of her husband for declaration of title to land which she claimed by a deed executed in her favour on June 11, 1924. The cause of action alleged was an ouster by the defendants in August, 1925. The defendants took the objection that the action was not properly constituted as the plaintiff's husband had not been made a party. The plaintiff, therefore, had bought the land before the commencement of the Ordinance but the cause of action arose thereafter.

In appeal the argument advanced for the respondent was that this property, in respect of which the wrong complained of has been committed, was bought by the wife before the commencement of the Ordinance, and that immediately on her acquisition of the property her husband acquired a certain status in regard to it. Lyall Grant J. declared that although the husband did acquire a certain status in regard to immovable property acquired by a married woman, subsequent to the 1876 Ordinance and prior to 1923, that status only necessitated the husband's written consent when the wife wished to dispose of or deal with such property,[86] He pointed out that the question before the court did not involve such a disposition. It concerned the wife's right to sue in defence of such property without her husband being joined as party to the action. He rightly pointed out that the 1876 Ordinance did not require the wife to join her husband in an action when she sued in defence of her separate immovable property. Consequently, he concluded that the husband had acquired no status in respect of his wife's separate property, which in any event could be interfered with by her separately maintaining the action. Justice Maartensz, in a separate judgment, came to the same conclusion but for a different reason. He opined that the provisions of section 5(2) of the Married Women's Property Ordinance applied both to persons married before the Ordinance

85. (1927) 29 N.L.R.161

86. Matrimonial Rights and Inheritance Ordinance No. 15 of 1876, sec. 8

as well as to those married subsequent to the passing of the Ordinance. "If the legislature intended to limit the operation of section 5(2) to marriages entered into after the Ordinance came into operation, I have no doubt there would have been the words necessary to give effect to that intention enacted in the section. There are no such words and I, therefore, am of the opinion that the provisions of section 5(2) are applicable to married persons whether married before or after the Ordinance came into operation."[87] Although the decision of the court in *Gaintote Nona* v. *Manuel* cannot be assailed, it is submitted that emphasis should have been accorded to the fact that the 1876 Ordinance gave a married woman *locus standi in judicio*; and since the issue in this case really involved a married woman's right to sue unassisted in a court of law, it made no difference whether she was governed by the Ordinance of 1876 or that of 1923.

The Ordinance of 1923 also conferred on a married woman civil and criminal remedies for the protection and security of her separate property, but it expressly declared that no husband or wife would be entitled to sue the other for a tort.[88] The statute, further declared that no criminal proceedings could be taken by a wife against her husband by virtue of the 1923 Ordinance while they were living together, concerning any property claimed by her, nor, while they were living apart, concerning any act done by the husband, while they were living together concerning property claimed by her, unless such property had been wrongfully taken by him when leaving or deserting, or was about to leave or desert, his wife.[89] A woman was also deemed to be liable for all antenuptial debts incurred by her and contracts entered into or wrongs committed by her before her marriage and was capable of being sued for any such debt, damages, or wrong, and all sums recovered against her was to be payable out of her separate estate.[90] Moreover, a husband and wife could be jointly sued in respect of any debt or liability contracted or incurred by the wife before marriage, if the plaintiff sought to establish

87. (1927) 29 N.L.R. 161 at pp. 167, 168
88. Sec. 18 (1)
89. Sec. 18 (4)
90. Sec. 19

his claim, either wholly or in part, against both of them; [91] if, in any such action, it was found that the husband was not liable in respect of any property of the wife so acquired by him, he could have judgment for his costs of defence, whatever the result of the action against his wife, if she was jointly sued with him. [92] It further provided that in an action against husband and wife jointly, if it appeared that the husband was liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband was liable "shall be a joint judgment against the husband personally, and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only."[93] Just as a husband would be liable to criminal proceedings for any act done with respect to the wife's property, so would the wife entail liability *mutatis mutandis*. [94] A married woman was also capable of suing and being sued in respect of property she held as trustee, executrix or administratrix as though she were a *feme-sole*. [95] In relation to the remedies available to a married woman for the protection and security of her separate property, and in situations where she is liable to criminal proceedings for acts done to her husband's property, the Ordinance declares that a husband and wife shall be competent, except when he or she is the accused, compellable, to give evidence against each other. [96] It has also been provided that the executor or administrator of any married woman shall, in respect of her separate estate, have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living. [97]

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91. Sec. 21(1)
92. Sec. 21 (2)
93. Sec. 21 (3)
94. Sec. 22 (1)
95. Sec. 24
96. See secs. 18 (3); 22 (2). See also *Queen* v. *Bantan* (1858) 3 Lorenz 135; *Catheraummah* v. *Sekunder* (1863-68) Ram. Rep. 139
97. Sec. 28.

IV. A. Contractual Rights

(i) Common Law

As a consequence of the husband's marital power in the Roman-Dutch common law, a married woman was under a contractual disability and as such she could not enter into a binding contract in her own right except with the consent of her husband.[98] If a married woman did enter into a contract without her husband's consent, the contract was civilly void.[99] Nevertheless, it was possible for the husband to ratify the contract subsequently, and such ratification had the same effect as antecedent authority and rendered the contract valid.[100] If, however, he did not ratify or repudiate it by the time of his death, according to Voet the widow could enforce the contract.[101] Van Leeuwen,[102] however, is of the view that a married woman's contract entered into without her husband's consent, was *ipso jure* void and that, therefore, it did not revive upon a dissolution of the marriage. This view, it must be pointed out, does not acknowledge the fact that the husband's guardianship over the wife is terminated when the marriage is dissolved.[103] Lee supports Voet and states that in such circumstances a contract will not revive only if it is against her will.[104]

The husband's consent or subsequent ratification could be expressed or implied. Consent was implied in the following situations:

(i) If he stood by and did not object to the transaction.[105] In *Wakista* v. *Dona Geniara Wakistahamine*[106] the plaintiff had purchased land on behalf of a married

98. Grotius 1.5.23; Voet 12.6.19; 23.2.42; Van Leeuwen *Cen. For.* 1.1.76
99. R. W. Lee; *An Introduction to Roman-Dutch Law* (3rd ed., Oxford 1931) p.65
100. Voet 23.2.42
101. Voet 23.2.43
102. 1.6.7
103. See M. Nathan, *The Common Law of South Africa* (London 1904 vol.1), p.222
104. R. W. Lee, *op. cit.* p. 65 note 5
105. Voet 23.2.42
106. (1910) 2 Matara Cases 85

woman in the presence of her husband. The court held that in these circumstances the husband had tacitly authorised the plaintiff to enter into the contract on behalf of his wife.

(ii) Failure, on the part of the husband, to notify third parties that he had repudiated his wife's contract in certain circumstances, amounted to tacit ratification. [107]

(iii) If the husband knowingly accepted a benefit under his wife's unauthorised contract he was deemed to have ratified it. [108]

Apart from the above instances in which the tacit consent of the husband had the effect of removing the contractual disability of his wife, there were other situations too in which a married woman's contracts were effective under the common law: Where for instance, community of property and of profit and loss as well as the marital power were excluded by antenuptial contract, a married woman enjoyed full contractual rights. [109] An unilateral contract entered into by a married woman solely to her advantage was deemed to be valid although it had been entered into without her husband's consent. [110] Where, as a result of a wife's contract, the joint estate or her separate estate became enriched at the expense of a third party, the third party had a right of recourse against the husband. If the parties were married in community of property, the husband was liable as administrator of the joint estate and, if they were married out of community, the wife's separate estate was liable. [111] In *Gunaris Hamy* v. *Nonababa* [112] the defendant, a married woman, had executed a mortgage bond without the concurrence of her husband. Counsel for the plaintiff asserted that although the mortgage bond was invalid, the money claim could be enforced on the basis that the woman had been enriched. De Sampayo J. however dismissing the plaintiff's claim

107. *Karsten* v. *Forster* 1914 C.P.D. 919 at p. 923
108. H. R. Hahlo, *op. cit.*, p. 167
109. Voet 23.2.63; *Van Hees* v. *Visser* 1914 T.P.D. 231; *Rosengarten* v. *O'Brien* 1912 T.P.D. 834
110. Voet 23.2.44
111. Hahlo *op.cit.* p. 169
112. (1921) 23 N.L.R. 253

declared that the money had been borrowed for a devil-dancing ceremony to cure the woman of a disease and that that was not the kind of benefit contemplated. In any event there was no evidence that the money was spent in the performance of the devil-dancing ceremony, or that it was this ceremony that cured the woman. Likewise, in *Sonnandara* v. *Kuruna* [113] the plaintiff, a jeweller, sued a married woman for jewellery sold and delivered. The success of the claim depended on the plaintiff's establishing that the wife had benefited from the contract, but proof of this was not forthcoming because the jewellery had been delivered to a domestic servant and there was no proof that it had been given to the defendant. Consequently, the plaintiff's claim failed.

It must be pointed out that in the common law, as long as a marriage subsisted, a wife was not emancipated from the marital power of her husband,[114] and therefore, merely because the spouses lived apart, either by mutual agreement or because of the matrimonial fault of one spouse, the contractual disability suffered by her was not cured. In *Gunasekera* v. *Hamine* [115] a married woman had signed a promissory note when her husband was in jail, and Grenier J. reasoned that that did not affect her status as a married woman under coverture. In *Nicholas de Silva* v. *Shaik Ali* [116] Withers J. declared: "I know of no authority for the position that the wife ever could become emancipated from the power of her husband even though she might have left him for his fault or with his will and might have herself lived in adultery. By divorce alone could she, in his lifetime, have been so freed from his authority and all her contractual acts thereafter can be of no validity against him."[117]

In *Anthony Appuhamy* v. *Ensinahamy*[118] a married woman had executed a mortgage bond unassisted by her husband. Subsequently, she paid the plaintiff part of the money due and the court had to decide whether the husband was entitled to recover

113. (1922) 7 Leader L.R. 214
114. Except by antenuptial contract.
115. (1905) 4 Bal. Rep. 90
116. (1895) 1 N.L.R. 228
117. *id.* at p. 229
118. (1912) 7 Weerakoon's Rep. 49.

the money paid by his wife on the basis that the mortgage bond was ineffective and, as such, she was not obliged to return the money to the plaintiff. Lascelles C.J. held that the husband's right to a repayment depended on the wife's knowledge of her rights and obligations when she signed the bond without her husband's consent. It was established by evidence that the wife was aware of her legal incapacity as a married woman and, moreover, that she had full knowledge of the fact that she was not obliged to make a repayment to the plaintiff. In the circumstances, the repayment by her was construed as a voluntary act and, as such, the court held that the plaintiff was not obliged to refund the money. [119]

In general, a married woman was incapable of releasing a debtor from liability by accepting money as repayment of money borrowed. [120] An exception to this principle, however, was accepted in *Jayasekera* v. *Ahamado* [121] where money borrowed on a mortgage bond was returned to the first plaintiff who was the wife of the second plaintiff. De Sampayo J. held that since the bond was in favour of the wife, and since the decree entered ordered the defendant to pay the money to her, she was entitled to accept payment. The evidence disclosed that the wife had acted as the husband's agent in investing the money; as such, the court held that it could be legitimately presumed that she had acted as his agent in receiving the money, too. It must be noted that even apart from the situation set out above, if there was evidence that the husband had benefited by the payment to the wife, that is, that she had handed the money over to the husband or had used it for household expenses, then, too, the debtor would be released from liability. [122]

In the common law a married woman was protected by the *Senatusconsultum Velleianum* and the *Authentica si qua mulier* which prevented her from binding herself as a surety or guarantor. [123]

119. See also *Silva* v. *Dissanayake* (1892) 2 C.L. Rep. 123; *Appuhamy* v. *Appuhamy* (1912) 15 N.L.R. 440

120. Voet 23.2.50

121. (1921) 3 C.L. Rec. 167

122. Voet 23.2.50

123. M. Nathan, *The Common Law of South Africa* (London 1904, Vol.1) p. 291 *et. seq;* Voet 16.1.1.

"On account of the real or supposed frailty of women, the law confers upon them certain privileges which it is competent for them to plead in bar of actions brought upon certain classes of contracts. Amongst these contracts is that of suretyship, which is not binding upon a woman who avails herself of the benefits of the *Senatusconsultum Velleianum*."[124] In *Goonetilleke* v. *Abeyagoonesekera*[125] the Supreme Court held that although these special privileges were not obsolete in Sri Lanka, the altered conditions in the country required that the *Senatusconsultum Velleianum* at any rate, should be sparingly administered. In this case it was contended that this benefit had been waived by the deceased, but Pereira J. reasoned that the renunciation, to be effective, must have been expressly made and that the expression in the bond sued upon "renouncing all benefits and privileges and exceptions to which sureties are otherwise by law entitled" could not be treated as an express waiver of this privilege. According to this view, then, a high degree of proof is necessary before a renunciation can be effective. Ennis J., disagreeing, held that he was "unable to see that for a renunciation of the general privilege there is any virtue in a name."[126] As for the *Authentica si qua mulier*, however, Ennis J. declared that it could be renounced only by naming it.[127] In *Goonetilleke* v. *Abeyagoonesekera*,[128] quite apart from the terms of the renunciation, there was sufficient evidence to establish that the deceased could not be protected by these special privileges. For instance, the deceased had bound herself jointly and severally with the first defendant and it was further established that she had benefited from the transaction. Consequently, the court held that she could not evade her responsibilities by seeking cover under these special privileges.

(ii) **Statutory Changes**

The Matrimonial Rights and Inheritance Ordinance[129] established a separate property regime and distinguished between

124. *ibid.*
125. (1914) 17 N.L.R. 368.
126. *id.* at p. 371.
127. *ibid.* In the South African law, both benefits have to be expressly renounced. See M. Nathan, *op. cit.* p. 301.
128. (1914) 17 N.L.R. 368.
129. No. 15 of 1876, sec.8. See Legislative Enactments of Ceylon 1870-1879.

a married woman's right to make a disposition *inter vivos* and *mortis causa*. The statute declared that a married woman had full powers of disposing of and dealing with immovable property *inter vivos* with the written consent of her husband, but not otherwise.[130] For a disposition *mortis causa*, however, the consent of the husband was not a requirement.[131] As for movable property, the statute enumerated the movable property over which a married woman had the power of disposition. For instance, the wages and earnings of a married woman, whether married before or after the proclamation of the Ordinance and which may be acquired or gained by her after the proclamation of the Ordinance in any employment occupation or trade, in which she is engaged or which she carries on separately from her husband and also any money or property so acquired by her through the exercise of any literary, artistic or scientific skill was deemed to be her separate property and she was to have as full power of dealing with and disposing of the same or any investment thereof, as if she were unmarried, and her receipts alone were to be a good discharge of such wages, earnings, money and property and the principal and interest of any investments thereof.[132]

In relation to the movable property listed below, just as in the case of an *inter vivos* disposition of immovable property, the consent of the husband was an essential requisite. If the disposition was made by last will, however, the husband's consent was not required. In this category, movable property included all jewels and all personal or household ornaments and wearing apparel belonging to a woman, married after the proclamation of the Ordinance, at the time of her marriage, and also all jewels personal ornaments and apparel suitable in respect of value to her rank and condition of life, which she may have acquired during her marriage, whether by gift from her husband or otherwise; all tools, implements and appliances belonging to her during marriage which may be required for the carrying on of any employment or trade she may be engaged in separately from her husband;

130. Sec. 9
131. *ibid.*
132. Sec. 10

and all implements of husbandry, machinery, live and dead stock belonging to her during marriage and *bona fide* kept and employed for the cultivation or proper use of any immovable property belonging to her for her separate estate.[133]

The statute further provided that "if in any case, in which the consent of a husband is required by this Ordinance for the valid disposition of or dealing with any property by the wife, the wife shall be deserted by her husband or separated from him by mutual consent or he shall have lain in prison under the sentence or order of any competent court for a period exceeding two years, or if he shall be a lunatic[134] or idiot, or his place of abode shall be unknown, or if his consent is unreasonably withheld or the interest of the wife or children of the marriage require that such consent should be dispensed with, it shall be lawful for the wife to apply by petition to the District Court of the district in which she resides, or in which the property is situate, for an order authorising her to dispose of or deal with such property without her husband's consent; and such court may, after summary inquiry into the truth of the petition, make such order, and that subject to such conditions and restrictions, as the justice of the case may require; whereupon such consent shall, if so ordered and subject to the terms and conditions of such order, become no longer necessary for the valid disposition of or dealing with such property by such woman."[135] Provided, of course, that where a separation *a mensa et thoro* has been decreed by a competent court, the consent of the husband shall not be necessary to enable the wife, so separated, to deal with or dispose of her property.[136] However, in *Wickremaratne* v. *Dingiri Baba*[137] the court held that a judicial separation was not tantamount to a dissolution of the marriage and as such the requisite of consent could not be dispensed with even in this situation.[138]

133. Sec. 11. See also sec. 17 according to which a married woman could effect a policy of insurance.

134. See *in re application of Caderamer* (1915) 6 Bal. N of C. 47

135. Sec. 12

136. See proviso to section 12

137. (1913) 2 C.A.C. 132

138. See also *De Silva* v. *Shaik Ali* (1895) 1 N.L.R. 228

In *Martelis Appu* v. *Jayawardene* [139] an agreement entered into by a married woman to sell immovable property without the consent of her husband was declared to be unenforceable. However, the money paid under such an agreement was held to be recoverable. In *Silva* v. *Dissanayake* [140] the court held that the husband's consent was a necessary prerequisite for a mortgage bond effected by a married woman. In the absence of such consent the creditors could not even recover the debt due on the bond because the incapacity of a married woman to bind herself by contract rendered the instrument inoperative even as a simple money bond. In *Ponnammal* v. *Pattaye* [141] the court considered the nature of consent required to cure the wife's contractual incapacity. In this case, the husband, who was illiterate, had made a mark under the signature of the two witnesses, and the court had to decide whether this satisfied the requirement of consent. The majority judgment held that there was an irrebuttable presumption amounting to proof that the husband, by putting his mark on the document, consented to its contents. Wood Renton J., however, in a dissenting judgment declared that the fetter imposed upon the wife's contractual powers could not be removed except by the "written consent" of the husband, and that the mark of an illiterate man was acceptable only if it amounted to a written consent when viewed in conjunction with the relevant circumstances of the case. He held that there was insufficient evidence to conclude that the explicit wording of the section had been complied with.

In *Tikirale* v. *Pavistinahamy* [142] the deed of a married woman, by which she purported to convey immovable property, was attested by her husband, a notary. De Sampayo J. held that the husband's signature on the document, in the capacity of a notary, was insufficient to signify consent as required by the Ordinance. A more flexible attitude, however, is reflected in *Fradd* v. *Fernando* [143] where Justice Dalton held that the consent of the husband need not

139. (1908) 11 N.L.R. 272
140. (1892) 2 C.L. Rep. 123
141. (1910) 13 N.L.R. 201
142. (1916) 19 N.L.R. 287
143. (1934) 36 N.L.R. 124

necessarily appear on the face of the document making the disposition. In this case, the husband had written to his wife's attorney approving of a draft of the agreement effected by the wife to sell immovable property, and the court held that this constituted the required consent.

The material time at which the husband's consent is given is the determining factor when deciding whether a contract entered into by a married woman, without the written consent of her husband, is absolutely void or merely voidable. The consensus of judicial opinion appears to favour the view that consent must be given prior to, or, at any rate, contemporaneously with the execution of the particular instrument involved and must relate to that very instrument.[144] In *Marie Cangany* v. *Karuppasamy Cangany*[145] the husband was present at the execution of a mortgage bond entered into by the wife and, by his subsequent conduct, had recognised the obligation arising from the bond. Nevertheless, a Full Bench of the Supreme Court held that the husband was not estopped from denying the validity of the bond. Wood Renton J. drew attention to the wording of the Ordinance that a married woman could enter into a contract "with the written consent of her husband, but not otherwise," and according to him the phrase "but not otherwise" invested it with the character of a condition precedent. Moreover, he opined that there must be express consent to the particular transaction.[146]

If this view is accepted, a contract entered into by a married woman without the assistance of her husband must be deemed to be absolutely void. However, Canekeratne J. in *Perera* v. *Perera*[147] declared that such a contract was neither absolutely void nor was it voidable. According to him it was a nullity which was respective in that if it is subsequently ratified, such ratification applies to the date of the original act, rendering the contract valid *ab initio*. In other words, the nullity is established in favour of the

144. *Ponnammal* v. *Pattaye* (1910) 13 N.L.R. 201 *per* Wood Renton C.J. reiterated by Garvin J. in *Valliamma* v. *Lowe* (1923) 24 N.L.R. 481
145. (1906) 10 N. L. R. 79
146. *id.* at p. 86
147. (1948) 49 N.L.R. 254

husband and it is for him to renounce the benefit of the nullity. In *Sinno Appu* v. *Podi Nona* [148] the court held that if a married woman represented herself as unmarried and executed a mortgage bond without the consent of her husband, the mortgagors would not be estopped from denying the validity of the bond.

The statutory fetter imposed on a married woman, from disposing of her separate property without the consent of her husband, was restricted to her immovable property and did not extend to the produce from her property. Thus in *Cassim* v. *Dominco* [149] a married woman, who was the owner of a paddy field, sold the produce from her field without the consent of her husband. De Sampayo J. reasoned that if the husband's consent was required for this manner of enjoyment of the income of her immovable property she would be restricted and, in certain situations, even be deprived of her rights which the Ordinance conferred on her.

In *Silva Hamine* v. *Agonis Appuhamy* [149a] the spouses were living separately and the court held that the wife could apply to court for sanction before entering into an immovable property transaction. [149b] There is also authority for the view that court sanction need not necessarily be obtained prior to the transaction, a subsequent ratification by court being sufficient. [149c]

It has been judicially declared that consent, when granted either by the court or by the husband, must be specific and must relate to the particular transaction to be effected. Thus an application from a married woman to the District Court for, say, a general order authorising her to deal with her immovable property, will not be granted. [150] Likewise, an agreement entered into by the spouses stipulating that the wife had general powers of disposition in relation to her immovable property would not be valid. [151]

148. (1912) 15 N.L.R. 241
149. (1921) 3 C.L. Rec. 89
149a (1900) 4 N.L.R. 101
149b The requirement for sanction was not dispensed with even if the separation was consensual. See *Wickramaratne* v. *Dingiri Baba* (1913) 2 C.A.C 132
149c See *Publina Silva Hamine* v. *Egoris* (1901) 2, Br. Rep. 362
150. *Silva Hamine* v. *Agonis Appuhamy* (1900) 4 N.L.R. 101
151. *Wickramaratne* v. *Dingiri Baba*. (1913) 2 C.A.C. 132

The Married Women's Property Ordinance [152] repealed sections 4-19 (both inclusive) of the Matrimonial Rights and Inheritance Ordinance relating to persons married on or after June 29, 1877: "Provided, however, that such repeal shall not affect any act done or right or status acquired while such sections were in force,..." [153] Thus a woman married prior to 1923 was governed by the 1876 Ordinance in relation to property acquired before 1923. Consequently, she could not dispose of such property without the written consent of her husband. [154] In *Perera* v. *Perera*,[155] Canekeratne J. declared that "the new law ought to be construed so as to interfere as little as possible with vested rights. A retrospective operation is not to be given to a statute so as to impair an existing right or obligation. The repeal of sections 4 to 19 is, according to the proviso to section 4, not to affect any right acquired while those sections were in force." [156] In this case a married woman had gifted property without the consent of her husband and subsequently transferred the same land to the first defendant with her husband's consent. The court held that the first transfer by way of gift was ueffective as it had not satisfied the requirement of consent. In *Seedin* v. *Thediyas* [157] a married woman possessed an undivided share of land before the 1923 Ordinance was enacted but was awarded a partition title to a divided portion subsequent to the Ordinance; the court held that since a partition title was a new title and not one that was merely declaratory of an existing right, the divided portion accrued to her separate property and was governed by the terms of the Married Women's Property Ordinance. Consequently, she could deal with it without the consent of her husband. In *Karunanayake* v. *Karunanayake* [158] the plaintiff, a married woman, had given the defendant, her husband, a sum of money as dowry at the time of marriage. The marriage took place before 1923 and, as such, by

152. No. 18 of 1923 (Cap. 56)
153. See proviso to sec. 4
154. *In re application of R. Caroline Nona* (1924) 6 C.L. Rec. 46; *Perera* v. *Perera* (1948) 49 N.L.R. 254; *Fradd* v. *Fernando* (1934) 36 N.L.R. 124.
155. (1948) 49 N.L.R. 254
156. *id.* at p. 255
157. (1951) 53 N.L.R. 63
158. (1937) 9 C.L.W. 109

the 1876 Ordinance the property vested absolutely in the husband.[159] When the plaintiff filed an action for divorce after the enactment of the Married Women's Property Ordinance, she reclaimed the dowry money, but the Supreme Court held that the 1923 Ordinance would not affect property already vested in the husband.

In relation to the contractual rights of a married woman, the most significant feature of the Married Women's Property Ordinance was the removal of the last vestige of control a husband had over his wife's disposition of immovable property. Moreover, all movable property was to form a part of the wife's separate estate.[160] She was given the right to enter into and to render herself liable, in respect of and to the extent of her separate property, on any contract. The Ordinance declared that:

"Every contract hereafter entered into by a married woman otherwise than as agent:

(*a*) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract;

(*b*) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and

(*c*) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to.

Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the insolvency laws in the same way as if she were a *feme-sole*.[161]

159. Sec. 19
160. Sec. 5 (1), see also ss. 7, 8, 9, 10.
161. Sec. 5(3) (4).

B. Contracts for Household Necessaries

(i) Essential Elements of Liability

The management of the household is not only the duty but the right of a wife and, thus for purposes connected with the common household the wife, in her capacity as manageress of the common establishment has the right to pledge her husband's credit.[162] There is a fundamental difference between the English law and the Roman-Dutch law in relation to the rationale sustaining this right vested in a married woman. In English law, the wife's right derives from implied agency[163] and, as such, the courts are compelled to examine critically all the relevant facts to ascertain whether, in each particular case, the husband had in fact authorised his wife to act as his agent. Marriage and cohabitation only raised a *prima facie* presumption of a mandate authorising the wife to act as the agent of her husband,[164] but this ostensible authority could be rejected by the husband on proof that his authority did not in fact exist. It was then left to the courts to decide the issue on a consideration of all the relevant evidence.[165] The essential point to note, then, is that in English law the husband is at liberty to revoke the authority vested in his wife, provided of course he first notifies third parties who had been trading with her in the past.[166]

In the Roman-Dutch law, however, a married woman's right to pledge her husband's credit for necessaries derives from the fact of marriage. It is an invariable incident of marriage, and as such it cannot be excluded even by antenuptial contract.[167] It is a right acquired by the wife irrespective of whether the marriage is contracted in or out of community of property.[168] Consequently,

162. Voet 23.2.46; Van der Keesel 1.5.23; Grotius 1.5.23; Groenewegen *ad. cod.* 4.12.6; *Lalchand* v. *Saravanamuttu* (1934) 36 N.L.R. 273

163. Halsbury, XIX (3rd ed.) sec. 1408. This was also the view of the early South African cases. See for instance *Janion* v. *Watson and Co.* (1885) 6 Natal L.R. 234; *Rautenbach* v. *Groenewald* 1911 T.P.D. 1148 at 1150

164. *Debenham* v. *Mellon* (1880) 6 App. Cases 31.

165. *ibid. per* Lord Blackburn.

166. *id.* at p. 33. See also Halsbury, XIX (3rd ed.) sec. 1412.

167. H. R. Hahlo, *The South African Law of Husband and Wife* (4th ed. Cape Town 1975) p. 169

168. *ibid.*

so long as the common household is in existence the husband is presumed to have tacitly relinquished the management of the household to his wife, who has the authority to contract for necessaries incidental to the management of the common household.[169] Quite unlike the position in English law, therefore, in the Roman-Dutch law the husband has no right to repudiate his wife's authority so long as the common household is in existence. Consequently, it is not open to a husband to plead in defence that he had provided his wife with an adequate allowance,[170] or that the manageress of the household is not in fact his lawful wife but a mistress.[171]

If, however, the spouses are living apart, there is a *prima facie* presumption that the wife's authority is extinguished, and it becomes necessary to ascertain the nature of the separation. If the common household is terminated as a consequence of divorce, the wife's authority comes to an end,[172] but if the separation is *de facto*, the nature of the separation, that is, whether it was by mutual agreement or brought about by the matrimonial misconduct of one spouse, becomes a relevant item of evidence. If, for instance, the wife was responsible for the termination of the common household, she loses the right to pledge her husband's credit.[173] On the other hand, if the husband was the deserter, or if the parties had separated by mutual consent, the wife's right to pledge her husband's credit is left unimpaired.[174] But in this situation the legal basis of her right undergoes a significant change, and subsequent to a *de facto* separation, the wife would contract not as manageress of the common household, which in fact would have ceased to exist, but rather as a means of enforcing her hus-

169. See *Kruger* v. *Kruger* 1980 (3) S.A. 283 at p. 287

170. *Reloomel* v. *Ramsay* 1920 T.P.D. 371

171. H.R. Hahlo, *op. cit.*, p. 170

172. See *Thompson* v. *Model Steam Laundry Ltd.* 1926 T.P.D. 674 where the parties, though divorced, continued to live in the common household and the court held that the former husband was estopped from disclaiming liability to traders who had supplied her with necessaries.

173. Voet 24.2.18; Van Leeuwen, *Cen. For.* 1.1.15, 19; *Bing and Lauer* v. *Van der Heever* 1922 T.P.D. 279

174. Voet 24.2.9; Van Leeuwen, *Cen.For.*, 1.1.15, 14; *Excel* v. *Douglas* 1924 C.P.D. 472 at pp. 480-1; *Behr* v. *Minister of Health* 1961 (1) S.A.629

band's obligation of support, which of course he cannot evade because of his own wrongdoing. It follows, therefore, that in this situation it is a reasonable defence for the husband to plead that he has provided his wife with adequate maintenance and that as such she is prohibited from pledging his credit.[175] Professor Hahlo submits that the wife's authority rests on *negotiorum gestio.*[176]

While the common household is in existence, there is authority in Roman-Dutch law for the view that the husband could, for good cause, petition court for a judicial interdict to restrain his wife from exercising her contractual right as manageress of the joint establishment.[177] There is, however, no authority for this in the modern law. The Sri Lankan courts have considered the question whether a disclaimer of liability, made by the husband to the trader, will suffice to exempt him from liability for his wife's trade debts. In *Lalchand* v. *Saravanamuttu*[178] the plaintiff sued the husband for purchases made by his wife. The husband, however, pleaded that in consequence of her extravagance he had notified various firms with whom his wife had had dealings, not to give her credit. He further claimed that he had given her an adequate allowance for her maintenance. Garvin S.P.J., however, held that since the goods supplied to the wife were necessaries, when viewed in relation to the station in life of the couple and the nature and quantity of goods, the husband was nevertheless liable to the trader. It appears, therefore, that so long as the common household is in existence and the goods supplied are deemed to be household necessaries, the husband will be liable notwithstanding his attempts to disclaim liability. This view, it is submitted, is consistent with the principle that the wife's authority is an invariable consequent of marriage and may be distinguished from the English law where the wife's right derives from implied agency which can be freely revoked.

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175. See *Gammon* v. *McClure* 1925 C. P. D. 137; *Contra. Frame* v. *Boyce and Co.Ltd.* 1925 T.P.D. 353.

176. *Gammon* v. *McClure* 1925 C.P.D. 137 at p. 139; *Oelofse* v. *Grundling* 1952 (1) S.A. 338; *Behr* v. *Minister of Health* 1961 (1) S.A. 629; P.Q.R. Boberg, *The Law of Person and the Family* (1977) p. 200; June Sinclair, "The Divorce Act 70 of 1979: The First Reported Case" 1980 (97) *S.A.L.J.* 353.

177. Voet 23.2.46; Grotius 1.5.23

178. (1934) 36 N.L.R. 273

The modern South African Law, too, supports the view that notice to traders does not terminate the wife's right to pledge her husband's credit for necessaries.[179] Nevertheless, it must be pointed out that a public or private notice to traders, of the husband's disclaimer of liability, is not without significance. The trader would then be warned to determine carefully the nature of the goods he supplies the wife. Provided the goods are clearly household necessaries, the husband would continue to be liable notwithstanding the notice of disclaimer, but if, for instance, the items purchased are not in the category of household necessaries and if, in addition, the husband had provided his wife with sufficient maintenance for her personal needs, he could well be exculpated from liability on the reasoning that he had in fact discharged his obligation of support.[180] The most significant outcome of giving notice to traders, then, is that, thereafter, the trader so warned would be giving credit facilities at his own risk. Indeed, from a practical standpoint this could cause much hardship to the wife who might well be unable to find a trader willing to take the risk of extending credit facilities to her.

Of considerable difficulty in this area of the law is the much mooted question: "what constitutes necessaries?" According to established authority the term "necessaries" is a relative one and must be defined in the context of the financial means of the husband and the life style of the spouses which includes their social status and the locality in which they live.[181] Thus, while items such as groceries and clothing may be "necessaries" to an average middle-income group family, jewellery and precious stones may be "necessaries" to an affluent one.[182] Indeed, it is the judge who finally decides what are necessaries and this decision is of paramount importance since on it will hinge the trader's right of recourse against the husband.

179. Wouter De Vos. "Husband's Liability for Household Necessaries Purchased by Wife" 1951 (68) *S.A.L.J.* 424 at p. 427

180. See H. R. Hahlo, *op. cit.* at pp. 178, 180. See also note 127

181. Voet 23.2.46; *Reloomel* v. *Ramsay* 1920 T.P.D.371; *Bing and Lauer* v. *Van der Heever* 1922 T.P.D.279 at 282; *Excell* v. *Douglas* 1924 C.P.D. 472; *Smith* v. *Philips* 1931 O.P.D. 107

182. *Reloomel* v. *Ramsay* 1920 T.P.D.371 at pp. 374, 381

In *Whelan* v. *Whelan* [183] a South African case the court adopted a very narrow interpretation of the term "necessaries." The court had to decide whether the purchase of a motor car was a household necessary since if it was, the wife who had paid a sum of money towards the purchase of the vehicle could have a right of recourse against her husband for the debt incurred. According to the terms of the Matrimonial Affairs Act,[184] if the wife made any payment for the purchase of a household necessary she had a right of recourse against her husband for the full amount paid by her. In other words, this statutory provision made the husband alone liable for all purchases made for the joint household.[185] Steyn J., in *Whelan* v. *Whelan*, appears to have been largely influenced by this statutory right of recourse vested in the wife when deciding whether the purchase of a motor car was in fact a household necessity. Consequently, although there was evidence that the motor vehicle was a necessary mode of conveyance for the husband to travel to work, and that it served the interests of the family and the requirements of the joint household and, therefore, was not a purchase within the framework of a luxurious and expensive style of living, Justice Steyn declared that "An unconditional right of recourse by the wife against the husband was created by section 3 of the Act and naturally such a variation of the common law must be restrictively interpreted ... therefore the liability of the husband does not extend beyond those necessaries which a wife would be entitled to purchase for the joint household, without the consent of her husband. If such a restrictive interpretation was not given to the section, it would be possible to conceive of nearly unlimited extensions. If a motor car was regarded as a household necessity for the husband to go to work, the tractor could be regarded as a necessity for the farmer to carry out his work. In this case I am satisfied that the purchase of a motor car was not a necessity for the joint household and the claim of the wife against the husband to recover the amount paid by her must fail." [186]

183. 1972 (4) S.A.306

184. No. 37 of 1953, sec. 3 proviso.

185. This provision was amended in 1976 and the spouses were made liable on a *pro rata* basis according to his or her contribution. See Matrimonial Affairs Act No. 37 of 1953, amended in 1976, section 3(2).

186. 1972 (4) S.A. 306 at p. 308

It must be pointed out that subsequent to 1976 liability of the spouses is determined on a *pro rata* basis, consequently, in the modern South African law there is no justification for the adoption of such a restrictive interpretation.

There are two different standards which that may be adopted to determine the question—what constitutes necessaries—and thereby the liability of the husband to the trader. One could either view the question from a purely subjective standpoint and take into consideration only those factors which were in fact within the knowledge of the trader. Alternatively, one could adopt an objective criterion and consider as relevant all the circumstances of the case irrespective of whether the trader was aware of these factors or not.[187] The choice between the alternatives set out above, in reality, amounts to a decision to favour either the trader or the husband; in other words, the choice is a mutually exclusive one. To illustrate this further if, for instance, the items purchased by the wife appears to the trader to be necessaries though in fact they are not because the husband had already provided her with ample stocks of the same, the trader's right of reimbursement would depend largely on which test the court chooses to adopt. If for instance the court views the question from a subjective standpoint the husband will entail liability notwithstanding that the purchases are not in fact necessaries, on the reasoning that the trader did not know, and had no means of knowing that the wife was amply supplied with the items purchased. On the other hand, objectively determined the husband could well disclaim liability on the premise that the purchases were not "necessaries."

In relation to the application of these alternative criteria, a consistent policy is not reflected in the South African Law. For instance, the ostensible standard of living of the spouses has been recognised by some authorities as the criterion for deciding whether the items purchased are necessaries or not.[188] This clearly favours the trader, whose claim, having supplied the wife with a luxury item well beyond the means of the family, cannot be met with the defence that he should have known that

187. Wouter De Vos, "Husband's Liability for Household Necessaries Purchased by Wife" at p. 424

188. See Wessels, *Contract*, sec. 742

the item supplied was not, in fact, a necessary. Similarly, the existence of the common household is all that the trader is expected to determine, and factors such as the irregularity of the union,[189] or that the spouses may even be divorced, though living together,[190] are factors that may not be considered in the South African law. Likewise, there is authority for the view that the fact that the husband had provided the wife with an adequate allowance to purchase necessaries cannot be raised as a defence against a trader's claim because "...how can the shopkeeper tell that a wife was given money to spend on a dress but that she spent it at the racecourse?" [191]

Co-existing with the application of these purely subjective tests is evidence of the adoption of an objective test in the South African law. Thus evidence that the husband had supplied his wife with the particular commodity she too had purchased has been accepted as a valid defence available to a husband. According to Wessels J.P. in *Reloomel* v. *Ramsay* [192] "No doubt if it can be shown that Mrs. Ramsay had ample store of silk and other dresses, and that she had no need to purchase more, that would be an element in determining whether the purchase was or was not reasonable"; again Murray J. in *Voortrekker Winkels (Ko-operatief) Bpts* v. *Pretorius* [193] declared that although the articles purchased might be thought of as necessaries "it is still open to the husband to show that in view of the amount of articles already possessed by the husband or its members, the articles purchased were in fact not necessary".

In an overall evaluation of the two tests it is submitted that one must determine initially, which of the two parties, namely, the trader or the husband, is more deserving of protection. On the one hand it may be argued that if the trader voluntarily incurs the risk of giving credit facilities to a married woman, there is no cogent reason why the law should endeavour to guarantee that he

189. H. R. Hahlo *op. cit.* p. 170
190. *Thompson* v. *Model Steam Laundry Ltd.* 1926 T.P. D. 674
191. *Reloomel* v. *Ramsay* 1920 T.P.D. 371 at p. 377 *per* Wessels J.P. cited in Hahlo, *op. cit.* p. 173
192. 1920 T.P.D.371
193. 1951 (1) S.A.730

does not suffer financial loss. On the other hand there appears to be little or no justification for permitting a husband to resile from his fundamental obligation of support by affording him ways and means of disclaiming liability. Indeed, when the choice is between a husband on the one hand, and a trader on the other, and the issue is one of liability for the debts incurred by the wife, the balance appears to tilt very definitely in favour of the trader. Why should he who has undertaken the responsibility of supplying a household with necessities, have to suffer the additional hardship of financial loss? In view of the tremendous risk the trader runs, anyway, when giving credit facilities in such circumstances, the law should endeavour to protect the trader from incurring a loss so that the common law right of a married woman to pledge her husband's credit for necessaries is made meaningful and effective. But if, as in early English law, the trader is made to give credit at his own peril, it would render this right meaningless because it would be hard to come by a trader adventurous enough to risk extending credit facilities to a married woman. [194]

If then we accept that the subjective test should be adopted, it is submitted that there is no real hardship to the husband as it is well within his power to advertise a disclaimer of liability addressed either to the individuals known to trade with his wife or by way of a general advertisement. If, having supplied his wife with household necessaries or with adequate maintenance, he notifies the traders, he would be effectively warning tradesmen not to make supplies without first ascertaining whether they are in fact necessaries or not. In this situation the trader cannot be heard to complain because he has been warned to trade at his own risk and if, having satisfied himself that the items ordered are in fact necessaries, he supplies the wife with them, the husband would be compelled to satisfy the debt incurred. Consequently, where notice has been given of a disclaimer of liability, specially if made to the particular trader concerned, the adoption of an objective test could not be assailed, but in all other situations the subjective criterion should prevail.

194. It is precisely for these reasons that the common law agency of necessity has been abolished in the English law by the Matrimonial Proceedings and Property Act 1970, s. 41. See Olive M. Stone, *Family Law* (London 1977) p. 91

(ii) **Pro Semisse Liability**

During the subsistence of a valid marriage[195] and a common household if a wife makes necessary purchases there is a fundamental presumption that she binds her husband's credit and that he is primarily liable for the debt incurred.[196] Notwithstanding the husband's liability, however, it has been queried whether the wife, too, is liable for the debt *pro semisse*.

In the Roman-Dutch common law, if the marriage was in community of property and the husband's marital power was retained, the debt incurred by the wife was considered a common debt which bound both spouses. As such, although the husband satisfied the debt in full during the marriage,[197] on a dissolution of the marriage by divorce or death, he had a right of recourse for half the debt from his former wife or from her estate.[198]

If, however, community of goods as well as of profit and loss were excluded by antenuptial contract, on dissolution of the marriage the wife would still be liable for half the debt incurred for necessaries purchased for the sustenance and common use of the family, but with one important difference, namely, that her right of recourse against the husband or his heirs would be for the full sum paid by her.[199] Departing thus from a marriage contracted with community of property and of profit and loss, where it was the duty of both spouses to share equally in all postnuptial debts, if marriage was out of community, the wife was still liable to be sued for half the debt although she retained the right of reimbursement from her husband for the full amount paid.

Attention must be drawn at the very outset to the two distinct aspects of the above proposition. One pertains to the wife's obligation towards third party creditors. Consequently, the rule

195. So long as the couple are living together this presumption will apply. "Valid" in this context does not necessarily connote a legally valid union. An appearance of marriage is sufficient. See Hahlo *op.cit.* pp. 170-171

196. *Clarkson* v. *Van Rensburg* 1951 (1) S.A. 595 at p. 599 *per* Price J.

197. Since the husband would be the administrator of the common fund.

198. See Hahlo, *op.cit.* p. 175

199. Groenewegen ad. cod., 4.12.4; Voet 23.4.52; Van der Keesel, *Th.* 99

that she is liable *pro semisse* in relation to the creditors. The other concerns the adjustment of the rights of parties *inter se*. For the purpose of clarity and convenience it is proposed to deal with these two aspects of the *pro semisse* rule separately.

(*a*) Wife's Liability to Traders

According to Professor Lee[200] the *pro semisse* rule may be defined thus: "Whichever of the two spouses is the contracting party, the other spouse is at all events liable to creditors for half of a debt validly contracted for household purposes independently of any private arrangement between the spouses, whether by antenuptial contract or otherwise." This is a well established principle in the South African Law, too, and applies irrespective of whether the debt is contracted *stante matrimonio*, when the spouses are living together, or *stante matrimonio*, when the spouses are living apart. In this latter situation however, the rule is applicable only within certain circumscribed limits. For instance its applicability is dependent on the allocation of blame or responsibility for the disruption of the common household. If, therefore, the wife is guilty of matrimonial misconduct, her authority to pledge her husband's credit would terminate *ipso facto*.[201] However, if the husband is responsible for the termination of the matrimonial home[202] or if the separation is with the mutual consent of both parties,[203] the wife's authority remains unaffected. An important distinction must, however, be noted. So long as the common household is in existence the wife's authority derives from the fact that she is the manageress of the home, but this rationale becomes inapplicable no sooner the home disintegrates and, therefore, when the spouses cease to live together the wife's authority is restricted to the extent to which her husband is obliged to maintain her in view of his common law obligation of support. This difference has far-reaching practical consequences because, when a

200. "A Married Woman's Contracts in Relation to Household Necessaries" 2 (1938) *T.H.R. - H.R.* 89 at p. 91

201. Voet 24.2.18; *Bing and Lauer* v. *Van der Heever* 1922 T.P.D. 279; *Excell* v *Douglas* 1924 C.P.D. 472

202. Voet 24.2.19; *Gammon* v. *Mc Clure* 1925 C.P.D. 137; *Behr* v. *Minister of Health* 1961 (1) S.A.629

203. *Excell* v. *Douglas* 1924 C.P.D. 472 at pp. 480-1; *Behr* v. *Minister of Health* 1961 (1) S.A. 629

married woman contracts for household necessaries, so long as the goods purchased are deemed to be necessaries, the husband is obliged to satisfy the debt. Where the wife pledges the husband's credit as a means of enforcing his duty of support, however, she is necessarily restricted in the purchases she makes in that they would then be in the nature of personal rather than household, necessaries. Moreover, if, for instance, the husband has provided his wife with sufficient maintenance, her right to pledge his credit ceases. In Sri Lanka, the Civil Procedure Code states that if, consequent to a judicial separation, alimony ordered to be paid is not paid by the husband, he shall be liable for necessaries supplied for the wife's use.[204] Consequently, from the point of view of the trader, in both situations set out above, he can sue the husband *in solidum* and, failing to recover the money, he can proceed against the wife for half the debt.

Various theories have been enunciated to explain the basis of the *pro semisse* liability of the wife. According to Stratford J. in *Van Rensburg* v. *Swersky Brothers*[205] "I can only conceive the answer to be this, that when either spouse buys necessaries for the common household, the vendor is entitled to hold each party liable for half the cost, on the assumption, I think, that because of the nature of the things bought, it is a joint purchase." It is submitted, however, that this is not necessarily an acceptable criterion because it does not explain the liability of the wife for say purchases of clothing exclusively for her husband's use or, for that matter, any purchase made or service ordered for his exclusive benefit. Goods purchased for the children or for the home may be treated as "joint purchases" but it may, in some instances be difficult to label items purchased for the husband alone in the same way although they are household necessaries.[205a] Consequently, the inherent nature of the items purchased may not in all instances serve as a suitable basis on which the wife's liability rests.

Lee, on the other hand declares that the rule is founded "upon the very reasonable principle that both spouses should be answer-

204. Civil Procedure Code (Incorporating amendments upto 1977) sec., 610
205. (1923) T.P.D. 225 at p. 259.
205a. See H. R. Hahlo, *op. cit.* p. 172

able to creditors for debts incurred for the benefit of the joint establishment. It may be regarded as a case of presumed enrichment."[206] De Vos,[207] however, disputes this rationale by pointing out that even if one concedes that the wife has been enriched as a consequence of the purchases made, her liability to the trader cannot rest on this premise because she cannot be said to have been enriched at the *expense* of the trader. According to this argument, then, it is in fact the husband who is enriched at the expense of the trader because the trader has fulfilled an obligation vested in the husband by acting as his representative and supplying the wife with the necessaries. If the husband so enriched at the expense of the trader, becomes liable to him, there is no satisfactory explanation for the wife's liability *pro semisse*. Moreover, De Vos points out that even if the circumstances are such that the obligation of support is vested in the wife—who, after all, has a reciprocal obligation of support in the common law—and if she was to pledge her husband's credit and then desist from making her contribution towards the purchases, she would still be enriched at the expense of her husband and not at the expense of the trader because it is the husband's obligation to pay the creditor and to then demand a contribution from his wife.

Peiris[208] however, analysing the reasons adduced by De Vos, contends that the arguments set out above do not give adequate consideration to the wife's concomitant obligation to support her husband. He rightly distinguishes between the two separate aspects of this rule, namely, that which entails the liability of the wife towards traders, on the one hand, and the adjustment of rights between the spouses founded on the obligation of support, on the other.[209] Having pointed out the need to distinguish clearly between these two facets of the *pro semisse* rule, he points out that in relation to the wife's liability towards traders, it is

206. See R.W.Lee, "A Married Woman's Contracts in Relation to Household Necessaries" 2 (1938) *T.H.R.* - *H.R.* 89 at pp. 96-97

207. De Vos, "Once Again, The Liability of a Woman Married with Antenuptial Contract For the Price of Household Necessaries." 1956 (73) *S.A.L.J.* 70 at pp. 72-73

208. G.L.Peiris, *Some Aspects of the Law of Unjust Enrichment in South Africa and Ceylon* (Colombo 1972) p. 293

209. *id.* at p. 293

not difficult to see that there may well be enrichment of the wife at the expense of the trader where the obligation of support is vested in her. Having thus conceded that the liability of the wife may well be founded on the rule of unjust enrichment, Peiris declares "but enrichment is not an indispensable requirement of liability in this context. If it were so, the wife would be entitled to evade liability by establishing the absence of a benefit accruing to her from the contract. It is submitted that, in circumstances where there is no enrichment of the wife, imposition of liability *pro semisse* on her for household debts can be justified on the basis of the principle of reciprocity which characterises the legal obligation undertaken by the spouses to support their marriage. It is submitted, therefore, that the reciprocal duty of support is the true foundation of liability since this is applicable to all situations in which liability *pro semisse* is imposed on the wife whether there is enrichment or not."[210]

It must be pointed out, however, that the wife's right to pledge her husband's credit for household necessaries is wider in scope and distinct in some aspects from the common law obligation of support. For instance, when the spouses are living together in the matrimonial home, even if the husband has paid an adequate allowance to his wife, thereby fulfilling his obligation of support, she can nevertheless pledge his credit for necessaries.[211] Moreover, even in relation to the items that may be purchased in the category of household necessaries it is evident that these need not necessarily coincide with purchases that may be made when enforcing the husband's obligation of support. For example, clothing for the husband, furniture for the house, and the services of plumbers and carpenters would clearly come within the purview of household necessaries although they cannot be labelled as purchases made because of the spouse's obligation of support. Conversely, cost of litigation and legal assistance,[212] cost of education,[213] or renting a house,[214] would be chargeable to the

210. G. L. Peiris, *op. cit.* p. 295

211. *Reloomel* v. *Ramsay* 1920 T.P.D. 371 at p. 377. See also H. R. Hahlo, *op.cit.* p. 173, note 87

212. *Lyons* v. *Lyons* (1923) T.P.D. 345

213. See W.G.M. Seymour, "A Wife May Eat Her Cake and Have It" 1967 (84) *S.A.L.J.* 396 at p. 399

214. *Stacey* v. *Stacey* 1976 (4) S.A. 365

husband as an incident of support but not as household necessaries.[215] It must, of course, be pointed out that in the event of a *de facto* separation when the wife's right to pledge her husband's credit is restricted to personal necessities, it has been clearly established that "her authority to contract on his behalf is 'co-extensive and co-terminous' with his obligation to maintain her."[216]

It would appear, then, from the foregoing that there are certain inherent limitations to a rationale which predicates that the wife's liability *pro semisse* rests on her reciprocal obligation of support. Moreover, it is submitted that although this rationale is entirely consistent with the Roman-Dutch common law principles of support—where a sex-based discrimination is not discernible in the spousal obligation, the respective needs of the spouses being the only criterion upon which the duty is founded,[216a]—according to the statute law of modern Sri Lanka a wife's obligation to support her husband comes to the forefront only when her "husband, who through illness or otherwise, is unable to maintain himself." [216b] This, then, constitutes a further limitation to the rationale set out above.

It is submitted that the wife's liability for half the debt is founded not on a rule of law pertaining to the rights and obligations of the spouses *inter se* but rather on the paramount need to safeguard the interests of the trader who after all is the primary beneficiary from the application of this rule. The *pro semisse* rule is a special and equitable remedy given to the trader to sue the contracting party *in solidum* so that, if his claim should fail because for instance, the debtor is insolvent, he can proceed against the non-contracting spouse for half the debt. This then amply explains the question raised by De Vos: "Why should the wife's liability be fixed in advance as being exactly one half of the price of necessaries supplied?"[217] The trader clearly benefits from this rule

215. See H. R. Hahlo, *op.cit.*, pp. 172, 181.
216. H. R. Hahlo, *op.cit.* p. 178
216a. Voet 25.3.8
216b. Married Women's Property Ordinance No. 18 of 1923 sec. 26
217. De Vos, "Once Again, The Liability of a Woman Married with Antenuptial Contract For the Price of Household Necessaries" at p. 73.

for if he fails to recover the total amount, he still has a right to at least half the debt. Indeed, one can justify the need to protect the trader who after all should not be made to bear the consequences of dissension in domestic relations. Moreover, this rationale is entirely consistent with, and lends support to, the contention that when determining the liability of the husband for necessaries supplied, the extent of the trader's actual knowledge of the facts, and not the facts objectively viewed, should be the governing criterion.

(*b*) The Wife's Right of Regressus Against Her Husband

As regards the second issue, namely, the wife's right of recourse against her husband for any sum of money paid by her, De Vos is of the opinion that except where the duty of support is vested in the wife, because the husband is in indigent circumstances, in all other instances the husband alone is liable *ex contractu* to creditors for necessaries supplied; as such, the wife has a right to reimbursement for the total sum paid by her. This view was echoed by Van der Heever J. in *Wiebel* v. *Wecke and Voigts*.[218] Scholtens, on the other hand, submits that the wife's right of *regressus* is limited by the terms of the antenuptial contract entered into by the parties. In other words, her right of recourse will depend on her having paid more than her share as determined by the antenuptial contract.[219] According to De Vos, however, the liability of the wife to assist her husband in household necessaries cannot be stipulated in an antenuptial contract, this right being an invariable obligation of marriage which neither spouse can deviate from.[220]

The total right of reimbursement advocated by De Vos found expression in the Matrimonial Affairs Act No. 37 of 1953. Section 3 of the statute declared that in respect of household necessaries a husband and wife married out of community of property are jointly

218. (1933) S.W.A. 123. See also De Vos "Liability of a Woman Married With Antenuptial Contract For the Price of Household Necessaries" at p. 71.

219. Scholtens, "The Liability of Married Women For Household Necessaries" (1954) *Butterworth's South African Law Review*, 183 at p. 195

220. De Vos, "Liability of a Woman Married with Antenuptial Contract For the Price of Household Necessaries" at p. 73

and severally liable and according to the proviso "if the wife pays any such debt or part thereof, she shall have a right of recourse against the husband for the full amount paid by her."[221] This principle was to apply even if the creditors brought the action after the marriage was terminated the reasoning being that once liability was fixed during the subsistence of the marriage, it was not affected by the subsequent termination of the marriage.[222]

On this basis the South African courts gave the wife an unqualified right of reimbursement from her husband.[222a] Indeed, the cardinal feature of this proviso was that it ran counter to the fundamental principle of a reciprocal duty of support, and caused an outcry of protest. Referring to the proviso Hahlo declared: "It is to be hoped that our courts will say that this result is so absurd that it cannot have been intended by the Legislature, and that the rule about recourse applies only in the normal case, where the duty of support is on the husband."[223] In similar vein, Scholtens pointed out that in the generality of circumstances the spouses' standard of living was determined and based on their combined income and this necessarily involved the wife making her contribution towards the household expenses; therefore, "On what reasonable grounds should the wife in this case be allowed an unrestricted right of recourse against her husband?"[224] He thus branded it the result of "hasty and unpremeditated Legislation" and "wholly ill-conceived."[225] Likewise, Professor O Khan-Freund declared that "the unity of the household as a community of life and a community for the purposes of using and consuming commodities, including money

221. See the proviso to sec. 3

222. *Gilberg* v. *Duncan Taylor (Pty.) Ltd.* (unreported) referred to by H. R. Hahlo, in "Liability For Household Necessaries After Divorce" 1963 (80) *S.A.L.J.* 324.

222a. *Foord* v. *Vardy* No. 1967 (1) S.A. 692; *Chouler* v. *Chouler* 1973 (4) S.A 218; *Engelbrecht* v. *Engelbrecht* 1974 (3) S.A. 673; *Bohlander* v. *Bohlander* 1974 (2) P. H. B. 10; *Stacey* v. *Stacey* 1976 (4) S.A. 365; *Halgreen* v. *Halgreen* 1977 (3) S.A. 34; *Van Lear* v. *Van Lear* 1979 (3) S.A. 1162; *Dys* v. *Dys* 1979 (3) S.A. 1170

223. See *The South African Law of Husband and Wife* (3rd ed. Cape Town 1963) p. 161.

224. "The Liability of Married Women For Household Necessaries" 1954 *Butterworth's South African Law Review*, p. 196

225. *id.* at p. 196

has been neglected by the law, except where the law is compelled to ascertain the degree to which the members of the household maintain each other and are dependent on each other. Here it was impossible to overlook the basic fact that they all contribute to, and are maintained out of a common fund, and it was impossible to determine the mutual relationship between any two given members of the community except in terms of what the whole community receives and what it spends."[226] According to Seymour, "perhaps the most tragic and revolutionary consequence is the possible effect of the proviso on every middle or lower-income house where the wife contributes to the common household expenses. If the obligation created by the proviso to section 3 is given the status of being an invariable consequence of marriage by the courts, it will create a gross injustice on the husband when he and his wife live on their combined incomes. As they use both his and her income, neither will have any left, but at the end of every month he will owe his wife what she has contributed: he will thus incur a monthly net debit balance. This will be an ever increasing millstone round his neck. On his retirement only his pension will be safe from the accumulated debt he owes his wife. He dare not save capital unless he can rely on her not to claim reimbursement for her contributions against his executor. If she dies first, he will be at the mercy of her heirs to whom her right of recourse will automatically pass. He is likely, therefore, to die bankrupt though he may not suffer at his wife's instance the indignity of sequestration ... To heighten the tragedy, it will be the wife who, willy-nilly, will be the author of her husband's plight."[227] He concludes that "the mischief for which the Matrimonial Affairs Act sought to provide was to minimise the inequality of spouses in the marriage relationship. The proviso exaggerates it."[228]

This tortuous legislation,[229] which was labelled harsh and inequitable to husbands, was amended in 1976. The

226. "Inconsistencies and Injustices in the Law of Husband and Wife" 1953 (16) *M.L.R.* 164

227. "A Wife May Eat Her Cake and Have It" 1967 (84) *S.A.L.J.* 396 at p. 400

228. See De Vos, 1962 *Acta Juridica* p. 144 at p, 151; *Engelbrecht* v. *Engelbrecht* 1974 (3) S. A. 673 at 675, *Whelan* v. *Whelan* 1972 (4) S. A. 306.

229. See House of Assembly Debates, 17th Feb. 1976, Vol. 60.

provision relating to the joint and several liability of spouses was retained[230] but the proviso of the 1953 Act was deleted and instead the amendment declared that a spouse married out of community of property was liable to contribute *pro rata* according to his or her income in respect of necessaries for the joint household.[231] It also gave a spouse a right of recourse against the other spouse in so far as he or she has contributed more in respect of necessaries for the joint household than was provided for by sub-section 2.[232]

In the Sri Lankan law, there is no direct evidence of the application of the *pro semisse* rule of liability. Although the case law makes reference to the liability of the wife for contracts *in re oeconomica*, no mention is made of the extent of liability. In *Lalchand* v. *Saravanamuttu*[233] a married woman operated an account in her own name pledging her credit as a married woman. On a consideration of the relevant facts Garvin S.P.J. concluded that the plaintiff, who was suing both the husband and wife, could succeed in his claim. In the course of his judgment Garvin S.P.J. referred to the fact that a wife who contracted for household necessaries bound both herself and her husband. There was, however, no reference whatsoever to the availability or otherwise of a right of *regressus* against the husband.

In *Molyneux Modes* v. *Muttukumaraswami*,[234] too, the plaintiff filed action against both husband and wife for purchases made by the wife. The husband could not be served with summons because he had left the country and the case was fixed for trial against the wife alone. The plaintiff's case was dismissed on the reasoning that a wife who pledged her husband's credit did not entail liability and that the husband alone was liable for the debt. Soertsz A.J. upheld this contention but pointed out that the husband was not always the one liable for household necessaries. Much depended on the capacity in which the wife entered into the contract. In other words, he opined that a wife could bind herself

230. Sec. 3 (1)
231. Sec. 3 (2)
232. Sec. 3 (3)
233. (1934) 36 N.L.R. 273
234. (1935) 14 C.L.Rec. 213

exclusively, alternatively she could act as her husband's agent and bind only his credit. On occasions she could bind both herself and her husband.

It is submitted that this case, too, does not lend support to the *pro semisse* rule of liability which holds that irrespective of whether the wife contracts in her own name or in the name of her husband, if the purchases made are household necessaries, both spouses are liable, the contracting party *in solidum* and the non-contracting party *pro semisse*. Moreover, the wife's right, if any, to reimbursement, was not discussed.

Molyneux Modes v. *Muttukumaraswami* was decided subsequent to the enactment of the Married Women's Property Ordinance.[235] Consequently, Justice Soertsz had to determine the impact of this statute on the common law right of a married woman to contract for household necessaries. The 1923 statute declares that when a married woman enters into a contract other than as her husband's agent, she binds her separate property.[236] According to Soertsz J. the exclusive liability of the husband in the case before him was founded on the fact that the wife acted as her husband's agent.

It is submitted, however, that when a married woman contracts for household necessaries she binds her husband not on the basis of agency but rather because it is an incident of marriage. In other words, by virtue of the fact of marriage, the existence of the common establishment and the nature of the goods purchased, she is deemed to bind him by her contract. Consequently, it cannot be contended that when a married woman contracts *in re oeconomica* that she is acting as her husband's agent as envisaged in the Ordinance. In fact, this is a common law rule which is not governed by the terms of the Ordinance and, as such, neither conflicts with nor creates an exception to the statutory provision.

An interesting case on this point is *Sonnandara* v. *Kuruna*[237]

235. No. 18 of 1923
236. Sec. 5 (3)
237. (1927) 7 Leader L.R. 214

where the plaintiff, a jeweller, sued his wife for the price of jewellery sold and delivered to her. The wife, however, contended that the action could not be sustained because her husband had not been made a party to the action. Ennis, J. upheld this plea and declared that the onus was on the plaintiff to establish that the wife had derived some benefit from the transaction if the plaintiff was to "succeed even in part in this claim." The plaintiff's action was dismissed for lack of evidence of a benefit accruing to the wife. This case appears to recognise a creditor's right to claim a part of the debt from the wife provided, of course, that she had benefited from the purchases made. Indeed, the nature of the items purchased is important for the application of the *pro semisse* rule, but it must be noted that the emphasis should properly be not on the benefit that might accrue to the wife, but rather on whether the goods were necessary for the benefit of the household. Moreover, this case refers to the wife's possible liability to a part of the debt, while the *pro semisse* rule fixes the liability of the wife as being half the value of the debt incurred. Consequently, the decision in this case, too is not authority for the application of the common law rule in Sri Lanka. It must also be pointed out that there is no indication from the decided cases how the debt is to be ultimately apportioned between the spouses.

C. A Married Woman's Contracts as a Publica Mercatrix

In the Roman-Dutch common law, a further exception to the contractual disability of a married woman was the right vested in her to bind both herself and her husband[238] when she incurred a debt as a public trader. When a married woman engaged in a public trade or business she was presumed to be acting with the consent of her husband,[239] and, therefore, had *locus standi in judicio*[240] and entitled to sue and to be sued alone.[241]

238. *Abdul Cader* v. *Baba* (1859) 8 Lorenz Rep. 207

239. Grotius 1.5.23; Schorer Note 22, 298; Voet 23.2.44

240. *Van Eeden* v. *Kirstein* 1880 Kotze 182 at 184; *Mc Intyre* v. *Goodison* 1877 Buch. 83; Mc *Cullough* v. *Ross* 1918 C.P.D. 389 at pp. 392, 395.

241. *Justin Fernando* v. *Don Jacobis Appu* (1879) 2 S.C.C. 204; C. R. Trincomalee No. 3245 (1877) Ramanathan Reports 356; *S.* v. *Tilhoele* 1979 (2) S.A 328; *Davidson* v. *Sivertsen* (1905) 22 S.C. 158; *Mc Cullough* v. *Ross* 1918 C.P.D. 389; *Grobler* v. *Schmilg and Freedman* 1923 A.D. 496

The husband, of course, could avoid liability in these circumstances by rebutting the presumption that his wife was acting with his consent and establishing that in fact he was ignorant of her business transactions.[242] There is evidence in the Sri Lankan law that the courts generally require cogent proof of a public trade before accepting the liability of a married woman for trade debts. Thus in *Somasundaram Chetty* v. *Banda*,[243] an early Sri Lankan decision, the second defendant, a married woman, was sued together with her son on a joint promissory note made by them in the plaintiff's favour. According to the plaintiff the second defendant was liable because she was a *publica mercatrix*. It appeared from the evidence led that the second defendant and her husband lived together in a house where the second defendant had set up a boutique in which she sold hoppers, betel, plantains, fruits and cigars; in other words, a "hopper boutique". Wendt J. declared that "it is startling to find a married woman who keeps such a boutique dignified with the title of *publica mercatrix* and, therefore clothed with authority to bind not only herself but her husband as well by her obligations". He concluded that it was much more plausible that the "trade" was the husband's and that the wife was merely his saleswoman, and that there was insufficient evidence to establish that the business was worthy of being described as a *publica mercatura*. Even if it was established that the wife was a *publica mercatrix*, a condition precedent to her liability was proof that the obligation was incurred *mercaturae intuitu* in respect of the trade.[244] Moreover, the husband should have consented to the particular kind of business, and a general consent would not suffice.[245]

In the common law, if the spouses were married in community of property the trade debt incurred by the wife was considered a joint debt on the common estate.[246] Likewise, all profits earned enriched the common fund.[247] An interesting

242. *Ex parte Vally* 1930 C.P.D. 304 at p. 305
243. (1903) 6 N.L.R. 253
244. Voet 23.2.44
245. Voet 23.2.44
246. *Somasundaram Chetty* v. *Banda* (1903) 6 N.L.R. 253 at p. 254; *Matson* v *Dettmar* 1917 E.D.C. 371; *Egden* v. *Goldwin* 1946 T.P.D. 98; *Smith and Walton* (S.A.) *Pty. Ltd.* v. *Hold* 1961 (4) S.A. 157
247. H. R. Hahlo, *op.cit.* p. 184

decision is the recent South African case *S.* v. *Tilhoele.*[248] The appellant's wife was a woman married in community of property and she was a public trader conducting a cafe business on her own. The appellant had been found guilty of thieving the money earned from this business. The court, therefore, had to decide on the liability of a spouse married in community of property for theft of the common estate. There is substantial authority in South African law for the view that the husband, as administrator of the joint estate, cannot steal from the common fund, but the same rule does not apply *mutatis mutandis* to the wife.[249] The basis of this distinction is said to derive from the fact that the husband, and not the wife, has the power of administration over the joint property; as such, the goods are placed at his disposal and he cannot, therefore, be held guilty of theft of common property. Hiemstra C.J. reiterating this view declared that a thieving husband was beyond the reach of the criminal law. However, he opined that in relation to certain categories of movable property which are excluded from the ambit of the husband's control by the Matrimonial Affairs Act,[250] he could be found guilty of theft because he did not exercise any control over such property although the spouses were married in community of property.[251] Nevertheless the earnings of the wife from her trade were not within the statutory exception and were, therefore, within the control of the husband.[252]

The contractual rights of a married woman in Sri Lanka have undergone several significant changes. In 1876 community of property was abolished[253] and consequently any wages or earnings of a married woman which was acquired or gained by her in any employment, occupation or trade in which she was engaged, or which she carried on separately from her husband, were deemed

248. 1979 (2) S.A. 328

249. See Hunt, *Criminal Law and Procedure* (Vol. 2 at p. 593); *R.* v. *Silas* 1958 (3) S.A. 253 at p. 255;
Ramdham v. *R* 1915 N.P.D. 565;
R. v. *Van Vliet* (1892) 9 S.C. 273

250. No. 37 of 1953, sec. 2(1) (a)

251. 1979 (2) S.A. 328 at p. 332

252. *id.* at p. 339

253. Matrimonial Rights and Inheritance Ordinance No. 15 of 1876, sec. 7

to be her separate property.[254] As such, this property was independent of the debts, control or engagements of her husband.[255] Notwithstanding the wife's liability for her trade debts, the Supreme Court in *Manakularatna* v. *Wickremanayake*[256] had to decide whether the husband, too, entailed liability. Counsel for the appellant argued that when marriage was in community of property, the wife's earnings enriched the common estate, and therefore it was reasonable to invest the husband with liability for a debt incurred by his wife. Counsel pointed out, however, that the same rationale could not sustain the imposition of liability in a separate property system.

Lascelles C.J. conceded that this would have been a plausible argument if the husband's liability for his wife's trade debts derived from the fact of marriage in community of property. But this, he submitted, was not the correct position. According to him the liability of the husband stemmed from an entirely different source, namely, the marital power of the husband over his wife; as such, the husband, as curator of the wife, was presumed to have consented to her contracts and was held jointly responsible for her trade debts.

Wood Renton C.J. in a separate judgment reiterated this view and declared that the wording of the Ordinance did not justify the court absolving the husband from liability for debts incurred by the wife as a public merchant.

To determine the validity of this decision it may be useful to examine the position in the South African law, where a marriage is contracted with antenuptial contract excluding community of goods but retaining the marital power. According to Hahlo, in a situation such as this, the wife alone is liable for all her trade debts which become chargeable to the wife's separate estate.[256a]

This view is explicable on the basis that the marital power of the husband has reference to the wife's right to enter into con-

254. Sec. 7
255. *ibid.*
256. (1913) 16 N.L.R. 277
256a. H. R. Hahlo, *op. cit.* p. 184 note 151

tracts with third parties in the course of her trade or business; and in relation to this, it has been accepted that when she contracts as a *publica mercatrix*, it is presumed that she acts with her husband's consent.[257] Indeed, in this situation the husband would continue to administer the wife's separate estate[258] but the spouses separate estates are individually liable for any debts incurred by either spouse.[259] Consequently, the decision in *Manakularatne* v. *Wickremanayake* is questionable. In *Bulner* v. *Kreltzheim*,[260] the plaintiff claimed a certain sum of money as having been lent to the first defendant, a married woman, for carrying on her business as a dressmaker. The second defendant, who was the husband, was also joined in the action, but he contended that he was not liable since he had no knowledge of the transaction. Schneider J. declared that both husband and wife could not be liable for the loan because the liability of the husband arose from the assumption that the wife was his agent in contracting that debt and "it is not possible for both principal and agent to be liable on the same contract".[261] It is submitted that the court should have initially ascertained the proprietary rights of the spouses, in other words, whether the parties were married in or out of community of property. If they were married with community of property, clearly both spouses would be liable because the debt would become a charge on the common estate provided of course that the husband's implied consent had accompanied the wife's trade debt.[262] On the other hand, if the marriage had been contracted excluding community of property, the wife's separate estate would be solely liable for the debt incurred. Schneider J. further declared that there was no evidence that the money was borrowed by the wife in her capacity as agent of her husband. "There are no facts from which the existence of an agency can be inferred."[263] Indeed, if this case was decided according to the common law,

257. See Voet 23.2.44
258. H. R. Hahlo, *op. cit.* p. 293
259. *ibid.* See also *id.* p. 184 note 151; R. W. Lee, and A. M. Honore, *The South African Law of Property Family Relations and Succession* (Durban 1954) p. 84 at p. 90
260. (1922) 23 N.L.R.408
261. *ibid.*
262. H. R. Hahlo, *op. cit.* p. 184
263. (1922) 23 N.L.R. 408

the presumption that the wife was acting as the agent of her husband would have applied provided she had contracted as a public trader, and it would have been the husband's responsibility to rebut this presumption.[263a] Schneider J. appears to have conceded that it was the duty of the husband to disclaim liability and rebut the presumption of consent because he refused to grant the second defendant his costs on the reasoning that the husband "might have made it known more publicly that he was not liable for the debts of his wife incurred for her business".[263b] The decision in this case is open to criticism in that as it was clearly established that the wife was carrying on a public trade or business, the presumption that the husband consented to all contracts entered into in the course of that business should have been properly applied; and in the absence of proof that the husband had disclaimed liability, he should have been jointly liable with his wife for the debt incurred, if the marriage was in community of property. Schneider J. appears to have been of the view that the presumption of agency was restricted only to situations in which the wife contracted for household necessaries or maintenance. In the common law, however, the wife's right to contract as a public trader was not disputed but this principle was not adequately appreciated in the above case.

The Married Women's Property Ordinance[264] emancipated a married woman even further and gave her wide contractual powers thereby excluding the husband's marital power in relation to her contractual rights.[265] After 1923, therefore, a married woman could carry on a trade independent of her husband whose consent was thereafter not a necessary prerequisite for its validity.[266]

Likewise, in the South African law, too, if both community of goods and the marital power are excluded by antenuptial contract the wife has an unfettered contractual right and can

263a. H.R. Hahlo, *op.cit.* p. 153; Voet 23.2.50
263b. (1922) 23 N.L.R. 408 at p. 409
264. No. 18 of 1923
265. See sec. IV. A (ii) *supra*
266. Sec. 5(1)

enter into contracts without her husband's consent.[267]

What then of the *pro semisse* rule? In the South African law for instance how can a trader be expected to know the nature of a customer's marriage and the terms of the antenuptial contract, if any? For this reason it is submitted that in a system like that of South Africa where it is possible to contract a marriage in or out of community of property and since very different consequences flow as regards the liability of the spouses for each other's debts depending on the terms of the antenuptial contract, perhaps in all instances when a married woman incurs a trade debt the creditor should be entitled to sue the contracting party *in solidum* and the non-contracting spouse *pro semisse*. This is advocated primarily in the interest of the trader who would at any rate be assured of recovering at least half the debt. Thereafter, the spouses could adjust their rights and liabilities according to the terms of their antenuptial contract and their proprietary rights. If the marriage was in community of property, and the wife had paid the debt in full, she would, after dissolution of the marriage have a right of recourse *pro semisse* against the husband or his estate.[268] On the other hand if the marriage had been contracted out of community of property, and the husband had satisfied the creditor in full, he should have a right to proceed against his wife for the full amount paid, because her separate estate would be liable for the entire debt.

In Sri Lanka, however, the trader takes no risk when contracting with a married woman because her contractual rights are no different from those of a *feme sole*.

267. R. W. Lee, A. M. Honore, *op.cit.* p. 91

268. H. R. Hahlo, *op.cit.* p. 184

Conclusion

The legal status of a married woman in modern Sri Lanka bears no comparison with that which prevailed under the common law. Total emancipation from the Roman-Dutch common law restrictions has been obtained by statutory provisions based on English law enactments. The common law, however, continues to influence this branch of the law in an area such as a married woman's right to contract for household necessaries. In the English law, the Matrimonial Proceedings and Property Act, 1970, sec. 41 abolished the agency of necessity because it was felt that this right did not in fact confer on a married woman an advantage because the chances of her finding a trader ready and willing to give her credit were rare.[269] Conceding the applicability of this limitation to the social conditions of modern Sri Lanka, it is submitted that there is no warrant for its abolition in our legal system so long as it provides a means of redress even to a small category of needy wives.

269. Olive M. Stone, *Family Law* (London 1977) p. 91

CHAPTER 5

THE PROPRIETARY CONSEQUENCES OF MARRIAGE

1. Introduction

The law regulating the proprietary consequences of marriage has undergone several changes in the law of Sri Lanka. A salient feature of the common law was community of property and of profit and loss which gave rise to a universal economic partnership of the spouses, "with the husband as the senior and the wife as the junior partner."[1] All the property owned by the spouses at the time of marriage and property acquired subsequent to marriage fell into a common estate or fund in which both spouses, irrespective of their contribution, held equal shares. In relation to their legal interest in the community, therefore, the spouses had joint ownership with a right to an exact half of the common estate.

As a result of the different but related consequence of marital power, which the husband exercised over the wife's person and property, the husband assumed the right of management and control of the common fund. While the marital power of the husband was a variable consequent of marriage, which could therefore be excluded by antenuptial contract, if marriage took place with community of property the marital power of the husband could not be excluded.[2] Notwithstanding the subordinate position occupied by a married woman in relation to her proprietary rights in the common law, it must be pointed out that the system of community of property had one salient merit. On a disslolution of the marriage the common estate was divided in half between the spouses unless the rule of forfeiture of benefits operated to cause a deviation from this norm of division. The wife, therefore, unless she was responsible for wrecking the marriage, was ensured of an equal

1 H. R. Hahlo, *op.cit.* p. 215
2 *id.* at p. 281

share in the common estate and needless to say a rule such as this is totally consistent with the ideals of marriage.

The 19th century, however, witnessed major statutory changes which expressly abolished community of property and replaced it with a separate property regime, which had as its primary advantage the right of each spouse to the full control, management and ownership of his or her separate property. This change was brought about gradually, first by the Matrimonial Rights and Inheritance Ordinance of 1876, and then by the Married Women's Property Ordinance of 1923. The introduction of these statutory changes had far-reaching consequences because this marked the beginning of the influence of the English law, on our law of matrimonial property, which had hitherto been governed by essentially Roman-Dutch law principles. The above mentioned statutes were modelled on the lines of English law statutes and there was, therefore, constant reference to the English law for purposes of clarification and interpretation.

It must be pointed out that while this system of separate property works admirably well during the tenure of the marital relationship, it does not provide a satisfactory basis for the redistribution of assets on a termination of marriage. A prominent feature of a separate property regime is the rule that entitlement to acquisitions is founded on the normal rules regulating ownership in other branches of the law. Hence, actual financial contribution is the criterion upon which ownership to property is determined. What must be noted, however, is that while this is, *prima facie*, an unobjectionable basis of entitlement, the special features of a marital relationship render this rule of thumb unsuitable if not unfair when a reallocation of matrimonial assets is made on termination of the marital union.

Within the bonds of matrimony, the spouses perform different functions depending on the attendent circumstances. For instance, the husband may be the primary or sole wage earner while the wife restricts her duties to that of home maker. The essential point, however, is that both functions, though different in nature, are directed towards a common objective; namely, the welfare of

the family as a single coherent unit. In other words, not only are they dependent on each other, but they also have a common objective; consequently, the unequal recognition of these different functions is not justifiable. Though the wage earning spouse will in all probability be the one involved in making acquisitions and investments in his or her name, the non-financial contributor plays an equally important role. Hence, the justness of a rule which recognises only monetary contribution as the yardstick of entitlement may be seriously questioned. To this extent, then, the rule of equal division, which was a feature of the common law, may be said to have been far more equitable.[3]

Indeed, some Western legal systems have accepted the philosophy of matrimonial partnership when formulating rules of reallocation of proprietary rights on divorce. According to Kevin Gray, [3a] "A 'new equity' has begun to emerge in some areas of matrimonial property law, according to which the spouses are no longer governed by the 'bleak and inflexible rules of property law', but by principles more apposite to the nature of the marriage relationship. In these areas, it may be said that orthodox property concepts have been partially displaced in favour of considerations of a 'matrimonial' or 'family' character. In the course of this development, the wife has been accorded a completely new status in the law of matrimonial property relative to the inferior position which has hitherto been almost invariably her lot."

The Matrimonial Property Act 1963 (No. 72) of New Zealand, vests in the judiciary the discretion to redistribute proprietary rights "notwithstanding that the legal or equitable interests of the husband and wife in the property are defined, or notwithstanding that the spouse in whose favour the order is made has no legal or equitable interest in the property."[3b] Making specific reference to the Matrimonial home or the division of the proceeds of sale of the matrimonial home, the statute declares that the court is to "have regard to the respective contributions of the husband and wife to the property in dispute (whether in the form of money

3 Sec. sec. v. *infra*

3a *Reallocation of Property on Divorce* (1977) p. 23

3b Sec. 5(3)

payments, services, provident management, or otherwise, howsoever."[3c] Explaining further what is meant by a| "contribution," the Matrimonial Property Amendment Act 1968 (No. 61) declares that "notwithstanding that he or she made no contribution to the property in the form of money payments or that his or her contribution in any other form was of a usual or not an extraordinary character."[3d]

Similarly, the Ontario Family Law Reforms Act 1975 provides that "except as agreed between them, where a husband or wife contributes to work, money or money's worth in respect of the acquisition, management, maintenance, operation or improvement of a property in which the other has or had a property interest, the husband or wife shall not be disentitled from any right to compensation or other interest flowing from such contribution by reason only of the relationship of husband and wife, or that the acts constituting the contribution are those of a reasonable spouse of that sex in the circumstances."[3e]

In England, the Matrimonial Proceedings and Property Act 1970 [3f] directs the court to have regard to "the contribution made by each of the parties to the welfare of the family, including any contributions made by looking after the home or caring for the family."[3g]

The Family Law Act 1975 of Australia declares that the court "may make such order as it thinks fit altering the interests of the parties" and the court is directed to take into account, *inter alia*, "the contribution made directly or indirectly to the acquisition, conservation or improvement of the property by either party, including any contribution made in the capacity of home maker or parent."[3h]

A form of deferred community of property has also been

3c. Sec. 6(1)
3d. Sec. 6(1A)
3e. Sec. 1(3) (c)
3f. Sec. 5(1) (f)
3g. This provision is now contained in the Matrimonial Causes Act 1973 sec. 25 (I) (f)
3h. Sec. 79(4) (b)

recognised in the Continental regimes, such as West Germany and East Germany. Several States of the United States of America, too, have acknowledged the significance of the role of the home maker.[3i]

What emerges from the above discussion, then, is the tendency in modern legal systems to reintroduce a system of community of property incorporating the notion of partnership by which if "a woman, upon marriage, gives up a career and devotes her life to making a home, bearing and nurturing children, and while so engaged she makes no monetary contributions to the home or family, and after the passage of years at the end of her child nurturing she has no assets and no capacity to sell her services to the labour market, then, her performance has amounted to a cogent consideration of justice entitling her to a share in her husband's fortune."[3j]

Indeed, the wheel has turned a full cycle. The system of community of property, which was a consequent of marriage in the previous century has reappeared in the form of a deferred community which comes into being only on a dissolution of marriage. No doubt the universal community of property, which took place on the solemnisation of a marriage, had several shortcomings, but the separate property regime which replaced it proved to be more iniquitous than its predecessor. "The Victorians believed that by exalting the principle of separate ownership justice could be done to women... The law is blind because the blinkers imposed on it when our Victorian ancestors were themselves trying to sweep away earlier and more mischievous abuses. Experience in our developing society has shown that their remedy has itself become a cause of injustice."[3k]

3i. See for a discussion of these jurisdictions Kevin J. Gary, *op. cit.* pp. 58—66.

3j. *Dunn* v. *Dunn* (1973) 1 N.S.W.L.R. 590 at p. 596, *per* Carmichael J.

3k. (1966) 76 The Listener 683, 684. *per* Sir Leslie Scarman. "Law Reform and Family Property."

II. The Common Law

(i) Community of Goods and of Profit and Loss

Prior to 1876,[4] the proprietary rights of the spouses were governed by the Roman-Dutch common law. Consequently, in the absence of an antenuptial contract excluding community of property and of profit and loss, all the assets and liabilities of the spouses at the time of marriage were merged in a common estate or fund. Therefore, irrespective of the nature of the property and the manner in which it was acquired, all property belonging to the spouses at the time of marriage, together with all property acquired *stante matrimonio* formed the common estate.[5] This universal partnership of the spouses took place by operation of law immediately on the solemnisation of marriage,[6] and continued until such time as the marriage was terminated by death or divorce, or on the annulment of a voidable marriage, or when an order of *boedelscheiding* was made.[7]

Thus came into being a form of co-ownership of property which was said to be a species of *condominium*,[8] where the spouses owned the assets of the joint estate in equal, undivided shares.[9] Although the legal ownership of this common fund vested equally on both spouses, it appeared *prima facie* as if the husband was the sole owner of the community. This derived primarily from the extensive powers of control and administration the husband exercised over the joint estate by virtue of his marital power.[10] Therefore, for instance, the husband alone administered the common estate[11] and the wife had no rights

4. The year in which the Matrimonial Rights and Inheritance Ordinance No. 15 of 1876 was enacted.
5. See Grotius 2.11.8; 3.21.10; Voet 23.2.65.
6. Voet 23.2.68; 41.1.41; Van Leeuwen *Cen For.*, 1.4.23, 22; Van der Keesel, *Th.*, 216.
7. See H. R. Hahlo, *op. cit* ch. 14
8. *id.* at p. 214 for a discussion of the different views on the legal nature of community.
9. See *Lock* v. *Keers* 1945 T.P.D. 113 at p. 116; *Issels* v. *Codd N.O. and Fitt N.O.* 1952 (2) S.A. 615. See also Voet 23.4.30.
10. Grotius 1.4.6; 1.5.19, 20; Voet 1.7.13; 23.2.23, 41; Van der Keesel, *Th.*, 19.
11. *ibid.*

in respect of it even if they were living apart by mutual consent.[12] He could alienate or encumber the property[13] and bind not only himself but his wife, too, by his contracts.[14] Moreover, the common estate was rendered liable for a delict committed by the husband in the execution of his duties as administrator of the community,[15] he was beyond the reach of the criminal law for acts relating to the common property, and could not be charged with theft[16] or arson[17] in relation to the joint estate. He was also free of liability for malicious injury to the common property,[18] and if he so desired he could diminish the joint estate by flagrant maladministration,[19] or prejudice his wife's interests by "scattering the estate on harlots."[20]

It would thus appear that the notion of a universal community was detrimental to the wife, whose rights in relation to the community were totally obliterated so much so that it rendered meaningless the contention that the spouses were, in fact, co-owners of the joint estate. It must be pointed out, however, that this is only a *prima facie* conclusion and that in actual fact the law provided the wife with remedies for the protection of her proprietary rights.

For instance, all the above common law consequences which derived from the marital power of the husband could be totally excluded by means of an antenuptial contract which excluded the marital power of the husband.[21] The wife, therefore, had the liberty to exclude the husband's authority over her proprietary rights and, consequently, if she married without an antenuptial contract excluding his common law power, she was deemed to

12. *Nicholas de Silva* v. *Shaik Ali* (1895) 1 N.L.R.228.
13. Grotius 1.5.22; Voet 19.2.17, 20.3.7; *Sellam* v. *Thayal* (1910) 2 Curr. L. Rep. 219; D.C. Tangalla (1899) Koch Rep. 36.
14. Grotius 1.5.22; Voet 19.2.17; 23.2.52, 53.
15. *Corey* v. *Fernando* (1861) Ram. Rep. 94.
16. *R* v. *Van Vilet* 9 S.C.C. 273; *S.* v. *Tlhoaele* 1979 (2) S.A. 328; *R.* v. *Silas* 1958 (3) S. A. 253; *Ramdhal* v. *R.* 1915 N.P.D. 565.
17. *R.* v. *Van Vilet* 9 S.C.C. 273.
18. *ibid.*
19. Voet 23.2.53; 63.
20. Voet 23.2.54.
21. H. R. Hahlo, *op. cit.* ch. 15. See also p. 153.

have made a voluntary choice to be subjected to his control. Indeed, if she married with community of property, and in these circumstances, the marital power of the husband would be an invariable feature of the marriage, the wife was the recipient of certain benefits such as a right to a half share of the total assets belonging to the community on termination of the marriage.[22] Consequently, the husband could not make a disposition of her share of the property by an act *mortis causa*.[23] If, however, the husband executed a last will disposing of the entire estate and making bequests to the wife, and if she had joined in the execution of the will expressly consenting to the disposition, then, on the death of her husband she was not entitled to renounce all benefits under the will and, instead, to claim her half share of the matrimonial estate.[24]

During the subsistence of the marriage the wife could control her husband's right of administration by means of an interdict which was available to her to restrain him from acting in a manner prejudicial to her interests.[25] The mere apprehension of a proprietary loss was not a sufficient basis for the award of an interdict. The courts insisted upon proof of actual *mala fides* and loss of the community assets before granting this remedy.[26]

A more permanent remedy was also available to a wife to check an extravagant or prodigal husband. She could ask for an order of *boedelscheiding* thereby terminating the community and putting an end to the husband's control over her proprietary rights.[27] This remedy, however, has not been resorted to often and is fast becoming obsolete.[28]

22. *id.* at p. 242.
23. *Teyvana* v. *Sinnecooty* (1863 — 68) Ram. Rep. 103; *Geddes* v. *The Colombo Apothecaries Co.* (1901) 2 Br. Rep. 10.
24. *In matter of Last Will of Wytianaden* D. C. Colombo 3,616, (1872 — 76) Ram. Rep. 25.
25. *Tel Peda Investigation Bureau (Pty) Ltd.* v. *Laws* 1972 (2) S.A.1; *Chellammah* v. *Nair and Another* 1953 (3) S.A.799; *Jones* v. *Jones* 1936 C.P.D. 381; *Nande* v. *Norwich Union Fire Insurance Co., Ltd. and others* 1913 W.L.D. 207; *Pickles* v. *Pickles* 1947 (3) S.A.175.
26. *Chellammah* v. *Nair and Another* 1953 (3) S.A. 799; *Jones* v. *Jones* 1936 C.P.D. 381.
27. Voet 23.5.7; *Weerasooriya* v. *Weerasooriya* (1910) 13 N.L.R. 376.
28. *Opperman* v. *Opperman* 1962 (3) S.A.40 at pp. 50, 51. In *Tel Peda Investigation Bureau (Pty) Ltd.* v. *Laws* 1972 (2) S.A.1. the court refused an

Apart from the above mentioned remedies, the wife could have recourse to the courts and could apply for leave to defend an action if her husband failed to protect her property. In *Tel Peda Investigation Bureau (Pty) Ltd.* v. *Laws*[29] the wife applied to court for leave to defend an action instituted by the plaintiff against the defendant, her husband, who had failed to enter appearance and defend the action. The court held that on the available evidence it was apparent that the husband's wilful refusal to defend the action was calculated to prejudice his wife's interests and, therefore, granted her leave to intervene. This was a remedy available to the wife even when the husband was absent or otherwise incapable of acting.[30]

The wife was also provided with a remedy if her husband made donations out of the joint estate in fraud of his wife or her heirs. In these circumstances the wife had a right of recourse against him or his estate when the marriage was dissolved.[31] The South African courts have adopted a strict interpretation of the word "fraud" in this context. Colman J. in *Pretorius N. O.* v. *Smith and Others*[32] distinguished it from fraud in the sphere of criminal and contractual liability. According to him, mere proof of false representation or deceit would not suffice. Nor would it be sufficient to establish that the common estate had diminished *per se*, since every alienation would have that effect. The court, instead, required proof of *dolus* in the sense of an intention to prejudice the wife's interests. This is consistent with the attitude of the court in *Davis* v. *Brisley's Minors*[33] where the concept of fraud was equated to "wilful intention to prejudice the wife." Consequently, proof of knowledge and approval of the donation made by the husband would estop her from attacking it

order for *boedelschieding* because an interdict had already been granted restraining the husband from alienating the common property. In *Exparte Dixie* 1950 (4) S.A.748 the court held that this remedy was not available to divide the common estate if the husband had been declared to be insane and thus incapable of administering the common property. The appropriate remedy in this case would be to apply to court for an order appointing a *curator bonis*. See *Traub* v. *Traub* 1955 (2) S.A.671.

29. 1972 (2) S.A.1.
30. *Ex parte Reid* 1932 W.L.D.11; *Exparte Kamfer* 1918 C.P.D. 2.
31. *Weerasooriya* v. *Weerasooriya* (1910) 13 N.L.R. 376; *Lewishamy* v. *de Silva* (1906) 3 Bal. Rep. 43.
32. 1971 (4) S.A. 459.
33. 1901 (18) S.C. 407.

subsequently.[34] Apart from the wife's right of *regressus* against her husband on termination of marriage, she could also institute the *actio pauliana utilis* directly against the donee.[35] But to do so she had to prove that the third party was aware that the disposition was made in fraud of her interests.[36] This remedy, too, was not available *stante matrimonio*.[37]

An essential feature of universal community was community of profit and loss according to which all antenuptial and postnuptial assets and debts formed a part of the common estate.

(*a*) Community of Assets

All property belonging to the spouses at the time of their marriage, and assets acquired subsequent to the solemnisation of the marriage became a part of the joint estate when the marriage was with community of property. This rule applied irrespective of the nature of the property and the mode in which it was acquired. Consequently, even property acquired by illegal means, gambling, fraud, theft, or prostitution became a part of the common estate.[38] Jewels belonging to the wife which she inherited from her mother were owned by the spouses jointly,[39] but jewels and other gifts received from her husband at the time of the betrothal or wedding were excluded from the community.[40] A question of some interest in South African law is whether delictual damages, recovered by one spouse from a third party, for damage caused by the wrongdoing of the other spouse, with the third party, will accrue to the common estate. If the answer is in the affirmative, it will result in the guilty spouse reaping a monetary benefit as a consequence of his own wrongdoing. While this fact did not deter Lucas A. J. in *Strydom* v. *Saayman*[41] from permitting a wife to sue her husband's paramour for

34. *Davis* v. *Trustee of Minors Brisley and Another* 1901 (18) S.C. 407; *Pretorius N. P.* v. *Smith and Others* 1971 (4) S.A. 459.
35. *Pickles* v. *Pickles* 1947 (3) S.A. 175; *Cullammah* v. *Munean* 1941 N.P.D. 163; *Pretorius* v. *Pretorius* 1948 (1) S.A. 250.
36. *Laws* v. *Laws and Another* 1972 (1) S.A. 321.
37. *Nel* v. *Cockroft and Another* 1972 (3) S.A. 592.
38. H. R. Hahlo, *op. cit.* p. 220.
39. *ibid.*
40. Voet 23.2.78. But see *Barkhan* v. *Barkhan* 1960 (4) S.A. 288; *Levin* v *Levin* 1960 (4) S.A. 469.
41. 1949 (2) S.A. 736.

damages for adultery although she had not sued her husband for divorce, Hiemstra J. in *Potgieter* v. *Potgieter*[42] avoided this consequence by having the damages, awarded to the wife in similar circumstances, excluded from the community.

(*b*) Community of Debts

As a general rule all antenuptial and postnuptial debts incurred by the spouses had to be satisfied out of the common fund, but this principle did not apply so as to cause detriment to either spouse. Consequently, only contractual debts incurred by the husband as administrator of the community became a charge on the joint estate.[43] In the Sri Lankan case *Santiagupulle* v. *De Neise*,[44] however, this rule was not applied. In this case the parties had married with community of property and the husband had criminally misappropriated a sum of money from his place of employment. A Full Bench of the Supreme Court had to determine whether, in the circumstances, the wife's share of the common estate was also liable. The unanimous decision of the court was that her share was not excluded. According to Justice Clarence, there was no authority for the proposition that the husband's contractual obligations did not bind the wife's share of the common property merely because his default was one which might also be punished criminally. In arriving at this decision, the court had to distinguish the previous ruling of the Supreme Court in *Corey* v. *Fernando*,[45] which was also the decision of a Full Bench. According to the facts adduced in this case, George Felsinger and three others were tried for theft in the Supreme Court and found guilty. The complainant, subsequently brought a civil action for damages and costs. When Felsinger's property was put up for sale his wife moved for an order to exclude her half-share of the property and to declare it free from liability. The contention for the appellant was that although in a criminal prosecution against the husband, the wife's share was not liable it was always liable in a

42. 1959 (1) S.A. 194
43. Grotius 1.5.22; Voet 19.2.17; *Corey* v. *Fernando* (1861) Ram. Rep 94
44. (1886) 8 S.C.C. 27
45. (1861) Ram. Rep. 94

civil action against him irrespective of whether the obligation arose out of contract or delict. The contention for the respondent, however, was that the distinction as to the liability or non-liability of the wife's share was created not by the form of procedure against the husband but rather by the nature of the act that made the husband liable. The decision of the Full Court was that the wife's share was not bound in either civil or criminal proceedings by the husband's obligations arising out of a delict amounting to a crime. The Supreme Court, however, cautioned that "in giving judgment, we do not go to the full length of deciding that there is no kind of delict which, if committed by the husband, will create an obligation affecting the wife. Cases may arise where the husband, in the *bona fide* management of the common property, may incur obligations *ex delicto* without any criminal or morally wrong conduct. The plaintiff in an action on such delict might urge arguments for his claim on the wife's share which would be inapplicable here."

Departing from the above decision, Clarence J. in *Santiagupille* v. *De Neise* held that while the former case involved an action in tort, the present one was a claim *ex contractu* and that there was no authority for the proposition that the husband's contractual obligation did not bind the wife's share merely because he could be made liable criminally, too.

It is submitted, however, that if one was to accord with the well established principle that, in both delictual and criminal liability, no one should be held liable for the wrongs of another,[46] the governing criterion should be not the manner in which the aggrieved party seeks redress but rather the nature of the wrong committed.

There is judicial authority in the early Sri Lankan law for the contention that all criminal and delictual liability has to be borne solely by the guilty spouse. In *Alissa* v. *Sendia*[47] the wife's share

46. H. R. Hahlo, *op. cit.* p. 233
47. (1899) 1 Tamb. 31

of the joint property or her dowry property was held liable for an injury caused by her to a third party.[48]

Conceding then, with the proposition that as between husband and wife, the non-delinquent spouse was not liable for the wrongdoing of the other spouse, practical difficulties have arisen when limiting liability to the half share of the guilty spouse primarily because there was only one estate which consisted of the proprietary rights of both spouses indissolubly tied up during the subsistence of the marriage. It was inevitable, therefore, that the innocent spouse would suffer when a payment was made out of the joint estate. When, therefore, the half-share of one spouse was deemed to be liable, the plaintiff was compelled to wait till the marriage was dissolved to make his claim. However, public interest demanded that wrongful acts did not remain unpunished and as such it was generally accepted that liability attached to the joint estate *stante matrimonio*,[49] subject, however, to the right of the non-delinquent spouse to an adjustment and reimbursement on dissolution of the community.[50] However, if the liability incurred was so heavy that the common estate was in danger of being rendered insolvent, thereby giving the innocent spouse a doubtful right of recourse on termination of the community, the innocent spouse could apply for *boedelscheiding*, thus putting his or her share beyond the reach of creditors.[51] The modern South African law, however, doubts the continued relevance of this remedy as a means of protecting the half-share of the innocent spouse.[52]

(ii) Termination of the Community

In the common law, there were four methods by which community of property was terminated. They were (*a*) on dissolution of the marriage by death; (*b*) on dissolution of the marriage by divorce; (*c*) on annulment of a voidable marriage; and (*d*) when an order of *boedelscheiding* was made.[53]

48. cf. *Queen's Advocate* v. *Sivagamipillai* (1884) 6 S.C.C. 46.
49. See H. R. Hahlo, *op. cit.* p. 238.
50. Van der Keesel, *Th.* 94; *Corey* v. *Fernando* (1861) Ram. Rep. 94.
51. Voet 48.20.3.
52. See *Opperman* v. *Opperman* 1962 (3) S.A.40 at p. 50.
53. See H. R. Hahlo, *op. cit.* p. 241.

(*a*) Dissolution of Marriage by Death

Death put an end to the partnership of marriage and dissolved the community and brought about a division of the estate between the heirs of the deceased spouse and the surviving spouse.[54] Prior to a division, the liabilities attached to the estate were paid off and it was the residue that was divided equally.[55] Subsequent to the introduction of the English law system of executorship in both South Africa and Sri Lanka, the heirs of the deceased spouse merely had the right to claim from the executor of the joint estate half of the net balance of the common estate after all liabilities had been discharged.[56] In the Sri Lankan case, *Dona Maria* v. *Don Paules de Silva*,[57] the question was whether the plaintiff, in taking out administration to her deceased husband's estate, was bound to deal with the whole of the estate or only half. The District Judge held that although on the death of the plaintiff's husband community of property ceased and one half of the estate devolved by operation of law on the plaintiff, the whole estate was liable for the debts contracted during the subsistence of the community and, consequently, administration had to be taken to the entire estate for otherwise it would have been impossible to pay and satisfy such debts for the entire estate. Moreover, he pointed out that it would be difficult to divide the estate and allot one half to the widow till the value of the whole estate had been ascertained. This could only be done after payment of all debts due from the estate, and the recovery of all moneys and other property from the debtors of the estate. He thus concluded that although one half of the estate devolved on the wife on the death of her husband, that half could not be divided or separated until such time as the entire estate was administered. The defendant appealed to the Supreme Court and Burnside C. J., reiterating the decision of the District Judge, declared that the statute law which introduced the system of administrators and executors had altered the common law position and as such the whole estate of the deceased should, in the first instance, rest in the administrator for disposal among the persons legally entitled to individual shares of it.

54. *Union Government* v. *Leask's Executors* 1918 A.D. 447; Grotius 2.11.13.
55. Grotius 2.11.13
56. *Costain and Partners* v. *Godden N. O.* 1960 (4) S.A. 456.
57. (1893) I. N.L.R. 268

In the early common law community of property was said to continue between the surviving spouse and the children of the marriage; but there is express authority in the modern South African law for the view that it is now obsolete in that legal system.[58] There is some doubt whether this doctrine was ever a part of the Sri Lankan law. One District Court decision referred to the existence of this doctrine in our law,[59] but Supreme Court authority disputes its introduction into Sri Lanka. According to Wendt and Middleton JJ. in *Carolis Appu* v. *Jayewickreme*[60] the doctrine of community being continued between the survivor and the children was never recognised in Sri Lanka. The death of one spouse finally terminated the community and the survivor had no power to deal with the children's moiety except for the payment of debts of the community. Likewise in *Wijeyekoon* v. *Gunewardene*[61] Justice Dias declared that the doctrine of continuing community "was never imported into this colony."

Before a division of the common property took place, the children of a deceased parent were obliged to collate any money or property they had received by way of dowry or to advance them in trade or business.[62] However, a necessary prerequisite of this duty to collate was the acceptance of a share of the inheritance. In *Soysa* v. *Weerasuriya*[63] there was some doubt as to the daughter's intention to share in her father's inheritance but the majority of the court opined that her presence at the testamentary and administrative proceedings was indication enough of her wish to accept a part of the inheritance and, as such, she was obliged to collate what she had received by way of dowry. When collating any property received, a child had the option to collate either what was received or its value.[64]

(*b*) Dissolution of Marriage by Divorce

Just as in the case of dissolution of marriage by death, in the event of divorce, too, the joint estate was divided equally between

58. H. R. Hahlo, *op. cit.* p. 255.
59. D.C. Colombo 21,043. Vanderstraaten Rep. Appendix XL vi
60. (1906) 1 Matara Cases 103.
61. (1892) 1 S.C. Rep. 147.
62. Grotius 2.11.13; *Thom* v. *Worthman N.O.* 1962 (4) S.A. 83.
63. (1899) 5 N.L.R. 196.
64. *Jainudeen* v. *Murugiah* (1952) 47 C.L.W.81

the former spouses.[65] Contractual claims, not satisfied during the marriage, were first discharged and if, for instance, the wife had pledged her husband's credit during the marriage, the creditor could proceed against either spouse who, of course, had a right of recourse for half against the other.[66] As for delictual claims, since the wrongdoer alone was liable, the spouse who was guilty of the delict had to satisfy the claim with no right of recourse against the other.[67]

A significant feature of the proprietary consequences of divorce was the application of the common law principle of forfeiture of benefits. This principle, which was dependent on the allocation of matrimonial fault to the ex-spouse, involved the unequal division of the common estate depending on which of the two former spouses had contributed more to the joint property. For instance, if the contributions of the innocent spouse exceeded those of the guilty spouse, the guilty spouse was deprived of the benefits which he derived from the marriage. The order for forfeiture, therefore, was an order for division together with an order that the defendant was not to share in any excess that the plaintiff had contributed over the contributions of the defendant.[68]

There is evidence in early Sri Lankan case law of the application of the principle of forfeiture of benefits in our legal system. All the reported authority, however, involved the question whether the wife's dotal property, or property given to her in contemplation of marriage, was forfeit on a dissolution of the marriage caused by her matrimonial misconduct. Divergent views have been expressed on this issue primarily because there has been an insufficient appreciation of the contention that an order for forfeiture of benefits does not attach to the spouses' *separate* properties and that such an order is strictly confined to a *benefit* accruing from the marriage. This principle is readily explicable by reference to the rationale on which the principle of forfeiture was founded. The singular

65. *Meyer* v. *Thompson* N. O. 1971 (3) S.A. 376 at 377
66. See chapter 3 *supra*
67. See chapter 4 *supra*
68. See *Smith* v. *Smith* 1937 W.L.D. 126

objective of this principle was the need to avert a situation in which a spouse reaped a pecuniary benefit out of, and because of, a relationship which he or she was responsible for putting asunder.[69] It is manifestly clear, therefore, that the rule of forfeiture should be confined to benefits derived from the marriage and that it has no relevance to the separate property of the spouses such as the dowry property of the wife which would, in any event, belong to her.[70]

In *Dondris* v. *Kudatchi*[71] the parties were married with community of property but the common estate consisted solely of property contributed by the husband. The wife had made no contribution at all and, consequently, when they divorced on the ground of her adultery, the court declared that she was entitled to nothing and that the entire estate was to vest exclusively in the husband. This decision, it is submitted, is entirely valid in that, had an equal division of the common property been ordered, the wife would have been the recipient of a substantial monetary gain from a marriage which she herself ultimately wrecked.

Likewise, in *Phillips* v. *Phillips*,[72] the common estate consisted of property contributed entirely by the wife, the husband not having brought anything into the community. When the wife obtained a divorce on account of her husband's adultery and requested an order of forfeiture of benefits, the court declared that the wife was entitled to all the assets and that a division between the two spouses was not to be made.

In *Wijesundra* v. *Bartholomeus*[73] a divorce was obtained on account of the wife's malicious desertion. When she filed action to recover her dowry property which consisted of cash, furniture and jewellery, Burnside C. J. declared that she could not reclaim the money because it had been spent during the marriage and that she was precluded from recovering the furniture, too, because she was the guilty spouse. Her jewellery, however, the court held

69. See H. R. Hahlo, *op. cit.* p. 435.
70. See chapter 2 *supra*.
71. (1902) 7 N.L.R. 107
72. (1882) 5 S.C.C. 36
73. (1884) 6 S.C.C. 141

was not subject to forfeit because it was her paraphernalia and also because it was not proved that the husband had obtained possession of it.

This decision, however, may be assailed for it proceeded on the assumption that the principle of forfeiture of benefits attached to the separate property of the spouses as well. Indeed, it has been clearly established that dowry property is the separate property of the donor spouse.[74] Consequently, irrespective of the guilt or innocence of the wife, she should be entitled to her separate property on dissolution of the marriage by divorce.[75]

In *Karunanayake* v. *Karunanayake*,[76] too, a sum of Rs. 5,000/- given by the father of the bride as dowry on his daughter's marriage, was held not to be recoverable on a dissolution of the marriage by divorce. This case, however, may be distinguished from *Wijesundra* v. *Bartholameus* in that it was decided subsequent to the enactment of the Matrimonial Rights and Inheritance Ordinance,[77] by which movable property became the absolute property of the husband.[78] Consequently, Maartensz J. rightly held that although under the Roman-Dutch common law the wife would have had the right to reclaim her dowry property "the Roman-Dutch law as regards the matrimonial rights of husband and wife in respect of property has been abrogated by the Matrimonial Rights and Inheritance Ordinance, 1876."[79] Consequently, the wife was denied the right to reclaim the money.

This view, namely, that the statute of 1876 had the effect of abrogating the common law rule of forfeiture was reiterated in *De Silva* v. *De Silva*[80] but departed from more recently in *Fernando* v. *Fernando*[81] when Tambiah J. declared that "after a careful consideration of the authorities, we are of the opinion that the

74. *Fernando* v. *Fernando* (1961) 63 N.L.R. 416
75. M. Nathan, *Common Law of South Africa* (1904) p. 317
76. (1937) 39 N.L.R. 275
77. No. 15 of 1876
78. Sec. 19.
79. (1937) 39 N.L.R. 275 at p. 281
80. (1925) 27 N.L.R.289
81. (1961) 63 N. L. R. 416

common law remedy was not abrogated as a result of the enactment of these sections, but rather the remedies envisaged by these sections are complementary to the action available under the common law."[82]

Indeed, it is submitted that, although the common law rule of forfeiture of benefits is neither incompatible with, nor incongruous to, a separate property regime operative in Sri Lanka, after the 1876 Ordinance, the better view appears to be the contention that the rule is inapplicable in modern Sri Lanka. While in a community property regime the principle of forfeiture created, as it were, an exception to the rule that the common estate be divided equally between the spouses on a dissolution of the marriage, when the spouses are deemed to have separate proprietary rights the relevance of the forfeiture rule is limited to situations in which one spouse has given the other a distinct proprietary benefit on account of the marriage. In view of the fact that dowry property is, more often than not, in the name of the wife, the situations in which the rule of forfeiture may be applied will be restricted.

Moreover, the newly amended Civil Procedure Code[83] vests in the courts an unfettered discretion to order a settlement of the property on divorce irrespective of the guilt or innocence of the parties.[84] This is entirely consistent with the dispensation of matrimonial fault as a ground for divorce in the Civil Procedure Code.[85] Of course it must be pointed out that proof of matrimonial misconduct continues to be a ground for divorce in modern Sri Lanka;[86] but this can hardly be said to be representative of modern legislative thinking. Nevertheless, it has been pointed out that the continued applicability of this rule of forfeiture in Sri Lanka has the distinct advantage of assuring a spouse the right to recover dowry property which may otherwise be the subject of a reallocation of proprietary rights according to the provisions of the Civil Procedure Code.[86a]

82. *id.* at p. 418
83. No. 20 of 1977
84. Sec. 617
85. No. 20 of 1977 sec. 608 (2) (*a*); (2) (*b*)
86. Marriage Registration Ordinance No. 19 of 1907 sec. 19(2)
86a. See chapter 10 *infra* sec. B

(c) Annulment of a Voidable Marriage

On entering a decree of nullity, the community is annulled and each party is entitled to recover what he or she brought into the community.[87] An equal division of the common estate does not take place because the effect of a decree of nullity is retroactive to the time of the marriage ceremony and as such the two parties are treated as if they had never entered into a marital union.[88] If, however, the joint estate had been enriched or diminished in value, perhaps a proportionate division of the resulting profit or loss would be made. Nevertheless, in relation to rights and obligations created in innocent third parties, the retroactive effect of nullity does not operate. Consequently, transactions completed during the tenure of the "marriage" and obligations incurred at that time are deemed to be valid, and the courts are wary of applying the "relation back" fiction for fear of jeopardising the interests of innocent third parties.[89]

III. Statutory Changes

Of considerable importance is the Matrimonial Rights and Inheritance Ordinance No. 15 of 1876[90] which abolished community of property between spouses[91] and "emancipated women from the thraldom of the Roman-Dutch principle of community of property on marriage."[92] *Inter alia*, the statute provided that: "All immovable property to which any woman, married after the proclamation of this Ordinance, may be entitled at the time of her marriage, or may become entitled during her marriage, shall, subject and without prejudice to the trusts of any will or settlement affecting the same, belong to the woman for her separate estate, and shall not be liable for the debts or engagements of her husband, unless incurred for or in respect of the cultivation, upkeep, repairs, management or improvement of such property, or for or

87. H. R. Hahlo, *op. cit.* p. 492
88. *id.* at p. 491
89. *id.* at p. 492
90. (Cap. 57)
91. Sec. 7
92. *Fernando* v. *Ammal* (1909) 12 N.L.R. 200, *per* Middleton J. at p. 204. For an evaluation of this statement see sec.v. *infra*.

in regard to any charges, rates, or taxes imposed by law in respect thereof, and her receipts alone or the receipts of her duly authorised agent shall be a good discharge for the rents, issues, and profits arising from or in respect of such property."[93]

Consequently, all immovable property was to belong to the wife's separate estate but her rights of administration of the separate estate was restricted in that for any act *inter vivos* the written consent of her husband was a necessary prerequisite.[94] By last will, however, she could dispose of her property "as if she were unmarried."[95]

As regards movable property, the statute enumerated the type of property which would belong to the wife, and all other property was to be in the ownership of her husband. Thus, a married woman's wages or earnings acquired or gained in any employment, occupation, or trade she engaged in or which she carried on separately from her husband, and also any money or property acquired by her through the exercise of her literary, artistic, or scientific skill, were deemed to be her separate property.[96] In relation to such property she had full power of dealing with and disposing of it or investing it as if she were unmarried. Moreover, her receipts alone were to be a good discharge for such wages, earnings and money, and property and the principal and interest of any investment.[97]

Although her powers of disposition were unlimited in relation to the above type of property the statute required that she obtain the prior consent of her husband when dealing with all jewels and personal or household ornaments and wearing apparel which belonged to her after the proclamation of the Ordinance, at the time of her marriage as well as those she may have acquired during the marriage as gifts from her husband or otherwise; all

93. Sec. 8
94. *ibid.*
95. *ibid.*
96. See. 9
97. Sec. 9

tools, implements and appliances which belonged to her during marriage and acquired for carrying on any employment or trade she was engaged in separately from her husband; and all implements of husbandry, machinery, live and dead stock which belonged to her during marriage and employed for the cultivation or proper use of any immovable property.[98] She could, however, dispose of or deal with the above-mentioned property by last will without the husband's consent.[99]

The wife was thus given varying powers in the specified categories of movable property set out above. All other movable property, however, was to vest absolutely in the husband.[100]

One of the advantages she reaped from the 1876 Ordinance was that her receipts were a good discharge for the rents, issues and profits arising from, or in respect of, immovable property.[101] Thus the judgment in *Rosairo* v. *Abraham*[102] affirmed the view that rents received from immovable property belonged to her separate estate and that she could give a valid receipt of it to her debtor in discharge of his liability. This view was further reiterated in *Mathes* v. *Rodrigo Appuhamy*.[103] Fisher C. J. declared that although the husband had signed the lease to give it validity, that fact did not render him "an authorised agent" of his wife to grant receipts for the rent. The wife alone was entitled to the rent and she, alone was the appropriate person to issue receipts for payment.

Although the statute declared that all immovable property belonging to the wife formed a part of her separate estate, as regards the ownership of money realised as a consequence of the sale or mortgage of the wife's immovable property, the position was not clear. For instance, in *Pate* v. *The A. G.*[104] the wife had mortgaged her immovable property and lent the money to her

98. Sec. 10
99. *ibid.*
100. Sec. 17
101. Sec. 8
102. (1914) 17 N.L.R. 357
103. (1928) 5 Cey. T. L. R. 153
104. (1923) 5 C.L. Rec. 122

husband who, in return, executed a mortgage bond hypothecating his stock in trade in her favour. On the death of the husband, the wife, who was the executrix of his estate, claimed the mortgage bond as an asset belonging to her which had to be deducted from the assets of her husband's business. Bertram C. J., however, declared that contention untenable because, by section 17 of the Ordinance, money raised on a mortgage automatically vested in the husband.

In *Government Agent* v. *Jayamaha Hamine*,[105] however, the wife's separate immovable property was compulsorily acquired under the Land Acquisition Ordinance and Ennis J. declared that the compensation paid accrued to the wife's separate estate. He opined that it was a question of fact whether or not the proceeds ceased to partake of the nature of immovable property. When the conversion was compulsory, like in this case, he declared that there was no presumptior that she intended to lose her rights to the property.[106]

A significant feature of the Matrimonial Rights and Inheritance Ordinarce was that although it abolished community of goods as a proprietary consequence of marriage, it did not establish in its place a total separate property system. Consequently, not only was the husband to be vested with full ownership of certain types of movable property but, in addition, he was to continue to exercise his power of control over the wife's property in the form of consent which was an essential prerequisite for any dispositions made by her. Indeed, it may be asserted that in 1876, a married woman lost the advantage attached to a community property regime, namely, the right to share equally with her husband in the division of the joint estate on termination of the marriage, and also retained some of the disadvantages of the husband's marital power over her property rights. However, if this piece of legislation is viewed as no more than an interim measure the legislature considered

105. (1917) 4 C. W. Rep. 17

106. In *Menik Ettana* v. *Allis Appu* (1899) 3 N.L.R. 330 the court held that a sale of property from the husband to the wife for which the wife paid money to the husband was not a valid sale since there was no valuable consideration, the money was in the ownership of the husband, anyway. Sec. 17.

necessary in the process of effecting substantial changes in the proprietary regime of our legal system, the consequences set out above cannot but be treated as having been inevitable.

The remaining vestige of control the husband exercised over his wife's property was finally abolished by the Married Women's Property Ordinance No. 18 of 1923.[106a] Indeed, it must be pointed out that subsequent to 1876, when community of property was abolished, and prior to 1923, when a married woman was given unfettered rights to her property, the impediments attendant on a married woman were obviously unrelated to the consequences of community of property. On the contrary, those impediments were statutory disabilities reminiscent of the husband's marital power over his wife's property. In fact, it was the concept of marital power that operated as a restriction and a fetter upon a married woman's proprietary rights, far more than were the consequences of community of property which after all, did serve the interests of the wife as well in that, on termination of the marriage, she was entitled to share equally with her husband in a division of the joint estate, thereby having the opportunity to share in the profits he may have earned during the tenure of the marriage.[107] From this point of view, then it may be asserted that, although Justice Middleton declared that the 1876 Ordinance "emancipated women from the thraldom of the Roman-Dutch principle of community of property on marriage,"[108] the statute which, in fact, removed all the common law proprietary impediments which had upto then attached to a married woman was the Married Women's Property Ordinance of 1923.

This statute, which continues to apply in Sri Lanka, declares that a married woman shall be capable of acquiring, holding and disposing, by will or otherwise, of any movable or immovable property as her separate property in the same manner as

106a. This statute repealed sections 4 to 19 (both inclusive) of the Matrimonial Rights and Inheritance Ordinance.

107. See section v. *infra*

108. See note 92 *supra*

if she were a *feme-sole* without the intervention of any trustee.[109] Any damages or costs recovered by her in any action in tort or other legal proceeding shall be deemed to be her separate property and, likewise, any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property.[110] Likewise, all contracts bind her separate property, and if she carries on a trade separately from her husband, in respect of her separate property, she will be subject to the insolvency laws in the same way as if she were a *feme-sole*.[111] Any will made by a married woman during the subsistence of her marriage shall, whether she is or is not possessed of, or entitled to, any separate property at the time of making it, be construed, as regards the property contained therein, to speak and take effect as if the will had been executed immediately before her death. Provided, however, that there shall appear nothing in the will showing a contrary intention.[111a] She is entitled to have and to hold as her separate property and to dispose of all movable and immovable property which belongs to her at the time of the marriage, or which she acquires or inherits after marriage, including wages, earnings, money, and property gained or acquired by her in any employment, trade or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic or scientific skill.[112] Any money or other property of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his insolvency, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other property after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied.[112a] The execution of a general power by will by a married woman shall have the effect of making the property acquired liable for her debts and other liabilities in the same manner as her separate estate is made liable

109. Sec. 5(1)
110. Sec. 5(2)
111. Sec. 5 (3), (4)
111a Sec. 6
112. Sec. 7
112a. Sec. 8

under the Ordinance.[113] A woman married before the commencement of the Ordinance will be entitled to have and to hold and to dispose of in manner aforesaid, as her separate property, all movable and immovable property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of the Ordinance including any wages, earnings, money, and property so gained or acquired by her.[114] If, however, a woman married before the commencement of the Ordinance, with the written consent of her husband, had disposed of by sale any immovable property to which she became entitled before the commencement of the Ordinance, the proceeds of any such sale, whether it is retained in the form of money or otherwise, remains her property but subject always to the same trusts as affected the immovable property from the sale of which such proceeds are derived.[115] All money secured in favour of a married woman by any mortgage deed executed before the commencement of the Ordinance shall be deemed, unless or until the contrary be shown, to be the separate property of that woman, and any such mortgage deed is sufficient *prima facie* evidence that she is beneficially entitled to the amount thereby expended to be secured in her favour for her separate use, so as to authorise and empower her to receive or otherwise deal with the same, and to receive the interest and profits thereof, without the concurrence of her husband, and to indemnify any person liable to pay the sum secured by any such mortgage.[116] All deposits in any post office or other savings bank, or in any other bank, all annuities granted by any person, and all sums forming part of the public stocks or funds, which at the commencement of this Ordinance are standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of this Ordinance are standing in her name, shall be deemed, unless and until the contrary be shown, to be the

113. Sec. 9
114. Sec. 10 (1)
115. Sec. 10 (2)
116. Sec. 11 (1) see also sub-sections (2), (3)

separate property of such married woman; and the fact that any such deposit, annuity, sum forming part of the public stocks or funds, share, stock, debenture, debenture stock, or other interest as aforesaid, is standing in the sole name of a married woman, shall be sufficient *prima facie* evidence that she is beneficially entitled thereto for her separate use, so as to authorize and empower her to receive or transfer the same, and to receive the dividends, interest and profits thereof without the concurrence of her husband, and to indemnify the Postmaster-General, and all directors, managers and trustees of every such bank, corporation, company, public body, or society as aforesaid, in respect thereof.[116a]

All sums forming part of the public stocks or funds, and all such deposits and annuities respectively as are mentioned in the last preceding section, and all shares, stock, debentures, debenture stock, and other interests of or in any such corporation, company, public body, or society as aforesaid, which after the commencement of this Ordinance shall be allotted to, or placed, registered, or transferred in or into, or made to stand in, the sole name of any married woman, shall be deemed, unless and until the contrary be shown, to be her separate property, in respect of which, so far as any liability may be incident thereto, her separate estate shall alone be liable, whether the same shall be so expressed in the document whereby her title to the same is created or certified, or in the books or register wherein her title is entered or recorded, or not:

Provided always that nothing in this Ordinance shall require or authorize any corporation or joint stock company to admit any married woman to be a holder of any shares or stock therein to which any liability may be incident, contrary to the provisions of any Act of the Parliament of the United Kingdom, enactment, charter, by-law, articles of association, or deed of settlement regulating such corporation or company.[116b]

All the provisions hereinbefore contained as to deposits in any post office or other savings bank, or in any other bank, annui-

116a. Sec. 12
116b. Sec. 13

ties, sums forming part of the public stocks or funds, shares, stock, debentures, debenture stock, or other interests of or in any such corporation, company, public body, or society as aforesaid respectively, which at the commencement of this Ordinance shall be standing in the sole name of a married woman, or which, after that time, shall be allotted to, or placed, registered, or transferred to or into, or made to stand in, the sole name of a married woman, shall respectively extend and apply, so far as relates to the right, title, or interest of the married woman, to any of the particulars aforesaid which, at the commencement of this Ordinance, or at any time afterwards, shall be standing in, or shall be allotted to, placed, registered, or transferred to or into, or made to stand in, the name of any married woman jointly with any person or persons other than her husband.[116c]

It shall not be necessary for the husband of any married woman, in respect of her interest, to join in the transfer of any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society as aforesaid, which is now or shall at any time hereafter be standing in the sole name of any married woman, or in the joint names of such married woman and any other person or persons not being her husband.[116d]

If any investment in any such deposit or annuity as aforesaid, or in any of the public stocks or funds, or in any share, stock, debenture, or debenture stock of any corporation, company, or public body, municipal, commercial, or otherwise, or in any share, debenture, benefit, right, or claim whatsoever in, to, or upon the funds of any industrial, provident, friendly, benefit, building, or loan society, shall have been made by a married woman by means of moneys of her husband, without his consent, the court may, upon an application under section 23 of this Ordinance, order such investment and the dividends thereof, or any part thereof, to be transferred and paid respectively to the husband; and nothing in

116c. Sec. 14
116d. Sec. 15

this Ordinance contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property, which, after such gift shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors; but any money so deposited or invested may be followed as if this Ordinance had not been passed.[116e]

A married woman may by virtue of the power of making contracts hereinbefore contrained effect a policy of insurance upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall enure accordingly.

A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts:

Provided that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid;

Provided further that, notwithstanding anything herein contained, any money received under any such policy shall be subject to the payment of estate duties under the Estate Duty Ordinance, upon the whole amount of such money where such policy is wholly kept up by the husband or wife, as the case may be, or upon a part of such amount in proportion to the amount of the premiums paid by him or her, where the policy is partially kept up by such husband or wife as aforesaid.

116e. Sec. 16

The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy.

In default of any such appointment of a trustee, such policy immediately on its being effected, shall vest in the insured and his or her executor or administrator, in trust for the purposes aforesaid.

If, at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by any court having jurisdiction under the provisions of the Trusts Ordinance, or any enactment amending and extending the same.

The receipt of a trustee or trustees duly appointed, or, in default of any such appointment, or in default of notice to the insurance office, the receipt of the executor or administrator of the insured shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whol or in part.[116f]

A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the enactments relating to joint stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between

116f. Sec. 17

them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof:

Provided always that nothing in this Ordinance shall operate to increase or diminish the liability of any woman married before the commencement of this Ordinance for any such debt, contract, or wrong as aforesaid, except as to any separate property to which she may become entitled by virtue of this Ordinance, and to which she would not have been entitled for her separate use under the sections hereby repealed or otherwise, if this Ordinance had not been passed.[116g]

A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the enactments relating to joint stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bona fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any court in which a husband shall be sued for any such debt shall have power to ascertain or to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount or value of such property:

Provided always that nothing in this Ordinance contained shall operate to increase or diminish the liability of any husband married before the commencement of this Ordinance for or in respect of any such debt or other liability of his wife as aforesaid.[116h]

A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any

116g. Sec. 19
116h. Sec. 20

wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part against both of them.

If in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him.

In any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only.[116i]

A wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Ordinance, shall in like manner be liable to criminal proceedings by her husband.

In any proceeding under this section, a husband and wife shall be competent, and, except when he or she is the accused, compellable, to give evidence against each other, any enactment or rule of law to the contrary notwithstanding.[116j]

A married woman who is a trustee solely or jointly with any other person or persons of property subject to any trust, or who is an executrix or administratrix solely or jointly as aforesaid of the estate of any deceased person, may sue or be sued, and may, without her husband, dispose of or join in disposing of any movable

116i. Sec. 21
116j. Sec. 22

or immovable property held by her as such trustee, executrix, or administratrix, as if she were a *feme-sole*.[116k]

The Ordinance provides a married woman with remedies for the protection and security of her separate property.

Every woman, whether married before or after this Ordinance, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a *feme-sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort.

In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property.

In any proceeding under this section a husband or wife shall be competent and, except when he or she is the accused, compellable to give evidence against each other, any enactment or rule of law to the contrary notwithstanding.

Provided always that no criminal proceedings shall be taken by any wife against her husband by virtue of this Ordinance while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.[117]

In relation to property disputes between the spouses the Ordinance provides that:

In any question between husband and wife as to the title or possession of property, either party, or any such bank, corpora-

116k. Sec. 24
117. Sec. 18

tion, company, public body, or society, as aforesaid, in whose books any stocks, funds, or shares of either party may be standing, may apply by petition in a summary way as provided for in Chapter XXIV of the Civil Procedure Code, to the District Court of the district in which either party resides.

The District Judge may make such order, direct or make such inquiry, and award such costs as he shall think fit.

The District Judge may, if either party so require, hear the application in his private room.

Any order so made shall be subject to appeal to the Supreme Court, and for the purposes of such appeal shall be regarded as an interlocutory order of the District Court.

Any such bank, corporation, company, public body, or society as aforesaid shall, in the matter of such application for the purposes of costs or otherwise, be treated as a stakeholder only.

Every such petition shall bear a stamp of Rs. 10/- and no more.[118]

In a recent unreported case,[118a] the Court of Appeal had to decide whether dowry property consisting of cash could be recovered under section 23 of the Ordinance. According to the evidence, Rs. 10,000/-, which was the dowry property the petitioner received at the time of her marriage, had been spent by the respondent, and the petitioner wished to reclaim it. Counsel for the respondent alleged that section 23 of the Ordinance was inapplicable because that section applied only if the property in dispute was traceable and identifiable. This was the accepted interpretation of section 17 of the Married Women's Property Act of England [118b] and Justice Abdul Cader reasoned that since section 17 of the English Act was similar to section 23 of our own Ordinance, the same view ought to prevail in our law. In the English law,

118. Sec. 23

118a. S.C. (C.A.) No. 370/60 (P.)

118b. *Turnstall* v. *Turnstall* [1953] 2 All E.R. 310

it was subsequently felt that an interpretation which required the existence of specific property in respect of which an order may be made worked injustice if the defendant had already disposed of the property. Consequently, the Matrimonial Causes (Property and Maintenance) Act 1958 gave the court power in such a case either to order the defendant to pay the plaintiff such a sum of money as represented the latter's interest in the property or to make an order with respect to any other property which now represented the whole or part of the original. However, a specific property or fund must have been in existence originally and proceedings cannot be brought under section 17 for the recovery of a debt.[118c]

Section 23 of the Ordinance vests in the Judge the discretion to make such order as "he thinks fit." In England, the courts have adopted two views on the scope of this judicial discretion. In *Jansen* v. *Jansen*,[118d] Lord Denning declared that the section "gives rights where none before existed and gives a remedy where before there was none. Where the existing rights can clearly be ascertained, effect must be given to them. But where it is not possible to ascertain them the court can do what the statute says it should do, that is make such order as it thinks fit."[118e]

This view, however, was departed from by the House of Lords in *Pettitt* v. *Pettitt*[118f] which held that the court had no jurisdiction under this section to vary existing titles and no wide power to transfer or create interests in property than it would have in any other type of proceeding. At most it has "a wide discretion as to the enforcement of the proprietary or possessory rights of one spouse in any property against the other."[118g]

Nothing in this Ordinance contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, concerning the property of any married woman.[119] This section appears to give the

118c. *Crystall* v. *Crystall* [1963] 2 All E.R. 330; P. M. Bromley, *op. cit.* p. 441
118d. (1965) 3 W.L.R. 875
118e. *id.* at p. 882
118f. [1969] 2 All E.R. 385
118g. *id.* at pp. 411, 820
119. Sec. 25

spouses a right to enter into an agreement or settlement regulating their proprietary rights outside the ambit of the Ordinance.

The Ordinance further provides that:

"When a married woman having sufficient separate property neglects or refuses to maintain her husband, who through illness or otherwise is unable to maintain himself, the Magistrate within whose jurisdiction such woman resides may, upon application of the husband, make and enforce such order against her for the maintenance of her husband out of such separate property as by section 2 of the Maintenance Ordinance, he may now make and enforce against a husband for the maintenance of his wife.[120] A married woman having separate property adequate for the purpose shall be subject to all such liability for the maintenance of her children as a widow is now by law subject to for the maintenance of her children:

Provided that nothing in this Ordinance shall relieve her husband from any liability at present imposed upon him by law to maintain her children.[120a] For the purposes of this Ordinance the executor or administrator of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living.[120b] From and after the commencement of this Ordinance the benefit of the *Senatus Consultum Velleianum*, the benefit of the *Authentica si qua Mulier*, and of the Article 6 of the Placaat or Edict of the Emperor Charles V dated the 4th day of October, 1540, relating to marriage settlements shall not apply or have any force whatsoever in Ceylon."[120c]

IV. Antenuptial Contracts

In the Roman-Dutch common law it was possible for spouses to vary or even totally exclude the common law consequences of

120. Sec. 26
120a. Sec. 27
120b. Sec. 28
120c. Sec. 29

marriage by entering into an antenuptial contract.[121] The spouses were thus able to set out the terms and conditions by which their marriage was to be governed.[122] These contracts could refer to any aspect of the marital relationship and could, *inter alia*, exclude community of goods or of profit and loss, or both; it could exclude the system of universal community as well as the marital power of the husband over both the wife's person and property;[123] or it could exclude community of property but retain the marital power of the husband; and it could also stipulate the legal system which was to govern their proprietary rights and provide for the succession of their property.[124]

Certain incidents of marriage, however, which were thought to be an intrinsic part of the marital relationship, were outside the scope of consensual agreements. Consequently, marital obligations such as the duty of support, conjugal fidelity and marital privileges could not be excluded by virtue of an antenuptial agreement.[125] In effect, any clause which was thought to be *contra bonos mores* could not be included in an antenuptial contract.

In the early Sri Lankan law, too, there was evidence of the use of antenuptial contracts.[126] Since these agreements sought to alter or exclude the common law consequences of marriage, there is evidence that a strict interpretation of these contracts was adopted and, as such, unless the intention of the parties was manifest, both the South African as well as the Sri Lankan courts adopted an interpretation consistent with the common law consequences rather than one which supported their exclusion.[127]

In *Brito* v. *Muthunayagam*,[128] the antenuptial agreement contained the following clause: "In consideration of the premises

121. Voet 23.4.26; Van der Keesel, *Th.* 227
122. Grotius 2.12.3; Van der Keesel, *Th.* 228
123. The husband's power to have the decisive say in all matters concerning the common life of the spouses was invariable and could not be the subject of an antenuptial contract. See Voet 23.4.20
124. See H. R. Hahlo, *op. cit.* p. 278
125. Voet 23.4.16
126. See *Babapulle* v. *Rajaratnam* (1899) 4 N.L.R. 348
127. *Brito* v. *Muthunayagam* (1915) 19 N.L.R. 38. See also *Natal Bank Ltd.* v. *Roods Heirs* 1909 T.S. 243; *Ball's Executor* v. *Ball* 1917 W.L.D. 68
128. (1915) 19 N.L.R. 38

the said Tangamma doth hereby renounce all right to community so far as the property, estate and effects of the said Christopher Brito are concerned, it being understood that the said Christopher Brito shall have, hold and enjoy his separate property, without any claim thereto on the part of Tangamma." The Supreme Court, consisting of Shaw and Ennis JJ. having reiterated the Roman-Dutch law principle that there was a strong presumption in favour of community and that unless the community was expressly renounced the presumption prevailed, declared that the antenuptial agreement entered into between the parties in this case excluded the *communio omnium bonorum*, that is property in which the spouses had an interest at the time of the marriage, but that the *communio quaestuum*, or property acquired during the subsistence of the marriage, had not been excluded from the terms of the agreement.[129] This interpretation was further reiterated by the Privy Council[130] and Lord Dunedin delivering the opinion of the Board declared that: "It appears to be absolutely settled by consistent authority that the *communio quaestuum* and the *communio bonorum* must be each indubitably dealt with, that is to say, that mere general words which may be satisfied by reference to the *communio bonorum* will not avail to discharge the *communio quaestuum*...This being so, it seems impossible to say that in this contract the *communio quaestuum* was excluded."[131] The onus is clearly on the party who says that *quaestus* is excluded to prove it, and this burden was not discharged.

The effect of an antenuptial agreement subsequent to the Matrimonial Rights and Inheritance Ordinance of 1876 was in issue in *In re estate of Louisa Ursula, Krichenbeck*.[132] The parties had agreed by antenuptial contract that there would be no community of goods between them, that neither should be liable for the debts of the other and that each should, during the subsistence of the marriage, deal with and dispose of his or her separate property without the joinder or intervention of the other. According to the 1876 Ordinance, however, all movable property belonging to

129. *id.* at pp. 39, 41
130. (1918) 20 N.L.R. 327
131. *id.* at p. 329
132. (1884) 6 S.C.C. 132

the wife was to vest absolutely in the husband "subject and without prejudice to any settlement affecting the same and except so far as is by this Ordinance otherwise provided."[133] Burnside C. J. declared that if the *inter vivos* agreement was treated as a "settlement" as contemplated by section 17, it would "defeat the Ordinance and let in all the mischief which the legislature intended to prevent." His opinion was that the Ordinance governed the property rights of parties on marriage and consequently it was beyond the purview of two parties to alter or abrogate the effect of the statute by a mere agreement. While Justice Lawrie concurred with this view, a dissenting opinion was expressed by Dias J. who held that the parties had entered into a contract which took their matrimonial rights outside the scope of the Ordinance so that the husband had no absolute rights in the wife's movable property. In his opinion, an antenuptial contract was a "settlement" from which the provisions of the statute were excepted and as such the agreement took precedence over the Ordinance.

Indeed, this dissenting opinion is supported by section 17 of the Ordinance and as such it would appear as if spouses had the right to contract themselves out of the scope of the Ordinance, thereby setting out the terms and conditions by which they wished to have their matrimonial rights and obligations governed. It is submitted, however, that if this view is accepted, it would seriously impede the authority of the legislature. It is more likely, therefore, that the word "settlement" in section 17 was not meant to refer to antenuptial agreements but rather, to any charge or liability attached to the wife's movable property. This interpretation would also be consistent with the meaning attached to the word "settlement" in other provisions of the statute.[134]

V. An Evaluation of the Legal Nature of Community of Property

It may perhaps be asserted that a matrimonial property regime wholly consistent with, and giving effect to, the fundamental tenets of marriage is one founded on the idea of unity, and the concept of the oneness of husband and wife,

133. Sec. 17

134. See, for instance, sections 10, 12.

which idea when carried to its logical conclusion, would necessarily require the invariable and equal division of matrimonial property on termination of the marriage. Indeed, this objective is achieved in a system of universal community of property: all property owned by the spouses at the time of marriage, and that acquired subsequent to the union, are held in a common fund or estate which fund is enriched by all profits earned, and is equally liable for any debts incurred during the tenure of the marriage. Moreover, on dissolution of the marriage the common estate is divided equally between the spouses. Undoubtedly, the traditional Roman-Dutch law proprietary regime, with community of property and of profit and loss, is representative of the sentiments expressed above. Nevertheless, this system was disadvantageous to the wife, she being made legally inferior to her husband. For instance, the husband alone administered the property and his powers in relation to the property rights of the spouses were so extensive that the wife was totally dependent on him for the exercise of any proprietary rights. What requires emphasis, however, is that this place of first importance, accorded to the husband, and the consequent merger of the wife's rights with his, was not a feature of community of property but of the different but related notion of marital power, which was also an incident of marriage in the common law. It is interesting to note, however, that while the marital power of the husband was a variable consequent of marriage in that it could be excluded by antenuptial agreement, if the spouses married with community of property, the marital power of the husband was never, in fact, excluded.[135] One possible rationale for this may be that administrative convenience required that one spouse take total responsibility for the common property; and that spouse had to be the husband because of his superior position as head of the family. In effect, then, in the Roman-Dutch common law, a woman married with community of property was compelled, as it were, to subject herself to its corollary, namely, the marital power of her husband, and therefore, although she enjoyed the privilege of sharing equally with her husband in a division of the common estate on dissolution of the marriage,[136] yet during the tenure of

135. H. R. Hahlo, *op. cit.* p. 281

136. Unless she was subject to the rule of forfeiture of benefits.

the marriage, she was no more than an adjunct of her husband. Indeed, this aspect of community of property, which was a necessary evil a woman had to tolerate if she wished to avail herself of the right to participate in a division of the common property; though tolerated by women at an early stage of history, is anachronistic and has no place in a modern legal system.

The alternative property regime selected by Sri Lanka is a system of total separation[137] which has as its primary advantage the retention of full control, by each spouse, of his or her respective properties. In other words, whatever each spouse owned at the time of his or her marriage remained in his or her separate ownership and control, and whatever was acquired or inherited subsequent to the marriage belonged to the spouse who paid for it or to whom it was given. Consequently, on dissolution of the marriage the proprietary rights of the spouses did not become a subject of judicial arbitration as there was nothing to divide, the property being in separate ownership any way.

Indeed, a system such as this, which is founded on property entitlement based on money contribution would *prima facie* appear to be totally non-discriminatory and wholly fair to both spouses; though married, they enjoy an independent status in relation to their proprietary rights, reaping whatever benefits and suffering any losses independent of one another and, upon dissolution, taking away with them their separate properties. In actual fact, however, a system such as this does considerable injustice to the wife who, more often than not, would have no claim whatever to what is commonly termed "family assets", for the acquisition of which she is equally responsible as a non-monetary contributor, but for which effort she gets no recognition or compensation.

The phrase "family assets" or "partnership property" refers

137 See Matrimonial Rights and Inheritance Ordinance No. 15 of 1876 which abolished community of property. This statute, however, entrenched some of the aspects of marital power which therefore continued to apply. The Married Women's Property Ordinance No. 18 of 1923, however, removed from a married woman the last vestige of marital power and conferred on her, full control in relation to her separate property.

primarily to those proprietary rights acquired by the collaborative efforts of both husband and wife and which, therefore, become the joint property of both spouses. According to Lord Denning in *Fribance* v. *Fribance*[138] "family assets" are that property "intended to be a continuing provision for (the spouses) during their joint lives... acquired by their joint efforts during the marriage." In English law, this definition has been extended to include property acquired in contemplation of his or her marriage and intended for the common use and benefit of both.[139]

The essential characteristic of this category of property is that in the generality of cases the husband, being either the sole wage earner or the primary one, makes the monetary contribution towards the acquisition of family assets, and the wife, whose role is essentially that of a homemaker, usually makes an intangible. non-monetary contribution. In a separate property regime the "solid tug of money"[140] ensures that entitlement is founded solely on the concept of financial contribution, thereby losing sight altogether of the intangible, and unquantifiable contribution of the woman who performs her duties as wife, mother and housekeeper, thereby leaving her husband free to devote his attention to the purely economic aspects of family welfare. It is precisely for this reason that Kahn-Freund said of the English law Married Women's Property Act 1882, which provided the model on which the Sri Lanka statute was drafted, that the idea of equality held forth by the 1882 Act was, and still is, "as mechanical as the crude idea of 'freedom of contract' which insists on treating as 'equals' landlord and tenant, employer and employee".[141]

Indeed, this sex-based discrimination of assigning to a woman the role of homemaker, is very much a prevalent idea in most Eastern societies, and Sri Lanka is no exception. No doubt the 20th century has witnessed a significant expansion in the avenues of employment

138. (1957) 1 W.L.R. 384, 387
139. See Kevin Gray, *Reallocation of Property on Divorce* (England 1977) pp. 127, 128
140. *Hofman* v. *Hofman* (1965) N.Z.L.R. 795, 800 *per* Woodhouse J.
141. 1959 (22) *M.L.R.* 241, 248

for skilled and professional women. In fact, an increasing number of women are entering the academic world and a large proportion of them would engage themselves in gainful employment. The essential point, however, is that notwithstanding all these factors, the woman's role in the home as wife and mother is not in any way diminished. In other words, the "choice" between wage-earner and housewife available to a woman does not provide her with mutually exclusive alternatives. On the contrary, the woman manages to combine both roles, with a difference in emphasis accorded to each function. Inevitably, primacy is accorded to her domestic functions. Moreover, it is a truism that her access to gainful occupation is significantly reduced in view of the restrictions imposed upon her during her years of child bearing and child rearing. These then are the realities a married woman is confronted with; the ensuing injustice that would follow if her proprietary rights were based solely on financial contribution to the acquisition of property is self-evident. The common law proprietary regime, on the other hand, which entrenched the sentiment of "equality is equity," offered a far more equitable basis of division. Although the reintroduction of the common law concept is not being canvassed, a system of division which takes into account both financial and non-financial contributions is indeed most desirable.

Most Western societies have realised the need to accord to the spouses true parity of status in relation to this question. In a New Zealand case, *Hofman* v. *Hofman*,[142] Woodhouse J. emphasised the need to "consider the true spirit of transactions involving matrimonial property by giving due emphasis not only to the part played by the husband, but also to the important contributions which a skilful housewife can make to the general family welfare by the assumption of domestic responsibility, and by freeing her husband to win the money income they both need for the furtherance of their joint enterprise. Each is in a unique position to support or to undermine the constructive efforts of the other." The House of Lords in *Gissing* v. *Gissing*,[143] attached a financial value to the domestic services of the wife when it declared that the wife must have "relieved the husband from

142. (1965) N.Z.L.R. 795, 798
143. [1971] A.C. 886

expenditure which he would otherwise have had to bear." In similar vein, Lord Denning pointed out in *Wachtel* v. *Wachtel* [144] "that the wife who looks after the home and family contributes as much to the family assets as the wife who goes out to work. The one contributes in kind. The other in money or money's worth."

The English legal system has incorporated these ideas into its statutes. Therefore, the Matrimonial Causes Act of 1973 expressly provides that when effecting a division of matrimonial property "the contribution made by each of the parties to the marriage, to the welfare of the family, including any contribution made by looking after the home or caring for the family," must be taken into account. [145]

In the Sri Lankan law, however, this idea has not been expressly declared. The amended Civil Procedure Code gives the court an unfettered discretion to order a settlement of the property "as the court thinks reasonable" [146] but as the legislature has not provided the courts with any guidelines for the exercise of judicial discretion, it is left to be seen whether the courts will be guided by recent developments in English law when reallocating proprietary rights on divorce. [147]

In conclusion t s submitted that there is an urgent need for legislative protection of the proprietary rights of a married woman in Sri Lanka. A prominent feature of modern Sri Lanka is the increased number of women in educational enclaves who spend their early youth equipping themselves with academic or non-academic qualifications. Consequently, such women marry at a much later age than before. This has far-reaching implications for the woman as her child bearing period gets reduced, and she is compelled to spend the early years of her married life in raising a family. Consequently there is a relegation of her career ambitions to the background and the

144. [1973] Fam. 72
145. Sec. 25
146. Sec. 615 (1)
147. See chapter 10, *infra* sec. D.

resulting diminishment of job opportunities when she re-enters the job market. The net result is that the financial contribution a woman makes to the family is significantly less than what her husband is capable of making. Hence, a combination of social, economic, and biological factors restricts a woman in her efforts to gain economic parity of status with her husband. The only exception would be the woman who has private means of her own; but in the generality of cases the woman is largely dependant on her husband financially. Indeed, such dependence is, in itself not to be scorned; if marriage, as described by Kevin Gray, is an enduring association of man and woman marked by a sharing of fortune and adversity, by love and constructive co-operation, by commitment, compromise and reciprocation[148] there need be no objection whatever to the total dependence of the wife on her husband for financial support. What necessitates judicial redress, however, is the unhappy situation in which the relationship sours and breaks thereby compelling impartial third parties to intervene in a matter which should properly be outside the purview of such arbitration. It is to do justice to both parties, when the so-called indissoluble bond of matrimony does, in fact, dissolve, that the law should give adequate recognition to the widely differing roles played, and contributions made, by each partner to the marriage.

148. See Kevin Gray, *op.cit.* p. 23

CHAPTER 6

DUTY OF SUPPORT

A. I. Introduction

The subject of duty of support, is governed by a statute, namely, the Maintenance Ordinance of 1889. Nevertheless it is not a comprehensive enactment and recourse to the common law continues to be relevant. Thus, for instance, the Ordinance does not provide for a right of action by needy parents against their children for support. But this would be an instance where a civil action for maintenance may be available. Moreover, a wife in indigent circumstances can enforce her husband's obligation of support by virtue of the statute as well as by pledging her husband's credit for necessaries, which latter common law action, continues to be recognised in our law.[1]

In addition, the law of support, in modern Sri Lanka has been greatly influenced by English law. Thus, for instance, there is reference to English case law on the subject of the ownership, use and enjoyment of matrimonial property.[2]

It must be pointed out that in an area of law as important as the one of support, the availability of a right of recourse not only to the statute but also to the Roman-Dutch common law and the English law on the subject is indeed desirable. Moreover, the practice of looking to other jurisdictions is to be encouraged for it will enable our own law to develop incorporating the enlightened trends found in other legal systems, as is manifest in our law regulating the use and enjoyment of matrimonial property.

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1. See IV b. *infra*
2. See B. *infra*

II. The Common Law

An invariable consequent of marriage in the Roman-Dutch common law was the reciprocal obligation of support[3] whereby the husband was thought to have the primary obligation of support,[4] perhaps because he was more often than not the principal wage-earner, and the wife's obligation came alive only in circumstances in which the husband was unable to support himself.[5] In other words, a fundamental difference in attitude to the spouses' obligation to maintain each other, is discernible at the very outset, and it is submitted that although a rationale founded on the theory that the husband's obligation is greater than that of his wife because of his earning potential, though wholly acceptable in a bygone era, has continued relevance only within a prescribed context.[6]

The level of support envisaged was one commensurate with the standard and style of living of the spouses,[7] and it was generally accepted that the husband, as head of the household, determined the requisite standard.[8] Therefore, support included not only absolute necessities but also the requisite needs of the wife in a given set of circumstances; as such, it has been said that "What will be regarded by the court as a necessary in the case of spouses who move in the best society of the place in which they live will not be regarded as a necessary in the case of a couple of humble origin and of narrow means."[9]

An important, though not essential, prerequisite for the performance of this obligation was the existence of a common household. If, however, the joint establishment had been terminated, it became relevant to ascertain who was responsible for the break-up. The allocation of fault became necessary at this junc-

3. Voet 24.3.8
4. See *Edelstein* v. *Edelstein* 1952 (3) S.A.1; *Rousseau* v. *Cloete* 1952 (3) S.A.703 at p. 709
5. *Lyons* v. *Lyons* 1935 T.P.D. 345; *King* v. *King* 1947(2) S.A.517 at p. 522
6. See section VII *infra*
7. *Gammon* v. *Mc Clure* 1925 C.P.D. 137 at p. 139; *Oberholzer* v. *Oberholzer* 1947 (3) S.A.294
8. See *Reloomel* v. *Ramsay* 1920 T.P.D. 371 at p. 374; *Stone* v. *Stone* 1966 (4) S.A. 98 at p. 103
9. *Reloomel* v. *Ramsay* 1920 T.P.D. 371 at p. 374, *per* Wessels J.P.

ture because it was reasonable that the wife should not be permitted to abandon the matrimonial home and to then demand that her husband support her in a separate establishment. If she was the deserter, or the one guilty of matrimonial misconduct, she was denied support *ipso facto* for having failed, herself, in a fundamental obligation of marriage, she could not be heard to complain of her husband's non-compliance with a marital obligation. But if the husband was the deserter, or if the parties separated by mutual agreement, the husband's obligation continued on the principle that no one can escape his legal obligations by his own wrong doings.[10]

In the common law, the wife's right of support could be enforced by pledging her husband's credit for household necessaries during the tenure of the joint establishment, and by pledging his credit for personal necessaries in the event of a termination of the matrimonial home. It must be pointed out that, while in the latter situation, the wife's right was directly founded on the husband's obligation of support;[11] in the former, her right was considered a legal incident of marriage and was therefore, wider in scope and different in some respects from his obligation of support.[12] Nevertheless, it was an aspect of his duty of support and this is best illustrated by the fact that even if he could successfully prohibit his wife from pledging his credit for household necessaries, he could not prevent her from binding him in respect of "necessities of life for herself and her children."[13]

An important aspect of the husband's obligation of support was his duty to provide his wife with a matrimonial home from which he could not eject her without providing her with alternative accommodation. This topic is discussed fully elsewhere in this book.[14]

10. See H. R. Hahlo, *The South African Law of Husband and Wife* (4th ed., Cape Town 1975) p. 114.
11. *Gammon* v. *Mc Clure* 1925 C.P.D. 137 at p. 139
12. H. R. Hahlo, *op. cit.* p. 181
13. *ibid.*
14. See sec. B. *infra*

III. The Modern Law of Sri Lanka

The first statutory enactment to recognise the husband's duty of support in the Sri Lankan legal system was the Vagrancy Ordinance No. 4 of 1841, inspired by the English Vagrancy Act of 1824. Though setting out the husband's obligation to maintain his wife, the Ordinance did not provide the means of enforcing this responsibility. Punitive sanction was imposed on a defaulting husband and as such he was liable to imprisonment and lashes. While this form of punishment did nothing to relieve the indigent circumstances of the needy wife, if he was fined, in addition, there is authority for the view that the wife was entitled to the fine.[14a] This Ordinance was repealed by the Maintenance Ordinance which declares that[15] "If any person having sufficient means neglects or refuses to maintain his wife, or his legitimate or illegitimate child unable to maintain itself, the Magistrate may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child at such monthly rate, not exceeding one hundred rupees, as the Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct. Such allowance shall be payable from the date of the order."[16]

This section was recently amended[17] and the words "at such monthly rate not exceeding one hundred rupees as the Magistrate thinks fit" has been substituted to read: "such monthly rate, as the Magistrate thinks fit, having regard to the income of the defendant and the means and circumstances of the applicant or such child."[18]

The word "maintenance" in the Ordinance has been defined as "to support with food, clothing and other conveniences."[19] More-

14a See R. K. W. Gunasekera, "A Married Woman's Right to Maintenance" *University of Ceylon Review* (Vol. 18) p. 177 at p. 186. *Contra* H. B. Thomson, *Institutes of the Laws of Ceylon* (Vol. 11, London) p. 103

15. No. 19 of 1889

16. Sec. 2

17. See Act No. 19 of 1972

18. Sec. 2 (1)

19. D.C. No. 23002 Galle, 1857 Beling and Vanderstraaten's Digest 1846-1862 at p. 107, *per* Morgan J.

over, the applicant must be the lawful wife of the defendant to claim maintenance under the Ordinance. In *Subramaniam* v. *Pakkiyaledchumy*,[20] the applicant, who had obtained a decree *nisi* in divorce proceedings against her husband K., alleged that she contracted a second marriage with S and claimed maintenance for herself from S before decree *nisi* in the divorce proceedings had been made absolute. Refusing the order, Rose C. J. declared that the law permitted a "wife" to make an application against her husband in the event of his failing or neglecting to maintain her. The duty was cast on the husband to provide only for his "wife", and "if the alleged marriage of an applicant for maintenance is invalid by reason of some legal impediment, which makes her stand in some lesser relationship to the alleged husband than his "wife" it would seem to be plain from the wording of the section that she is not entitled to claim maintenance for herself under the Ordinance."[21] This case, however, may be distinguished from a situation in which the marriage was defective because the parties were under the statutory age of marriage. In an early case a Full Bench of the Supreme Court awarded maintenance although the applicant had been under-age when she contracted the marriage.[22] Similarly, in *Athai* v. *Arumugam*[23] there was a considerable body of evidence to show that a marriage ceremony according to Hindu rites had been performed, and the Magistrate who had seen and heard the witnesses held that the appellant and the respondent had gone through a ceremony of marriage. Basnayake J. in the Supreme Court upheld this decision and declared that "Once a marriage in fact is established, a marriage in law is presumed." The distinguishing feature between the two sets of cases, it is submitted, is the difference between void and voidable marriages.[23a]

Moreover it has been judicially declared that not only the wife but also her guardian or legal representative has *locus standi in judicio* to initiate an action for maintenance on her behalf. On the premise, then, that "it is open to anyone to bring to the notice

20. (1952) 55 N.L.R. 87
21. *id.* at p. 88
22. See (1870) Vanderstraaten's Rep. 109
23. (1948) 37 C.L.W. I.
23a. See chapter 3 sec. 11, *supra*

of the court the failure of a man to maintain his wife and children,"[24] the guardian of a lunatic wife[25] and the brother of an insane woman[26] were permitted to claim maintenance from the husbands on behalf of the wives. However, the converse case of a claim made against the administrator of the deceased husband's estate was disallowed on the reasoning that the Ordinance could not be "interpreted so as to include the legal representative of the person so made liable."[27]

According to decided cases, a wide interpretation of the phrase "having sufficient means" has been adopted. Consequently, not only the actual means but also the potential means of the husband are taken into consideration. Hence, the defence that the respondent is out of job cannot be sustained unless it is also established that he does not have the ability to procure one. In *Sivapakiam* v. *Sivapakiam*[28] the husband had no means of his own as he was a student at the Ayurvedic College and his mother gave the couple an allowance of Rs. 100 per month while they lived apart from her. This allowance, too, was stopped after the parties separated. He had no other income from property or employment, nor was there evidence that he could earn but that he had wilfully abstained from doing so. Accordingly he contended that he was not a person who "having sufficient means" neglected or refused to maintain his wife. Maartensz J. in the Supreme Court remitted the case to the Magistrate's Court to determine if the husband was one who had wilfully abstained from working. He directed that the Magistrate should consider whether the husband was in health and strength and able to earn by work suitable to his past and present condition in life, and whether such work was readily attainable.[29]

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24. *Anna Perera* v. *Emaliano Nonis* (1908) 12 N.L.R. 263, *per* Wood Renton J.
25. *Murugesu* v. *Suppiah* (1949) 1 C.L.W. 73
26. *Girigoris* v. *Don Jacolis* (1914) 1 Cr. App. Rep. 4
27. *Dingitto* v. *Singho Appuhamy* (1961) 3 C.W.R. 64. In the Roman-Dutch common law, too the surviving spouse was not permitted to claim maintenance out of the estate of the first dying. See H. R. Hahlo, *op. cit.* p. 327
28. (1934) 36 N.L.R. 295
29. See also *Micho Hamy* v. *Sudappu* (1883) 5 S.C.C. 198, a case decided under the Vagrants Ordinance of 1841 for a similar view.

In *Rasamany* v. *Subramaniam*[30] Basnayake J. declared that "section 2 should be given a wide meaning and not restricted in its scope to persons having an income or actually earning at the time of the application. In this context the word 'means' should be taken to include capacity to earn money. It cannot be that the legislature, when enacting these provisions, intended to exclude from the scope of sections 2 and 3 able-bodied men capable of earning and maintaining their wives and children but who, by their voluntary act, refrain from doing so."[31] According to the evidence in this case the respondent was prepared to maintain his wife as long as she agreed to live with him. Moreover, he had offered to let her select any house in Chavakachcheri to live in. Basnayake J., therefore, rightly concluded that this evidence was irreconcilable with the respondent's claim that he had no means to maintain his wife. "If a man is able to maintain his wife on condition of her living with him, it will be doing violence to language to say that he is a person without sufficient income to maintain his wife."[32] The case, therefore, was sent back to the Magistrate to determine the quantum of maintenance the respondent should be ordered to pay.

This interpretation of the Maintenance Ordinance is entirely consistent with the judicial interpretation of the Indian Criminal Procedure Code which contains a similar provision.[33] In *Kandasami Chetty*[34] the court declared that both actual and potential means had to be determined when deciding whether the husband had sufficient means. The Matrimonial Causes Act of England,[35] too, is no different in this respect. It provides that either party to a marriage may apply to court for an order if the other party has "wilfully neglected to provide reasonable maintenance..."[36] The term "wilful neglect" according to decided cases connotes the ability to maintain and the refusal to do so.[37]

30. (1948) 50 N.L.R. 84
31. *id.* at p. 86
32. *id.* at p. 85
33. Sec. 488 (1)
34. (1926) A.I.R. Madras 346
35. 1973, sec. 27 (1)
36. *ibid.*
37. *Mc Ewen* v. *Mc Ewen* [1972] 1 W.L.R. 1217

Although there is unanimity for the view that "A man is not, and ought not to be, permitted by his own voluntary act to free himself from the elementary duty of maintaining his wife and children,"[38] there is considerable doubt whether there is an initial presumption of fact that in all cases the defendant is one who is capable of engaging in a job, if he is not already in one, so that the onus is on the defendant to rebut it, or whether it is the duty of the applicant to establish that the respondent is one who has opted not to secure the means required to provide maintenance although he is well able to do so. According to Creasy C.J. "in a country like this where work is so easily procured, it ought to require very cogent evidence on the part of an able-bodied man to make a Police Magistrate believe that he has been not only out of work, but that he has been unable to obtain work, though he has tried hard to do so; otherwise, it is a matter of commonsense to presume that he might, if he liked, get work, and thereby get the means of supporting his wife."[39] However, a contrary view was expressed by Chief Justice Burnside in *Micho Hamy* v. *Sudappu*.[40] Interpreting the Vagrants Ordinance, which was the precursor of the Maintenance Ordinance, he opined that there must be cogent evidence of the wilful refusal to procure a suitable job before a Magistrate may be justified in finding against the defendant. Although he conceded that in the case of an able-bodied man the quantum of evidence required would be significantly reduced, he said that the onus was on the one who alleged the neglect or refusal of maintenance to prove that although the defendant was in a position to fulfil his obligation he had refrained from doing so.

This latter view, it is submitted, is to be preferred and is consistent with the Supreme Court judgment in *Sivapakiam* v. *Sivapakiam*[41] where the order appealed from was sent back to the Magistrate's court since there was no evidence to establish that

38. See further, *Muni Kantivijayaj* v. *Emperor* (1932) A.I.R. Bombay 285; *Ma Tha* v. *Naga San E.* 13 Cr. L. J. 162; *U. Thiri* v. *Ma Pway* (1923) A.I. R. Rangoon 131; *Maung Tin* v. *Ma Hmin* (1933) A.I.R. Rangoon 138.

39. Decisions of the S.C. in appeal from 1869-1871, Vanderstraaten's Rep. 121. This case interpreted the Vagrants Ordinance which was the precursor of the Maintenance Ordinance. The relevance of this mode of reasoning to the changed circumstances of modern Sri Lanka may be doubted.

40. (1883) 5 S.C.C. 198

41. (1934) 36 N.L.R. 295

the husband had wilfully abstained from earning an income. The court directed that the Magistrate should consider the health and working capacity of the husband together with the job opportunities available to him before concluding that he was guilty of a deliberate refusal to work. This is entirely consistent with the rules pertaining to burden of proof in all criminal actions and is also in keeping with the English law on this point. [42]

IV. The Nature and Scope of the Maintenance Ordinance

(*a*) The Applicability of the Ordinance to Kandyans and Muslims

It has been judicially accepted that the statute governs not only those subject to the Roman-Dutch law, but also indigent wives under the Kandyan [43] and Muslim [44] law.

Kandyan customary law recognises a *diga*-married husband's liability to maintain his wife [45] and Hayley points out that "presumably this would not apply to a *binna*-married husband." [46] This is presumably founded on the nature of a *binna* marriage which relegates the husband to a subordinate position; the wife is, in such a marriage, the head of the family. [47] This is also consistent with the authority of the *Niti Nighanduwa* which declares that even on divorce, a *binna*-married husband is not liable for the support of his wife and children unless he departed of his own accord, and then, too, he is liable to supply only his children with the necessities of life. [48] Judicial authority, however, has not made

42. See *Weatherley* v. *Weatherley* [1929] 142 L.T. 163, 165; *Earnshaw* v. *Earnshaw* [1896] P. 160
43. *Ukko* v. *Tambya* (1863-68) Ram. Rep. 70; *Yadalgoda* v. *Herat* (1879) 2 S.C.C. 33; *Menikhamy* v. *Loku Appu* (1898) 1 Bal. Rep. 161; (1855) Bel. and Vand. 75; (1899) Koch. Rep. 54; *Meniki* v. *Sugathuwa* (1940) 19 C.L.W. 37
44. *Abdul Rahiman* v. *Lebbe Pathumma* (1889) 5 C.W.R. 145; *Assa Muthu* v. *Marimuttu* (1863-68) Ram. Rep. 140; *Pathuma* v. *Bawa* (1863-68) Ram. Rep. 144; (1873) Grenier Rep. 48
45. F. A. Hayley, *A Treatise on the Laws and Customs of the Sinhalese* (Colombo 1923) p. 286
46. *id. note* (d)
47. *id.* at p. 193
48. *id.* at p. 289

a distinction based on the form of marriage contracted and, consequently, an order for maintenance has been made against a *binna*-married husband as well. Therefore, in *Ran Menika* v. *Punchi Banda*,[49] a case decided under the Vagrants Ordinance, the Supreme Court held that an exception was not to be made in relation to a *binna*-married husband if he left his wife and child without maintenance and they had to be supported by others.[50] It is submitted, however, that to assert a successful claim for support under the Maintenance Ordinance there must be an initial obligation of support, the function of the statute being merely to provide a speedier and less expensive method of enforcement. Therefore, if the Kandyan customary law does not impose an obligation of support on a *binna*-married husband, the assertion of a claim under the statute cannot be justified.

A further anomaly is apparent in the application of the Maintenance Ordinance to Kandyans who have ceased to be husband and wife. The statute is clearly applicable only to a "husband" who refuses or neglects to maintain his "wife".[51] Moreover, it denies relief in a situation in which the parties have separated by mutual consent.[52] While the common law of Sri Lanka distinguishes between separation and divorce, the Kandyan customary law accepts the mere cessation of the common life of the spouses in the matrimonial home as amounting to a divorce.[53] Consequently, on mere separation the woman would cease to be a "wife" in terms of the Maintenance Ordinance. Nevertheless the courts of Sri Lanka have consistently held that a Kandyan woman, deserted by her husband, can have recourse to the Maintenance Ordinance. In *Yadalgoda* v. *Herat*[54] a woman who had been deserted by her husband sued him for maintenance under the Ordinance. Clarence J. in the course of his judgment referred to the payment of "alimony" rather than "maintenance." If by

49. (1855) Ram. Rep. 61
50. See also (1855) Bel. and Vand. 75; (1899) Koch. Rep. 54
51. Sec. 2
52. Sec. 4
53. F. Moder, *Kandyan Law* (Colombo 1914) p. 354; Sharya de Soysa, "Selected Aspects of the Kandyan Law of Marriage" *The Colombo Law Review*, (Colombo 1979, vol. 5) p. 77 at p. 88
54. (1879) 2 S.C.C. 33

this he meant that the woman was, in fact, divorced and not merely separated, to recognise the woman's right to sue for maintenance under the Ordinance is clearly contrary to the provisions of the statute. The decision to award maintenance under the statute appears to have hinged primarily on the reasoning that a Mohammedan wife has a claim to maintenance under the statute, and, as such, a similar right is available to a Kandyan woman. However, as Bonser C.J. pointed out in *Menikhamy* v. *Loku Appu*,[55] "For my part, I cannot see what the rights of a Mohammedan wife has to do with the rights of a Kandyan wife."[56] In this latter case, too, a deserted wife was permitted to sue for maintenance under the statute. Bonser C.J. recognising this right declared that recourse to the statute was permissible because the Kandyan law was silent on the question of maintenance to a deserted wife. This proposition, however, is not tenable in view of the clear textual authority for the contention that a deserted wife has a right to alimony in the Kandyan customary law.[57]

An interesting feature of the law in this context is the evidence of recourse to the Maintenance Ordinance even subsequent to the enactment of the Kandyan Marriage Ordinance[58] which statute imposes on the husband an obligation to support the wife and children on a dissolution of the marriage.[59] In *Sarana* v. *Heen Ukku*[60] the marriage had been dissolved by the Provincial Registrar in terms of the Kandyan Marriage Ordinance[61] and the appellant had been ordered by the Provincial Registrar to pay a monthly sum of Rs. 2 to the respondent for her maintenance. Subsequently, the respondent applied to the Magistrate's Court for an enhancement of the rate of maintenance. It was contended for the appellant that section 2 of the Maintenance Ordinance was inapplicable and that the Magistrate's Court had no power to direct the payment of a sum of money after the dissolution of a marriage. In support

55. (1898) 1 Bal. Rep. 161
56. *id.* at p. 161
57. See F. A. Hayley, *op.cit.* pp. 287-289; J. Armour, *Grammer of Kandyan Law* p. 14
58. No. 1 of 1919
59. Sec. 4
60. (1944) 45 N.L.R. 196
61. No. 1 of 1919, sec. 20

of this contention, counsel cited *Meniki* v. *Siyathuwa*.[62] In this latter case the appellant had obtained an order for maintenance against her husband, the respondent. Thereafter, the parties were divorced under the Kandyan Marriage Ordinance. But the order of dissolution of marriage was not accompanied by an order for the periodical payment of a sum of money. When the applicant subsequently claimed arrears of maintenance, de Kretser J. refused the claim on the reasoning that the Maintenance Ordinance applied only while the conjugal relationship existed. In *Sarana* v. *Heen Ukku*, however, Howard C.J. declared that the decision in *Meniki* v. *Siyathuwa* had no relevance to the facts before him because of the provisions of the Kandyan Marriage Ordinance which empowered the Provincial Registrar to make an order for support and states that an order made by the Provincial Registrar may be enforced, cancelled or varied by a competent court. Moreover, according to the statute a competent court shall mean "a Magistrate's Court in the exercise of its jurisdiction under the Maintenance Ordinance, in respect of an order made under section 2 thereof, where such entry or order directs the payment periodically of a sum of money in so far as such entry or order directs such payment."[63] In the light of this statutory provision, Howard C.J. declared that when the Magistrate acted under sec. 20, he exercised his powers "as if the parties were husband and wife."[64]

It is submitted, then, that while *Sarana* v. *Heen Ukku* was correctly decided, an anomaly arose because the Kandyan Marriage Ordinance provided for recourse to the Magistrate's Court whereas the Maintenance Ordinance provided for the support of a "wife" only and did not include an ex-wife as well. However, recourse to the Maintenance Ordinance is not provided for in the Kandyan Marriage and Divorce Act No. 22 of 1955 and, therefore, in the modern law, Kandyans divorced in terms of their statute would be governed by the provisions of this Act in relation to all matters pertaining to the obligation of support.[65]

62. (1940) 42 N.L.R. 53

63. Sec. 20, (5) and (6) of the Kandyan Marriage Ordinance.

64. (1944) 45 N.L.R. 196 at p. 198

65. See sec. 33(7) See *Abeysekera* v. *Abeysekera* (1957) 60 N.L.R. 66; *Premawansa* v. *Somalatha* (1961) 63 N.L.R. 551; *Abeysekera* v. *Bisso Menika* (1961) 64 N.L.R. 260; *Wimalawathie Kumarihamy* v. *Imbulbeniya* (1953) 55 N.L.R. 13.

In *Premawansa* v. *Somalatha*,[66] subsequent to a divorce obtained under the Kandyan Marriage and Divorce Act, the respondent claimed arrears of maintenance, as ordered by the Magistrate, for the tenure of the marriage, and a distress warrant to claim it. Tambiah J., refusing the claim, declared that the order for the dissolution of the marriage had the effect of rendering the order for maintenance ineffective as from the date of the dissolution. Moreover, he pointed out that the respondent was not without a remedy because the District Registrar, acting under the Kandyan Marriage and Divorce Act, had ordered the payment of maintenance, and the respondent could have that order enforced in the same manner as an order made by the District Court in a matrimonial action under chapter 42 of the Civil Procedure Code.[67] Likewise, in *Abeysekera* v. *Bisso Menika*[68] the Supreme Court held that there was no provision under the Kandyan Marriage and Divorce Act No. 44 of 1952 to enable an order for maintenance entered by a District Registrar to be converted into an order of the Magistrate's Court.

Moreover, there is evidence in our law of the application of the Maintenance Ordinance to Mohammedan wives as well. In *Abdul Rahiman Lebbe* v. *Pathumma*,[69] Justice Shaw declared that Ordinance No. 19 of 1889 provided the proper remedy for support of deserted wives and children "of all classes of the community."[70]

In 1951, the Muslim Marriage and Divorce Act[71] provided for the award of maintenance by the Kathi Courts; nevertheless, the jurisdiction of the Police Court to entertain applications for maintenance under the Ordinance continued to apply. In *Sooriyaumma* v. *Sathukeen*,[72] Fernando A.J. declared that "sec-

66. (1961) 63 N.L.R. 551
67. See sec. 35 of Act No. 44 of 1952
68. (1961) 64 N.L.R. 260
69. (1889) 5 C.W.R. 145
70. *ibid.* See also *Assa Muttu* v. *Marimuttu* (1863-68) Ram. Rep. 140; (1873) Grenier Rep. 48.
71. No. 13 of 1951. See *Rahumath Umma* v. *Gouse* (1938) 11 C.L.W. 39; *Umma Saidu* v. *Hasim Marikar* (1941) 22 C.L.W.55; *Seyed Mohamed* v. *Mohamed Ali Lebbe* (1953) 54 N.L.R. 307
72. (1937) 8 C.L.W. 149

tion 21 [73] merely provides that in a case where the kathi is inquiring into an application for divorce he may also inquire into a claim for maintenance. There is nothing in the Ordinance ousting the jurisdiction of the Police Court to inquire into claims for maintenance pure and simple."[74] Consequently, the Maintenance Ordinance was invoked to provide for the support of an ex-wife, in spite of the wording of section 2 which refers to "wife" and which logically applies, therefore, only to support during the subsistence of the marital relationship.

In *Abdul Gafoor* v. *Mrs. Joan Cuttilan*[75] H. N. G. Fernando J. declared that "The Kathi Court and the Magistrate's Court have concurrent jurisdiction to hear and determine applications for maintenance and, in my opinion, it is not open to a party who has once invoked and submitted to the jurisdiction of the Kathi Court to withdraw from those proceedings and to seek to agitate the same matter in the Magistrate's Court."[76] Conversely, an order of the Magistrate against the award of maintenance was held to preclude the applicant from reopening the question decided against her in the Kathi Court.[77]

It is evident that anomalous consequences can flow from the application of the Maintenance Ordinance to those professing the Muslim faith. For instance, according to the Ordinance an allowance for maintenance will not be awarded to a wife who, without any sufficient reason, refused to live with her husband.[78] Consequently, a wife who leaves the matrimonial home because her husband is living with another woman has been held to have had sufficient reason to desert her husband.[79] Nevertheless, the same criterion was held not to apply to a Muslim woman who had refused to live with her husband, who, she claimed, was "living in

73. Muslim Marriage and Divorce Ordinance No. 27 of 1929
74. (1937) 8 C.L.W. at pp. 149, 150
75. (1956) 61 N.L.R. 88
76. *id.* at p. 89. See also *Saboor Umma* v. *Cooskanny*(1909) 2 Leader L.R. 139 *Contra Jiffry* v. *Nona Binthan* (1960) 62 N.L.R. 255 at p. 256, *per* T. S. Fernando J.
77. *Jainambo* v. *Izzadeen* (1938) 10 C.L.W. 138
78. Sec. 2
79. *Richard* v. *Anulawathie* (1971) 72 N.L.R. 383

adultery." In *Mammadu Nachchi* v. *Mammatu Kassim*[80] the court held that since the Mohammedan Code[81] entitled a man to keep as many concubines as he was able to maintain, the mere fact that the husband kept an unmarried woman in addition to his wife was not sufficient to justify the wife's refusal to live in the matrimonial home.

It is submitted, however, that the adoption of different criteria for Muslims and Non-Muslims when interpreting the Maintenance Ordinance should no longer be necessary in the light of recent decisions.[82] In *Ismail* v. *Muttu Marliya*[83] Herat J. had to decide on the validity of a Magistrate's order for maintenance against the defendant who professed the Muslim faith, and he concluded that the Magistrate's Court had no jurisdiction to hear maintenance cases of persons governed by the Muslim Marriage and Divorce Act because that statute had conferred exclusive jurisdiction to a validly appointed Quazi to decide this matter.[84] Likewise, in *Ummul Marzoona* v. *Samad*,[85] Justice Vythialingam declared that "in respect of marriage and divorce and matters connected thereto such as maintenance in regard to persons who profess the Muslim faith, the Muslim Marriage and Divorce Act by section 48 vests exclusive jurisdiction in the Quazi who has to decide those matters in accordance with the Muslim law of the sect to which the parties belong."[86]

(*b*) The Availability of a Civil Action For Maintenance

A long debated question in the law of maintenance is the right to bring a civil action for maintenance thereby enforcing the husband's duty of support outside the ambit and independent of the provisions of the Maintenance Ordinance. Although there is no dearth of judicial decisions on this question, there is considerable difficulty in finding a clear and conclusive answer pri-

80. (1908) 11 N.L.R. 297
81. Sec. 101
82. *Jiffry* v. *Nona Binthan* (1960) 62 N.L.R. 255 at p. 256
83. (1963) 65 N.L.R. 431
84. See sec. 48
85. (1977) 79 N.L.R. 209
86. *id.* at p. 211

marily because the case law has discussed this question in relation to several aspects of the law of maintenance, thereby making it difficult to formulate a single theory applicable to the entire law on the subject.

A much relied on and oft cited decision in this context is *Menikhamy* v. *Loku Appu*,[87] a two bench decision which involved the application for maintenance by a Kandyan woman deserted by her husband. Bonser C.J. and Withers J. in a short judgment pointed out that a wife, whether under the Roman-Dutch law or the Kandyan law, had no right to bring a civil action for maintenance when deserted by her husband, her only right to relief being confined to an action under Ordinance No. 19 of 1889.[88]

The following year in *Subaliya* v. *Kannangara*,[89] a case which discussed the plea of *res judicata*, the father of an illegitimate child was sued for maintenance, and Bonser C.J. in the course of his judgment referred extensively to Roman-Dutch law authority in support of the contention that the Roman-Dutch common law recognised the liability of a father to support his illegitimate family and he concluded that the mother could, on behalf of the child, compel the performance of this duty by a civil action.[90] Although he was of the view that the Ordinance provided "a simpler, more speedy and less costly remedy," he recognised, in addition, the concurrent right to file an action for maintenance outside the four corners of the statute.[91]

It is submitted that Bonser C.J.'s judgment in *Subaliya* v. *Kannangara* neither conflicts nor is inconsistent with his earlier decision in *Menikhamy* v. *Loku Appu*, as the two cases may be distinguished on their facts. While in the former case he opined that a mother of an illegitimate child could file a civil action for maintenance against the father of the child to enforce his obliga-

87. (1898) 1 Bal. Rep. 161

88. This decision was approved of and followed in *Abdul Rahiman Lebbe* v. *Patumma Natchie* (1918) 5 C.W.R. 145

89. (1899) 4 N.L.R. 121

90. *id.* at p. 123

91. See *Jane Ranasinghe* v. *Pieris* (1909) 13 N.L.R. 21 at pp. 23, 24, *per* Middleton A.C.J. and Pereira A.J.

tion of support towards the child; in the latter case he declared that as far as a deserted wife's right to obtain support from her husband is concerned, the Maintenance Ordinance is the only means by which she can obtain redress.[92]

In *Anna Perera* v. *Emaliano Nonis*,[93] Wood Renton J. extended the *ratio decidendi* of *Menikhamy* v. *Loku Appu* to include all actions for maintenance whether it be by a deserted wife against her husband, or a woman in her capacity as mother, against the father of her children. In other words, he was of the view that "the special rights and remedies created by the Ordinance must be held to have superseded the common law,"[94] and, as such, the Maintenance Ordinance was the only means by which the obligation of support could be enforced.

The following year, in *Jane Ranasinghe* v. *Pieris*,[95] Justice Middleton appeared to recognise the continued availability of an action for maintenance under the Roman-Dutch common law. Of course this case involved an action for past maintenance and he ruled that since the Maintenance Ordinance only contemplated maintenance being granted from the date of the order, an action for past maintenance must be instituted by way of a civil action under the common law. In similar vein, Pereira A. J., in a separate judgment, declared that if actions for maintenance were competent under the common law,[96] "it does not to my mind appear to be quite clear how the Maintenance Ordinance, in the absence of express words to that effect, can be said to have brought about their abolition."

It must be pointed out that the action for past maintenance was refused in this case not because the court did not recognise the right to institute such an action under the common law but

92. *Subaliya* v. *Kannangara* was further reiterated by Bonser C.J. in *Eina* v. *Eraneris* (1900) 4 N.L.R. 4 the facts of which were on all fours with the previous case

93. (1908) 12 N.L.R. 263

94. *id*. at p. 267

95. (1909) 13 N.L.R. 21

96. See *Yadalagoda* v. *Herat* (1879) 2 S.C.C. 33; *Subaliya* v. *Kannangara* (1899) 4 N.L.R.121

because, according to the evidence adduced, it appeared that the applicant was not entitled to reimbursement since he had not been in need of support in the first instance.

In 1921, this matter was adjudicated by a Full Bench of the Supreme Court in *Lamahamy* v. *Karunaratne*[97] where the plaintiff brought an action in the District Court against the administratrix of the estate of the deceased claiming maintenance for an illegitimate child aged six. The majority decision of the court was that the Maintenance Ordinance was the only means by which a wife or child (legitimate or illegitimate) could claim maintenance from a husband or father. It is indeed interesting to note the reasons adduced for this decision. Ennis A.C.J. did not dispute the contention that in the Roman-Dutch law a civil action for maintenance was available, but he doubted whether the Roman-Dutch common law governing the right to claim maintenance from the estate of a deceased person was ever introduced into Ceylon.[98] Likewise, Justice Shaw opined: "it appears to me to be extremely doubtful whether the liability contended for ever existed, but if it did, I am of opinion that it was never introduced into Ceylon."[99] Hence, the most salient reason for the decision not to recognise a civil action for maintenance appears to have been the fact that an action based on the liability of the heirs of a deceased person for maintenance, even if available in the Roman-Dutch common law, was not introduced into Ceylon. Indeed, this may well justify a denial of a cause of action in the common law, but there is no warrant whatever for concluding on the basis of this finding that all actions for maintenance must be brought under the provisions of the statute. A conclusion that is rightly founded on a particular fact cannot justifiably be extended to include within its ambit situations which are not influenced by the same, or similar, considerations. Indeed, both Ennis and Shaw JJ. admitted that the Roman-Dutch law of maintenance may have been in force in the colony,[100] but they were clearly of the opinion that even if a civil action for maintenance was available prior to the enactment of

97. (1921) 22 N.L.R. 289
98. *id.* at p. 290
99. *id.* at p. 292
100. *id.* at pp. 291, 292.

the Maintenance Ordinance, that right did not include the availability of a right to sue the heirs of the deceased person. On the basis of this latter proposition, however, it cannot be concluded that a civil action for maintenance was not available or that, even if it was, that it has been abrogated, in full, by the Maintenance Ordinance.

Schneider A. J., delivering a strong dissenting argument, concurred with the majority view that it was not clear whether, even in the Roman-Dutch law, the heirs of the father upon his demise were under any obligation to maintain his children; he said that "in view of the fact that there is not a single instance which can be cited to prove that such a liability had been recognised in this Colony, it seems to me that the existence of such a liability in this Colony cannot be assumed or be said to have been recognised."[101] Nevertheless, he had no doubt that there was "ample authority to support the proposition that that branch of the Roman-Dutch law which writers upon Roman-Dutch law treat under the head of 'Parent and Child' was recognised as the law of this Colony in so far as it was not excluded by any local custom having the force of law or by any local legislation."[102] He further declared that "It is an accepted doctrine that the courts of law in a country exist for the purpose of enforcing legal rights. The liability of a father to maintain his child being recognised by the law, an action to compel him to perform that duty may be brought in any court of civil jurisdiction unless such courts are precluded from exercising jurisdiction by some special provision relating to the matter. There is nothing in the Maintenance Ordinance No. 19 of 1889 to indicate that it was intended that the special procedure therein provided was to preclude resort to any general procedure which might be available. It seems to me therefore doubtful that that Ordinance, with its limitations, restrictions and penal provisions was intended to do anything more than provide a speedier, less expensive, and more summary and rigorous procedure to recover maintenance. I am, therefore, not convinced that the Ordinance No. 19 of 1889 was intended to, or did, in fact, abrogate the right of action in an ordinary court of civil jurisdiction to enforce payment of maintenance for a child."[103]

101. *id.* at p. 294
102. *id.* at p. 293
103. *id.* at p. 293

The view reflected in the majority decision, namely, that the Ordinance is a complete code, has been reiterated in a series of subsequent cases.[104] In *Ambalavanar* v. *Navaratnam*[105] the reciprocal obligation of a child to support indigent parents was in issue. Sansoni J. cited several authorities in support of the contention that this reciprocal obligation of support was a part of the Roman-Dutch common law. He then went on to declare that this principle was introduced into Ceylon and that it was a part of our common law. He referred to and approved of the judgment of Bertram C.J. in *Sameed* v. *Segutamby*[105a] where he said that "the proposition that the Roman-Dutch law pure and simple does not exist in this country in its entirety and that it is not the whole body of Roman-Dutch law, but only so much of it as may be shown or presumed to have been introduced into Ceylon that is now applicable here, does not apply to fundamental principles of the common law enunciated by authorities recognised as binding wherever the Roman-Dutch law prevails."[106] Justice Sansoni, therefore, concluded that a child's obligation to support needy parents was a fundamental principle of our common law and that it obtained in Ceylon.

104. See *Letchiman Pillai* v. *Kandiah* (1928) 30 N.L.R. 280; *Jane Nona* v. *Van Twest* (1929) 30 N.L.R. 449; *Selliah* v. *Sinnammah* (1947) 48 N.L.R. 261; *Saraswathy* v. *Kandiah* (1948) 50 N.L.R. 22; *Namasivayam* v. *Saraswathy* (1949) 50 N.L.R. 33 at p. 335; *Tenne* v. *Ekanayake* (1962) 63 N.L.R. 544; *Ediriweera* v. *Dharmapala* (1965) 69 N.L.R. 45; *Weeraratne* v. *Chandrawathie Perera* (1977) 79 N.L.R. (Part I) 445 at p. 452. In *Ariyanayagam* v. *Thangamma* (1939) 16 C.L.W. 33, De Kretser J. held that the order of a District Court, made in the exercise of its matrimonial jurisdiction to make provision for the maintenance of the children of the marriage, was a bar to separate proceedings for their maintenance under the Maintenance Ordinance. He was of the view that it was more advantageous to file an action in the District Court for maintenance than to proceed under the Maintenance Ordinance, because it would avoid the restrictions in the statute. An order may be made not in favour of the wife but in favour of some other person more likely to look after the interests of the children. There is one advantage the Ordinance gives, namely, the punitive sanction of imprisonment in the event of default of payments. So long as the order of the District Court remains, however, it is the order of a court of competent jurisdiction and, on general principle, it ought to be a bar to separate proceedings on the same subject matter.

105. (1915) 56 N.L.R. 422

105a (1955) 56 N.L.R. 422

106. *id.* at p. 424

In an overall analysis of the case law, it is submitted that a choice between the two strands of opinion does not have to be made because both views are reconcilable and operative in our legal system. To explain this further, the view that the Maintenance Ordinance is a comprehensive code which governs the entire law of support is acceptable to the extent that, as far as the subjects purported to be governed by the statute are concerned, the Ordinance provides the only means of redress and, in this circumscribed area, the civil action for maintenance is excluded. It is not a necessary corollary of this statement, however, that the Ordinance governs the entire law of support so much so that if the statute does not provide for a right of action in a particular situation, that the applicant is without any redress, and that resort to the common law is not a viable alternative. Consequently, an action for past maintenance, for instance,[107] or the availability to needy parents of a right of action to enforce the children's obligation of support,[108] though not provided for in the statute, are instances where the common law right may be invoked. However, if a destitute wife or child (whether legitimate or illegitimate) wishes to make a claim for support, they would be compelled to bring their action within the four corners of the statute. Moreover, a concurrent application of the statute and the common law is manifest in our legal system because of the recognition of a wife's right to pledge her husband's credit for personal necessaries when the spouses have entered into a *de facto* separation. The Maintenance Ordinance expressly shuts out relief to an indigent wife in a situation where the spouses have separated by mutual consent.[109] The wife, however, is not without a remedy in this contingency, because she can pledge her husband's credit for her personal necessaries thereby enforcing his common law obligation of support.[110]

In conclusion, then, it is submitted that the alternative remedies available to one entitled to support is to be commended for it ensures a proper application of the obligation of support, so vital to an indigent spouse, parent or child.

107. See *Jane Ranasingha* v. *Pieris* (1909) 13 N.L.R. 21
108. See *Ambalavanar* v. *Navaratnam* (1955) 56 N.L.R. 422
109. Sec. 4
110. See chapter 4, B. *supra*

(c) The Nature of the Maintenance Action

In an early case *Wijeyasuria Arachige Podihamy* v. *Wijeyasuria Arachige Martelis Gooneratne*,[111] the defendant had previously been charged with not maintaining a bastard child in breach of the Vagrancy Ordinance.[112] After hearing the evidence, the Police Magistrate acquitted the defendant. Subsequently, the complainant, the mother of the child, brought a charge against the defendant for not maintaining the same child, and the defendant raised the plea of *autrefois acquit*. The Supreme Court was therefore called upon to decide whether a plea of *autrefois acquit* was a good plea in bar to a subsequent prosecution for the offence created by the Ordinance. Burnside C.J., upholding the plea declared that "these matters, unhappily, as I think, have been constituted by our legislature as matters entirely of criminal prosecution. From first to last these charges stand on that footing, the defendant party being placed in the dock unable to give evidence on oath. The Ordinance under which the procedure is taken unquestionably deals with these as criminal proceedings. The word 'offence' is employed, the word 'conviction' also, and the sentence which may be pronounced on a finding against the defendant that the charge is established extends to several months' imprisonment at hard labour, and even to lashes."[113]

Chief Justice Burnside reiterated the above view in *Rankiri* v. *Kiri Hattena*,[114] the facts of which were on all fours with the previous case. There was, however, one notable difference, in that *Rankiri's* case was decided under the Maintenance Ordinance,[115] which was the successor to the Vagrancy Ordinance. Nevertheless, Burnside C.J. did not concur with the view that the nature of the maintenance action was different under the new Ordinance. Dias J., too, declared that while some of the provisions of the 1889 Ordinance were of a civil nature, the bulk of the matter dealt with by the Ordinance was criminal or *quasi* criminal. However, a dissenting judgment was delivered by Clarence J. He opined that while

111. (1883) 5 S.C.C. 231
112. No. 4 of 1841
113. (1883) 5 S.C.C. 231 at p. 233
114. (1891) 1 Cey. Law Rep. 86
115. No. 19 of 1889

under the Ordinance of 1841, which was based on the English Act, the proceedings were distinctly criminal in nature, under the new Ordinance the proceedings were civil. "It is true that in certain of the proceedings including the mode of enforcing a judgment in the complainant's favour, the procedure under the Criminal Procedure Code is adopted, but the trial or hearing is essentially an adjudication as to a civil and not a criminal liability."[116]

This dissenting opinion was approved of and followed by Bonser C.J. in *Subaliya* v. *Kannangara*.[117] He declared that the foundation of the jurisdiction of a Police Court in these matters was the civil liability already existing and that the Ordinance simply provided a speedier, simpler, and less costly remedy.[118] Likewise, in *Chivakannipillai* v. *Chuppramanian*,[119] Bonser C.J. was firmly of the view that an application under the Maintenance Ordinance was not a "complaint." He also declared that maintenance cases, being civil in their nature, should be decided according to the balance of evidence, and not on the footing that the innocence of the "accused" was to be assumed until the contrary was proved.[120] Since the person proceeded against was not in the position of an accused party in a criminal case, inculpatory statements made by him to a police officer, for instance, were not tantamount to a confession. As such, they were not inadmissible in evidence against him.[120a]

The maintenance action was referred to as being of a *quasi* civil nature in *Isabel* v. *Pedru Pillai*[121] and, as such, Grenier A.J. declared that the Police Magistrate had no power to condemn the husband to pay Crown costs for bringing a false and frivolous charge of adultery against his wife.[122]

116. (1891) 1 Cey. Law Rep. 86 at p. 87
117. (1899) 4 N.L.R. 121
118. *id.* at p. 123. See also *Gunahami* v. *Arnolishami* (1895) 3 N.L.R. 128
119. (1896)2 N.L.R. 60
120. See *Eina* v. *Eraneris* (1900) 4 N.L.R. 4, *per* Bonser C.J.
120a See *Bebi* v. *Tidiyas Appu* (1914) 18 N.L.R. 81 *per* Pereira J. See also *Eliza* v. *Jokino* (1917) 20 N.L.R. 157 where Shaw J. declared that, as in all civil actions, section 9 of the Oaths Ordinance applied to such proceedings.
121. (1902) 6 N.L.R. 85
122. See also *Chivakannipillai* v. *Chuppramanian* (1896) 2 N.L.R. 60

The vital difference between the Vagrants' Ordinance and the Maintenance Ordinance was explicitly pointed out in *Anna Perera* v. *Emaliano Nonis*.[123] Justice Wood Renton declared that the Vagrants' Ordinance made the failure by a man to maintain his family a criminal offence, whereas the Maintenance Ordinance not only contained no enactment to that effect, but expressly repealed the very section in the 1841 Ordinance under which *Podihamy* v. *Guneratne*[123a] was decided. Consequently, the statement of Burnside C.J. in *Rankiri* v. *Kiri Hattena*,[123b] that there was no point of difference between that case and the case previously decided by the Chief Justice, namely, *Podihamy* v. *Guneratne* cannot be accepted. Wood Renton J. also pointed out that the practice which had grown in many Police Courts of using the terms "complainant," "accused," "discharge," and "acquittal" in maintenance proceedings was not warranted by the Ordinance and he opined that it should be abandoned.[124]

Anna Perera v. *Emaliano Nonis*[125] involved a maintenance application against the alleged father for the support of two illegitimate children. When the case came up for trial on a previous occasion the appellant was not ready and the Police Magistrate "discharged" the respondent. At the subsequent trial the court had to decide whether the failure of a man to maintain his wife was a criminal offence so as to enable the defence of *autrefois acquit* to be successfully pleaded. The Supreme Court, however, was clearly of the view that as the proceedings in a maintenance action were not criminal and the trial for an offence was not involved, the doctrine of *autrefois acquit* was inapplicable.[126]

A contrary view had been previously expressed by Justice Wendt in *Saboor Umma* v. *Croos Kanny*[127] when he declared that

123. (1908) 12 N.L.R. 263
123a (1883) 5 S.C.C. 231
123b (1891) 1 Cey. Law Rep. 86
124. (1908) 12 N.L.R. 263 at p. 269. This statement met with emphatic approval by Middleton J. See p. 265
125. (1908) 12 N.L.R. 263
126. *id.* at pp. 265, 267, 269
127. (1909) 12 N.L.R. 97

the clear intention of the legislature was that Ordinance No. 19 of 1889 should be regulated by the Criminal Procedure Code and that, as such, an order that the case be "struck off" amounted to an acquittal of the accused under that code. However, Wood Renton J. in *Anna Perera* v. *Emaliano Nonis* held that this reasoning was unsound because the Maintenance Ordinance expressly set out the sections of the Criminal Procedure Code that should be incorporated and, consequently, there was no justification for the indiscriminate importation of the terms of that code by analogy.[128]

In conclusion, then, it must be pointed out that the consensus of judicial opinion is clearly in favour of the view that the nature of maintenance proceedings are civil rather than criminal.[129]

V. Maintenance Agreements

Although the Maintenance Ordinance provides an effective means of enforcing a husband's obligation of support, there may well be situations in which the parties, though separated *de facto*, do not wish to deliberate their rights in open court but would rather enter into an agreement regulating the payment of maintenance to the wife and children, if any. Apart from this situation, the right to enter into a consensual agreement for the payment of maintenance may also prove to be most valuable where the parties have separated by mutual consent and are, therefore, denied relief under the statute.[130] The Sri Lankan courts have accepted the validity of such agreements provided they conform to the law of contract. However, the courts have jealously guarded the interests of the party, more often than not the wife, who is in a lesser bargaining position and, consequently, more vulnerable and in need of legal protection. It has, therefore, been the consistent

128. See in this connection *Selestina Fernando* v. *Mohamado Cassim* (1908) 11 N.L.R. 329. In *Menika* v. *Banda* (1923) 25 N.L.R. 70 Schneider J. said that section 306 of the Criminal Procedure Code was not applicable to maintenance proceedings.

129. See *Sayalee* v. *Setuwa* (1923) 25 N.L.R. 216; *Podihamy* v. *Wickremasinghe* (1924) 27 N.L.R. 93; *Parupathipillai* v. *Kandiah Arumugam* (1944) 46 N.L.R. 35; *Ketchiman Pillai* v. *Kandiah* (1928) 30 N.L.R. 280. *Selliah* v. *Sinnammah* (1947) 48 N.L.R. 261; *Peiris* v. *Peiris* (1940) 45 N.L.R. 18; *Carlina Nona* v. De Silva (1948) 49 N.L.R. 163; *Herft* v. *Herft* (1928) 29 N.L.R. 324; *Jane Nona* v. *Van Twest* (1929) 30 N.L.R. 449

130. Sec. 4

policy of the courts to declare as invalid a contract whereby the wife barters away her right to enforce her husband's obligation of support.[131] In an early case[132] decided under the Vagrants' Ordinance, Stewart J. declared that a deed of separation entered into by the spouses whereby the wife was to retain her own property, of which she appeared to have sufficient, and forgo her right to maintenance from her husband, was void. Likewise, in *Mininduwage Madduma Hami* v. *Dumbutrige Kalu Appu*,[133] an agreement which relieved the husband of his obligation of support was deemed to be contrary to public policy, and invalid.[134] This view was once again reiterated by Jayatileke J. in *Parupathipillai* v. *Kandiah Arumugam*.[135] The basis of this view is the proposition that the husband's obligation of support is a continuing one and, as such, he cannot divest himself of this liability by entering into an unconscionable bargain whereby the wife is deprived of maintenance and is thrown upon the public for support. This obligation then, surpasses the bounds of a purely personal duty owed to the wife. It is on the contrary a matter of public concern, and as such the satisfaction of this obligation is closely watched over by the courts.

It is clear therefore that under no circumstances can the wife be precluded from having access to the legal remedies available to her to enforce her husband's obligation of support. However, to do so she must, as a necessary prerequisite, establish that she is in indigent circumstances and that her husband has knowledge of this fact. The requirement pertaining to the husband's knowledge becomes particularly relevant in a situation where the parties had previously entered into a maintenance agreement whereby the wife had been provided for, either by the payment of a lump sum or by vesting in her full rights in relation to her property. If, therefore, the husband had *bona fide* believed that his wife was amply provided for by the property set aside for her by the agreement, there would be a total absence of *mens rea* and *mens conscia*

131. See C. G. Weeramantry, *The Law of Contracts* (Colombo 1967 vol. 1) p. 369
132. (1873) 2 Grenier Rep. 92
133. (1880) 3 S.C.C. 132
134. See also *Nakamuttu* v. *Kanthan* 1 S.C.D. 48, *Hinnihamy* v. *Gunawardana* 3 C.L.Rec. 163
135. (1944) 46 N.L.R. 35

to render him liable.[136] Therefore, in an early case decided under the Vagrants' Ordinance[137] Cayley J. pointed out that if due to absence of knowledge of the wife's indigent circumstances the husband neglects to maintain her, "It would be unduly pressing the operation of Ordinance No. 4 of 1841 to hold that the defendant should be deemed an idle and disorderly person for not maintaining his family."[138] What is required in these circumstances, therefore, is proof of a demand for maintenance and the husband's consequent refusal to discharge his liability. Moreover it has been said that if the wife's claim is despite a maintenance agreement which relieved the husband of his obligation of support, the husband ought not on the wife's first application be convicted on a charge under Ordinance No. 4 of 1841.[139] This view, however, is of doubtful validity in view of the clear authority for the proposition that a provision relieving the husband of his obligation of support is *contra bonos mores* and consequently void. It is nevertheless reasonable to expect the wife to communicate her indigent circumstances to the husband and on such knowlegde, the husband's fundamental obligation of support should revive. "No man can renounce a right of which his duty to the public and the claims of society forbid the renunciation."[140]

VI. (*a*) The Effect of a decree of Divorce on the Right to Claim Maintenance

Widely divergent attitudes to this question are manifest in the decided cases. The most salient objection to a woman being given relief under the Maintenance Ordinance subsequent to the cessation of conjugal relations appears to be the wording of section 2 of the Ordinance according to which a person is liable to maintain his "wife". It has been suggested therefore that this fact necessarily excludes from the scope of applicability of the section an ex-wife. Indeed this view, which had the support of Indian authority until

136. See (1873) 2 Grenier Rep. 92

137. (1874) 3 Grenier Rep. 30

138. *id*. at p. 31

139. See *Mininduwage Madduma Hami* v. *Dumbutrige Kalu Appu* (1880) 3 S.C.C. 132

140. *Hyman* v. *Hyman* [1929] A.C. 601. See also the English Matrimonial Causes Act 1973, sec. 34, which renders void any maintenance agreement purporting to restrict or vitiate a spouse's right to petition court to enforce the other's obligation of support.

very recently, was first expressed in *Meniki* v. *Siyathuwa*.[141] The appellant, who had obtained an order for maintenance against her husband, the respondent, subsequently divorced her husband under the Kandyan Marriage Ordinance.[142] At a later date when she applied for arrears of maintenance Justice de Kretser declared that her claim must fail because the Ordinance applied only while the conjugal relationship existed and that the very terms of section 2 and of other sections in the Ordinance indicated that the Ordinance applied only while the relationship of husband and wife continued. He also pointed out that while under the Kandyan Marriage Ordinance it was open to the Registrar to order maintenance for the wife, an order had not been made. Nevertheless he declared that irrespective of this fact and regardless of the reason for the omission, whether it was due to negligence or mistake, the woman had no right of recourse under the Maintenance Ordinance.[143]

This case, however, was not referred to by Justice Sinnetamby in *Francis Fernando* v. *Vincentina Fernando*,[144] a case which involved an appeal by a husband against an order of the Magistrate, made under section 10 of the Maintenance Ordinance, enhancing the amount of maintenance payable by him to his wife. The appeal was founded on the argument that a decree of the District Court granting a dissolution of the marriage had been made, and the applicant had, therefore, ceased to be a "wife" and was not entitled to invoke the provisions of the Maintenance Ordinance. Justice Sinnetamby declared that if an application was made under section 2 of the Ordinance it was imperative that she be a "wife" to succeed. However he opined that section 10, perhaps advisedly, avoided using the words "wife" and "husband" and provided that any "person receiving or ordered to pay a monthly allowance" may apply for the cancellation or alteration of a maintenance order. "It would thus be reasonable to hold that once an order for maintenance under section 2 has been made in favour of the wife, it continues in force until it is cancelled or varied under section

141. (1940) 42 N.L.R. 53
142. No. 3 of 1870
143. (1940) 42 N.L.R. 53. See also (1873) Grenier Rep. 82
144. (1958) 59 N.L.R. 522

10 irrespective of all other considerations and irrespective of whether there has since come into existence a decree for divorce. In my opinion it is open to a divorced 'wife' to apply for enhancement under section 10 just as much as it is open to a divorced 'husband' to apply under it for a cancellation." [145]

According to this view, then, a decree for divorce does not *ipso facto* discharge the order for maintenance. [146] On an analysis of the facts of the above case and those of *Meniki* v. *Siyathuwa* [147] it is evident that there is no material difference between the two cases; in *Meniki* v. *Siyathuwa*, too, an order for maintenance had previously been obtained against the husband, and the appellant sought to recover arrears of maintenance from the respondent, subsequent to the entering of a decree of divorce. It was, therefore, not a case in which an application for maintenance was made for the first time under section 2 by a woman who had ceased to be a 'wife' and as such the mode of reasoning adopted in *Francis Fernando* v. *Vincentina Fernando* would be equally applicable to the facts of *Meniki* v. *Siyathuwa*.

Once again in *Mihirigamage* v. *Bulathsinhala* [148] the Supreme Court favoured a restricted interpretation of section 2 of the Maintenance Ordinance thereby denying a married woman who had obtained a divorce from obtaining maintenance under the statute. Weerasooriya J., arriving at this conclusion, relied on a *dictum* by Rose C.J. in a previous case, namely, *Subramaniam* v. *Pakkiyaladchumy*. [149] According to the facts of this latter case, the applicant, who had obtained a decree *nisi* in divorce proceedings against her husband K, alleged that she had contracted a second marriage with S., and claimed maintenance for herself from S. before decree *nisi* in the divorce proceedings was made absolute. Rose C.J., rejecting the claim declared that "The duty is cast on the husband to provide only for his wife and if the alleged marriage of an applicant

145. *id.* at p. 524
146. This interpretation has the support of English law authority as well. See *Bragg* v. *Bragg* 41 T.L.R.8; [1920] P. 158
147. (1940) 42 N.L.R. 53
148. (1962) 65 N.L.R. 134
149. (1952) 55 N.L.R. 87

for maintenance is invalid by reason of some legal impediment, which makes her stand in a somewhat lesser relationship to the alleged husband than as wife, it would seem to be plain from the wording of the section that she is not entitled to claim maintenance for herself under the Ordinance." [150] In support of this view he relied on the relevant section in the Indian Code of Criminal Procedure, [151] which is substantially the same as section 2 of our Maintenance Ordinance. In the Indian case of *Shah Abu Ilyas* v. *Ulfat Bibi* [152] Aikman J. observed that "It is only on proof of the existence of conjugal relations between a man and a woman that the man can under sec. 488 be ordered to provide for the woman's support."

It is submitted that while conceding the validity of the decision in *Subramaniam* v. *Pakkiyaladchumy*, [152a] the mode of reasoning adopted in that case cannot be justifiably extended to all situations in which the applicant is not the "wife" of the person from whom maintenance is claimed. Indeed, a woman who contracts a void marriage cannot be treated as a "wife" at any stage of the relationship, and as such her status must be materially different from that of a woman who dissolves an otherwise legal marriage. The recognition of this distinction in other areas of the law is manifest in the obligation cast on an ex-husband to pay alimony to his former wife whereas an analogous duty is not cast upon a "spouse" in the event of an annulment of a void marriage. [153] It is clear, therefore, that the dicta of Rose C.J. in *Subramaniam's* case though valid in the context in which it was stated, was erroneously relied on to form the basis of the decision delivered in *Mihirigamage* v. *Bulathsinhala*.

It must be pointed out that the availability of a right to maintenance, under the statute, to a woman whose marriage has been dissolved assumes importance only in a situation in which she is not the recipient of alimony subsequent to the divorce. In other

150. (1962) 65 N.L.R. 134 at pp. 136, 137
151. Act No. 5 of 1898, sec. 488(1)
152. Indian Decisions (New Series) 9 Allahabad 33
152a. (1952) 55 N.L.R. 87
153. See H. R. Hahlo, *op. cit.* p. 498

words, if she had been awarded alimony and if it was being duly paid there would be no warrant for a separate action for maintenance. Thus, for instance, in *Premawansa* v. *Somalatha*[154] Tambiah J. refused an order for a distress warrant to be issued to recover arrears of maintenance subsequent to a decree of divorce. However, the applicant was not left destitute because the District Registrar, acting under the Kandyan Marriages and Divorce Act[155] had ordered the payment of a sum equal to that ordered by the Magistrate in the maintenance proceedings.

Substantial injustice, however, may result in a situation like that which arose in *Meniki* v. *Siyathuwa*[155a] where an order for alimony had not been made and the Supreme Court refused to allow a claim for arrears of maintenance even though the reason for the District Registrar not making an order for support in the divorce proceedings might well have been founded either on negligence or on the fact that there already was an order for maintenance.[156] Moreover, if the validity of the ruling in *Meniki* v. *Siyathuwa* is accepted it would necessarily follow that if the husband had been responsible for the dissolution of his marriage, he would be permitted to take advantage of his own wrongdoing.

On an analysis of the case law it is obvious that the singular impediment to a more flexible interpretation of the Maintenance Ordinance is the use of the word "wife" in section 2. Consequently, a child, who does not cease to be a child merely because the parents are divorced has been granted the right to assert a claim for maintenance notwithstanding the fact that an order for support had been made in the District Court, which order was not being carried out. In *Peiris* v. *Peiris*,[157] although an order for support had been made by the District Court in an action for judicial separation, the defendant did not comply with the order and instead he got himself adjudicated an insolvent. Soertsz J. declared that "In this state of things, the law must surely stand compromised if it

154. (1961) 63 N.L.R. 551
155. No. 34 of 1954
155a. (1940) 42 N.L.R. 53
156. See text at note 143 *supra*
157. (1940) 45 N.L.R. 18

were helpless against the unscrupulous ingenuity of the defendant."[158] In *Fernando* v. *Amarasena*[159] the applicant had obtained a dissolution of her marriage from the District Court and provision had been made for the maintenance of the child but the order had not been complied with. When an action for maintenance was instituted the plea of *res judicata* was raised, but Justice Keuneman dismissed this defence on the reasoning that "the issue involved in the civil case is not the same as that in the maintenance case." As for the jurisdiction of the court he opined that the existence of the decree of the civil court did not oust the jurisdiction of the Magistrate to entertain an application under the statute.

Of course it was pointed out that it was open to the husband to show that he was making payments under the civil decree and that as such he had not failed or neglected to maintain his child. In this case, however, since there was no evidence to show that the respondent had made an attempt to comply with the civil decree against him the case was sent back to the Magistrate to make an appropriate order under the Maintenance Ordinance. Likewise in *Silva* v. *Karunawathie*[160] Justice Nagalingam declared that if the order for alimony in the divorce proceedings was carried out even at a later date, the jurisdiction of the Magistrate's court to order maintenance under the statute was vitiated.

It is interesting to note that while the Sri Lankan courts have relied heavily on the Indian Criminal Procedure Code in arriving at the conclusion that the use of the word "wife" in section 2 of the Maintenance Ordinance necessarily excludes the right of an ex-wife to relief under the statute, a recent amendment to the Indian Code[161] states that the expression "wife" includes a woman who has been divorced by or has obtained a divorce from her husband and who has not contracted a second marriage.[162]

158. *id.* at p. 19. See also (1872) Grenier Rep. 17. *Contra Aryanayagam* v. *Thangamma* (1939) 41 N.L.R. 169 where de Kretser J. held that the order of the District Court in divorce proceedings operated as a bar to separate proceedings on the same subject matter.

159. (1943) 45 N.L.R. 25

160. (1954) 56 N.L.R. 93

161. See Act No. 1 of 1974, sec. 125(1) explanation (*b*)

162. See also S. S. *Manickam* v. *Arputha Bhavani Rajan* (Madras) 1980 Cr. Law Journal, part 964, p. 354

Moreover, there is evidence in the English law, too, in support of the contention that a decree of divorce does not *ipso facto* terminate a maintenance order.[163] This interpretation has been adopted in spite of the fact that the Matrimonial proceedings (Magistrates' Courts) Act [164] uses the terms "husband" and "wife." If then the mere nomenclature used in the statute has not impeded a liberal interpretation of the English law statute, there is no warrant for the adoption of such a stringent interpretation in our law. Furthermore, in the light of the recent amendment to the Indian Criminal Procedure Code, from which guidance has been sought by our courts by virtue of the fact that the provisions relating to maintenance in that code are similar to our own Maintenance Ordinance, there is further justification for granting to a woman whose marriage has been dissolved relief under the statute.

Of course, it must be pointed out that if provision had been made for financial support in the divorce proceedings there can be no justification for upholding a separate order for maintenance under the statute. In fact, in the English law, a rule of practice has evolved that ensures that a divorce court does not make an order for maintenance if a Magistrate's order is in force.[165] Indeed, this is manifestly fair because an ex-wife should not be permitted to drive her husband to bankruptcy by enforcing his duty of support by two separate and distinct orders. While admitting this limitation, however, our courts, too, should endeavour to guard against a woman being left destitute merely because the divorce courts have not made provision for her support.[166]

(*b*) The Right to Maintenance Pending Divorce

In the event of an applicant for maintenance in the Police Courts filing an action for divorce in the District Court, the two courts may well find themselves deliberating the same issues

163. *Wood* v. *Wood* [1957] 2 All E.R. 14; *Bragg* v. *Bragg* 41 T. L.R.8; P. M. Bromley, *Family Law* (London 1976, 5th ed.) p. 519

164. 1960, sec. 1(1) (*h*)

165. See P. M. Bromley, *op. cit.* at p. 502

166. See *Fernando* v. *Fernando* (1884) 6 S.C.C. 99; *De Silva* v. *Senaratne* (1925) 7 C.L.Rec. 58; *Ross* v. *Ross* [1950] 1 All E.R. 654

thereby bringing about a conflict of jurisdiction. Consequently, the early case law has preferred the view that proceedings in the Police Courts should be stayed pending the decision of the action for divorce.[167] This view, however, has been departed from in the more recent cases. For instance in, *Wimalawathie Kumarihamy* v. *Imbuldeniya*[167a] Basnayake J. declared that "the divorce proceedings which the respondent says he has instituted do not in my view affect the application for maintenance and a Magistrate is not entitled to refuse an application for a monthly allowance under section 2 of the Maintenance Ordinance on the ground that divorce proceedings have been instituted by the husband of the applicant... In the absence of provision in the Maintenance Ordinance enabling a Magistrate to adopt the course suggested therein he has no power in law to deny to an applicant the relief provided for in the statute."[168] More recently in *Rayappan* v. *Monicamma*[169] Justice de Kretser approved of and followed the judgment of Basnayake J. in the above case.

The practice of the English courts has been different in that the Magistrates' Courts do not entertain an order for maintenance if the applicant is about to commence, or has already commenced proceedings in the divorce courts.[170] Nevertheless there is authority for the view that if the exigencies of the situation warrants an order for maintenance it will not be withheld, the paramount consideration at all times being the interests of the wife and child.[171]

VII. The Reciprocal Obligation of Support

In the Roman-Dutch common law the duty of support on marriage was a reciprocal obligation. According to Voet,[172] "lifelong association directs that a needy wife shall be maintained by her husband and a pauper husband by his wife." The essential feature,

167. *Fernando* v. *Fernando* (1884) 6 S.C.C. 99, a case decided under the Vagrants' Ordinance. See also *De Silva* v. *Senaratne* (1925) 7 C.L. Rec. 58
167a. (1949) 39 C.L.W.75; (1953) 55 N.L.R. 13
168. *id.* at p. 76
169. (1969) 73 N.L.R. 428
170. *Sanders* v. *Sanders* [1952] 2 All E.R. 767 at pp. 770-781
171. *Jones* v. *Jones* [1974] 3 All E.R. 702 at p. 703
172. 25.3.8

then, of an obligation of support is the presence of a "need" in either spouse and consequently, a discussion of the duty to provide maintenance must necessarily be preceded by a proper understanding of the term "maintenance." To do so one must first ascertain the criterion used to determine the need for support and who should determine the existence of such need. In the Roman-Dutch law, by virtue of the husband's marital power over his wife, the husband had the privilege of determining the standard of life to be enjoyed by the spouses.[173] Likewise, in the English common law, on marriage the very being or legal existence of the woman was suspended or at least incorporated into that of the husband and as such all the wife's personal property and income vested in her husband in return for which he was obliged to maintain her by providing her with necessaries.[174] Consequently, in the early English law, too, it was the husband who determined what were necessaries and it was he who decided on the standard of living.[175]

While conceding, then, that it was the husband who determined the requisite standard and life style to be enjoyed by the spouses the question arises whether, independent of the financial means of his wife and as such, irrespective of what her means were, he was expected to set a suitable standard of living, or whether her means were assessed and used as a criterion to either increase or diminish his obligation of support. Indeed, if the latter alternative is applicable there will be no doubt that the idea of reciprocity in the obligation of support, is given effect to, while, the former alternative coincides with the view that the husband's duty is an unilateral one which ignores the essential features of the concept of reciprocity.

There is, moreover, another aspect to the reciprocal obligation of support, and that is illustrated by the principle that the wife is called upon to provide for a needy husband.

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173. *Reloomel* v. *Ramsay* 1920 T.P.D., 371 at p. 374; *Stone* v. *Stone* 1966 (4) S.A. 98 at p. 103

174. Blackstone p. 442

175. *Gollins* v. *Gollins* [1964] A.C. 644

It is proposed then, to discuss this question in the following manner:

1. The relevance of the wife's financial status when determining the husband's obligation of support, first, when the parties are living together in the matrimonial home and, secondly, when cohabitation has ceased and the spouses are living apart. The only difference between the two situations set out above is that when the common household is in existence the wife pledges her husband's credit for household necessaries, whereas the nature of her purchases will undergo a material change when the spouses are separated. In this latter situation her purchases would have to be personal necessaries. It has been previously pointed out that the legal basis for these two rights is not identical because the former right is an incident of marriage while the latter is founded on the husband's obligation of support. Nevertheless, a rigid distinction between the two is not possible since there are many areas of overlap and because the obligation of support is relevant when the common household is in existence as well. Consequently, it is proposed not to distinguish between the two in this context.

11. The wife's obligation to support a needy husband.

1. The Sri Lankan legal system provides a needy wife with two avenues of redress. She can either pledge her husband's credit for household or personal necessaries, alternatively, she can make a claim for maintenance under section 2 of the Maintenance Ordinance. Although a married woman's right to pledge her husband's credit for necessaries has been recognised in our legal system [176] decided cases do not contain a detailed application of the common law rules. Thus, for instance, there is no clear proof of the applicability of the *pro semisse* rule of liability, neither is there any evidence as to how the debt is ultimately apportioned between the spouses.[177]

176. See Chapter 4 *supra*, iv. B
177. Chapter 4 *supra*, iv. B (ii)

> Hence it is not possible to determine whether one spouse alone is expected to bear the total liability or whether the debt is shared between the two spouses thereby giving effect to the reciprocal obligation of support.

The modern South African law, however, has worked out the details of this common law right. By virtue of an amendment to the Matrimonial Affairs Act No. 37 of 1953, a spouse married out of community of property is deemed to be liable to contribute *pro rata* according to his or her income in respect of necessaries purchased for the joint household.[178] Moreover, in the event of a spouse having contributed more in respect of necessaries for the joint household, than was provided for by the statute, a right of recourse against that spouse is available.[179] Consequently, the law of South Africa gives ample recognition to the concept of reciprocity thereby compelling the spouses to share according to their means in the support obligation of the common law.

In an early Sri Lankan case [180] decided under the Vagrants' Ordinance No. 4 of 1841 which preceded the Maintenance Ordinance,[181] there was evidence that the wife had only her dowry property which was not sufficient to maintain herself and her child for more than five years, and Cayley J. declared that "this dowry property was part of the wife's paraphernalia, part of the luxury to which her station entitled her, and I am not prepared to hold that it is competent for a husband to throw his wife on her own resources and subject her to menial service for her maintenance when his means and her position entitle her to exemption from that service. It is true that the words of the Ordinance are "without maintenance" but I take it that 'maintenance' signifies maintenance in the station to which she is entitled and that where the husband has means he

178. Sec. 3(2)

179. Sec. 3(3). The analogous right available to a wife in the English law was abolished by the Matrimonial Proceedings and Property Act 1970, s. 41

180. (1873) 2 Grenier Rep. 104

181. No. 19 of 1889

is bound to furnish his wife with those means and not make her chargeable to others for what are to a delicately nurtured woman, necessaries."[182]

According to Creasy C.J. and Stewart J. in *Cadera Umma* v. *Calendan*,[183] which was also decided under the Vagrants' Ordinance, "When it is clear that a woman is in perfect health and strength, and without incumbrance, and that she can, if she pleases, obtain ample means to support herself, by work that is suited to her sex and to her past and present condition and habits, such a woman does not require the support of others within the meaning of the Ordinance against vagrant husbands. But the law on this point should be administered with great caution and humanity. The woman ought not to be required to prove ineffectual attempts to obtain employment, and we think that, in the absence of proof, the natural and just presumption is that a wife does require the support of her husband, and that when he wrongfully withdraws that support from her the natural consequence will be to make her require the support of others within the meaning of the Ordinance. As we have pointed out such a presumption is liable to be rebutted by proof of the wife's ability to maintain herself, but such proof ought to be very clear, and the work by which she is to maintain herself ought not to be such as to impose any real grievance or degradation on her."

It is clear, then, that cases decided under the Vagrants' Ordinance paid adequate attention to the financial status of the wife when imposing a liability of support on the husband. Moreover, the court has rightly pointed out that the wife is entitled to be maintained at a standard suitable to the station in life to which she is entitled.

Cases decided under the Maintenance Ordinance, however, reflect varying shades of opinion. In *Punchinona* v. *William Appuhamy*[184] the defendant had, before he deserted his wife, transferred to her an interest in some property reserving a life-interest in

182. (1873) 2 Grenier Rep. 104 at p. 105
183. (1863 - 68) Ram. Rep. 141
184. (1917) 4 C. W. Rep. 422

himself. The Magistrate, therefore, refused to make an order for maintenance unless the wife first retransferred the property to the defendant. The Supreme Court however declared that the basis for refusing the maintenance order could not be upheld since there was no evidence that the wife was getting any income from the property. In the circumstances, the court held that the husband was obliged to support her.

It is not clear from this judgment whether, even if there was proof that the wife was receiving an income from the property, the court would have gone further to ascertain the adequacy of that income.

Departing widely from the decisions delivered under the Vagrants Ordinance, Middleton A.C.J. in *Jane Ranasinghe* v. *Pieris* [185] adopted a stringent approach to this question when he declared that "a claim for maintenance implies that the claimant has no means of her own."[186] Presumably then, proof of some means avilable to the wife would *ipso facto* vitiate her claim for maintenance irrespective of considerations such as the manner in which she obtained those means and its adequacy to enable her to live a life style suitable to her social status. In contrast to this view Wood Renton J. declared *obiter* in *Gunawardene* v. *Abeywickreme* [187] that the husband's obligation to support his wife was independent of and not related to his wife's means. This conclusion was founded on an analysis of the statutory provision according to which "If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself..." an order for maintenance could be made.[188] Wood Renton J. was of the opinion that the phrase "unable to maintain itself" in the above section applied exclusively to a child, and consequently, it would appear to follow that even an affluent wife is entitled to make a successful claim for support.

Once again in *Thankachiammah* v. *Sampanther* [189] Justice

185. (1909) 13 N.L.R. 21
186. *id* at p. 22
187. (1914) 17 N.L.R. 450
188. Sec. 2.
189. (1922) 24 N.L.R. 250

Ennis was firmly of the view that in an application made by the wife to have the maintenance awarded enhanced, the court can act on evidence that the husband's financial circumstances had improved and it was not bound to consider the circumstances of the wife. No authority, however, was cited for this conclusion. Once again a contrary view was asserted by Macdonell C.J. in *Silva* v. *Senaratne*.[190] He declared that the only justification for permitting a claim for maintenance, namely, to avert the possibility of the wife becoming a public charge, was vitiated if she had sufficient means to live comfortably. Consequently, an order for maintenance was refused in this case on the evidence that the wife was well able to support herself.

In view of the diverse attitudes to this question, the matter was referred to a Divisional Bench of the Supreme Court in *Sivasamy* v. *Rasiah*,[191] and the court unanimously held, overruling *Silva* v. *Senaratne* and following *Gunewardena* v. *Abeywickrema* that whereas the right of children to maintenance depended on both their inability to maintain themselves and on the possession of sufficient means by the father, the right of a wife to maintenance was conditioned only on the possession of sufficient means by the husband and was not affected by the fact that she had sufficient means of her own. Soertsz A.C.J. cited with approval a passage from Maasdorp[192] which declares that "Maintenance may be withheld, as a matter of judicial discretion, where a wife is provided with ample means, and the husband is not in a position to contribute to her support" and on that basis concluded that "that is the position under the Maintenance Ordinance too. The contrary view would lead to the appalling result that a fickle husband, having enjoyed the *consortium* of a wife possessed of means so long as it pleased him, may, on wearying of it, turn his wife adrift and free himself of all his obligations to her."[193] Moreover, he distinguished the case *Sivasamy* v. *Rasiah* from *Cadera Umma* v. *Calendren*[194] according to which latter case the husband was not liable to provide

190. (1931) 33 N.L.R. 90
191. (1943) 44 N.L.R. 241
192. A. F. S. Maasdorp, *Institutes of South African Law* (Cape Town 1961) vol.1, pp. 30-31
193. (1943) 44 N.L.R. 241 at pp. 244-245
194. (1863-68) Ram. Rep. 141

for a self-supporting wife. According to Soertsz A.C.J. *Sivasamy* v. *Rasiah* was decided under the Maintenance Ordinance which was not concerned with questions of vagrants and vagrancy, its purpose being to provide maintenance for indigent wives and children.

Several features of this judgment may be commented on. To begin with Soertsz A.C.J's conclusion founded on a statement by Maasdorp may be queried. According to Maasdorp if the wife had ample means and the husband was destitute the obligation of support could be withheld. Indeed this is an indisputable fact and in such a situation the wife could well be called on to support her husband provided the requisites set out in the Married Women's Property Ordinance are satisfied.[195] What may be objected to, however, is the conclusion based on this authority according to which when deciding on the husband's obligation of support, the wife's means are totally irrelevant. This view however is not warranted by the statement made by Maasdorp.

Moreover, Soertsz A.C.J. proceeded on the assumption that a contrary view might well give rise to a situation in which a fickle husband can divest himself of his marital obligation of support as and when it pleases him provided the wife has some means of her own. This however does not convey the total picture which, in fact, is far more complex. Much would depend on the actual financial status of the wife. If, for instance, she is a very wealthy woman who is well able to maintain not only a standard and style of living suitable to her rank and position but also one comparable to that enjoyed by her husband, who had turned her adrift, there would be little justification in economic terms for compelling her husband to provide for her financially. Moreover an obligation such as this can hardly provide an adequate *solatium* for his treatment of her, nor can it be plausibly alleged that the threat of support in these circumstances would effectively compel him to honour his marital obligations towards his wife.

Apart from the extreme situation envisaged above one can also conceive of a case in which the wife, though not totally self-

195. No. 18 of 1923, sec. 26

supporting, has some means of her own. It would appear from the judgment of the Supreme Court in *Sivasamy* v. *Rasiah* that a distinction was not made between these two situations, but it is submitted that they warrant the application of different rules and as such should be treated differently. For instance, while it is urged that when the wife is totally self-sufficient and the husband less affluent, his duty of support does not come alive, it is also contended that if both spouses have some means the extent of the husband's obligation of support should be either diminished or enhanced depending on her financial means and the extent of support he is compelled to provide her. In other words, her financial status must at all times have a material bearing on the husband's duty of support because it is only in this way that the reciprocal obligation of support can be made meaningful and effective.[195a]

According to a recent amendment to the Maintenance Ordinance[195b] when making an order for maintenance the Magistrate should have "regard to the income of the defendant, and the means and circumstances of the applicant or such child." This provision then gives recognition to the concept of reciprocity but in the absence of any judicial decision applying the amendment it is left to be seen what criteria the courts will be guided by in the future.

It is interesting, in this connection, to glance at the South African and English law position. The Matrimonial Affairs Act of South Africa[195c] provided that if the wife incurred a debt by making purchases which were household necessaries she had a right of recourse against her husband for the full amount paid by her.[196] Consequently, irrespective of her means she could throw the entire burden of support on her husband. Likewise in the early English law, too, the wife could accumulate her income

195a. See also *Ediriweera* v. *Dharmapala* (1965) 69 N.L.R. 45 where when determining the quantum of maintenance payable by the father in respect of his child under section 2 of the Maintenance Ordinance, the court held that the fact that the mother was possessed of means was not a factor that should be taken into consideration.

195b. Act No. 17 of 1972 sec. 2 (1)

195c. No. 37 of 1953

196. See the proviso to section 3

while her husband shouldered the burden of support alone.[197] In 1976, however, the South African legislature deleted the proviso which gave the wife a full right of recourse against her husband and enacted instead an amendment which required the spouses to contribute *pro rata* according to his or her income in respect of necessaries purchased for the common household.[198] As Watermeyer J. observed in *Stone* v. *Stone*[199] in the case of separated spouses the award of maintenance is, broadly speaking, the court's translation into terms of money what the spouse, whose duty it is to support, would in the case of continued cohabitation have provided for the other, in money and in kind. When making an order for maintenance, therefore, the courts of South Africa endeavour, as far as possible, to ensure that the spouse in whose favour the order is made is maintained at a level somewhat akin to that which she enjoyed prior to the termination of their common life. Of course the court takes into consideration the new factors that enter into the question. For instance, when two establishments have to be run instead of one the spouses may well find that they are compelled to maintain a standard of living below that which they had enjoyed previously. Consequently, although the court has regard to the standard that obtained prior to the separation the recipient of maintenance will not be permitted to demand that she should be maintained at the level she would have enjoyed if not for the separation. Moreover, the wife's own means and her ability to support herself will be important factors when assessing the quantum of maintenance.[200]

Likewise, in the English law a spouse can petition court for an order of maintenance if the other has wilfully neglected to provide reasonable maintenance.[201] As to what is reasonable is a question of fact and is determined having regard to the financial status of

197. *Callot* v. *Nash* [1923] 39 T.L.R. 292 at p. 293; *Ward* v. *Ward* [1947] 2 All E.R. 713; *Jones* v. *Jones* [1929] 1 All E.R. 424

198. See sec. 3 (2)

199. 1966 (4) S.A. 98

200. See *Stone* v. *Stone* 1966 (4) S.A. 98; *Roos* v. *Roos* 1945 T.P.D. 84 at p. 90; *Hossach* v. *Hossach* 1956 (3) S.A.159 at p. 163; *Martens* v. *Martens* 1959 (4) S.A. 218 at p. 220; *Glazer* v. *Glazer* 1959 (3) S.A. 929 at p. 930; *Jacobs* v. *Jacobs* 1955(4) S.A.214.

201. See Matrimonial Affairs Act 1973, sec. 27(1)

both parties.[202] When considering the wife's financial status the court may, if appropriate, consider her earning capacity as well.[203] However, the court will be reluctant to consider the wife's potential ability to earn her living if this is sought to be established merely in order that she may then reduce the burden of support vested in her husband. As Barnard J. said in *Le Roy-Lewis* v. *Le Roy-Lewis*[204] "she may have been lucky, or, at any rate thought that she was lucky at the time, in marrying someone who brought about an improvement in her financial and possibly her social position; but it has been through no fault of hers that their married life together came to an end, and I see no reason whatever why the wife should go back to earning to reduce the husband's liability to maintain her."[205] Likewise, a wife cannnot reasonably be expected to realise her capital assets. For instance, if all she has is the house in which she lives in with her children, she cannot be expected to sell it, or if all she has is an insurance policy, she cannot be expected to surrender it. It all depends on what can reasonably be expected of her.[206]

In *Attwood* v. *Attwood*[207] Sir Jocelyn Simon P. set out some of the criteria that should guide the courts when making an order for maintenance. He observed that where cohabitation has been disrupted by the commission of a matrimonial offence by the husband, the wife's maintenance should be so assessed that her standard of living does not suffer more than is inherent in the circumstances of separation. Therefore, although the standard of living of both parties may have to be lower than that enjoyed by them earlier, in general, the wife should not be relegated to a significantly lower standard of living than that which her husband enjoys.[208] Neither should her standard of living be placed at a point significantly higher than that of her husband, since that

202. *Morton* v. *Morton* [1942] 1 All E.R. 273 at p. 277; *Young* v. *Young* [1962] 3 All E.R. 120 at p. 127; *National Assistance Board* v. *Parkes* [1955] 1 Q.B. 486; *Scott* v. *Scott* [1951] 1 All E.R. 216; *Tulip* v. *Tulip* [1951] 2 All E.R. 91 *Northrop* v. *Northrop* [1967] 2 All E.R. 961

203. *Graves* v. *Graves* [1973] 117 S.J. 679

204. [1954] 3 W.L.R. 549

205. *id.* at p. 551

206. *Biberfeld* v. *Berens* [1952] 2 All E.R. 237 at p. 243, *per* Denning L.J.

207. [1968] 3 All E.R. 385

208. See also *Kershaw* v. *Kershaw* [1964] 3 All E.R. 635; *Ashley* v. *Ashley* [1965] 3 All E.R. 554

would amount to imposing a fine on him for his matrimonial offence, and would not be justified in the modern law. Moreover, if the wife is earning an income, or if she has what should in all circumstances be considered a potential earning capacity, that must be taken into account when determining the relevant standard of living.[209] However, the whole of her income need not, and should not, ordinarily be taken into account to enure to the husband's benefit.[210] This consideration is particularly potent where the wife takes up employment as a consequence of the disruption of the marriage by the husband, or where she would not reasonably be expected to be working had the marriage not been so disrupted. At the same time the court must ensure that the result of its order is not to depress the husband below subsistence level.[211]

In *Gengler* v. *Gengler*[212] Sir George Baker P., declared that if as a consequence of the separation the wife was compelled to go out to work although she could not reasonably have been expected to work had the marriage subsisted, the wife should be compensated for what she would have had and consequently, she should get one-third of the joint income (less her own earnings.)

It is clear then that recent legislation in Sri Lanka, South Africa and England seeks effectively to enforce the reciprocal obligation of support. Reciprocity, it is submitted, connotes not only the vesting of an obligation of support on each spouse when the other is in need but also the obligation vested on both spouses to pool their resources to determine the extent of liability vested in the spouse against whom the maintenance order is to be made. Indeed, the early attitude of these legal systems, namely, the reluctance to consider the financial status of the wife when the obligation of support was vested in the husband, was admissible in an era in which women occupied a place subordinate to that of their husbands. Modern jurisdictions, however, have divested women of these shackles and today women are to a large extent on an equal footing with their male counterparts in the economic, social

209. See *Rose* v. *Rose* [1950] 2 All E.R. 311; *Levett - Yeats* v. *Levett - Yeats* [1967] 111 Sol. Jo. 475

210. See *Ward* v. *Ward* [1947] 2 All E.R. 713

211. See *Ashley* v. *Ashley* [1965] 3 All E.R. 554; *Young* v. *Young* [1962] 3 All E.R. 120

212. [1976] 2 All E.R.81

and political planes. It should necessarily follow, therefore, that they must shoulder the responsibilities which attach to this improved status. Of course one must not lose sight of the special problems that are peculiar to the female sex such as a woman's obligation to perform her functions as mother and wife, which role generally takes precedence to her career particularly when rearing a young family. During certain periods of her married life, therefore, she is compelled to sacrifice her career in the interest of her family and this inevitably results in a diminution of her financial status and this economic inequality must have a bearing on the spouse's obligation of support. Bearing this in mind, however, one must admit the desirability of apportioning to a woman her share of responsibility in the obligation of support.

The essential feature of the decided cases relating to this question, is the judicial practice of endeavouring to equalise the economic status of the spouses. In other words, the concept of "need" on the part of the recipient of maintenance is determined from a subjective standpoint taking into consideration the financial status of the spouses from time to time. If then, the husband is vested with the obligation of support, his economic status will be the criterion for deciding on the quantum of maintenance due to the wife taking into account her financial means as well. The principal justification for using his economic status as the yardstick when awarding maintenance is the rationale that this is perhaps the only substitute, at least in monetary terms, for the life she would have enjoyed if not for the separation. Moreover, this equalising of standards is sought to be achieved when the marriage is dissolved,[213] a *fortiori* one can justify this procedure when the marriage relationship is still intact.

(II) The Wife's Obligation to Support a Needy Husband

Although the Roman-Dutch common law recognised the wife's obligation to support a needy husband,[214] this right was given statutory recognition in Sri Lanka only in 1923 by the Married Women's Property Ordinance[215] according to which

213. P. M. Bromley, *op.cit.* p. 543
214. Voet 25.3.8
215. No. 18 of 1923 sec. 26

"when a married woman having sufficient separate property neglects or refuses to maintain her husband, who through illness or otherwise is unable to maintain himself, the Magistrate within whose jurisdiction such woman resides may, upon the application of the husband, make and enforce such order against her for the maintenance of her husband out of such separate property as by section 2 of the Maintenance Ordinance he may now make and enforce against a husband for the maintenance of his wife."[216]

In *Fernando* v. *Fernando*[217] the applicant made a claim for maintenance from his wife under the Married Women's Property Ordinance. Akbar J. held that unlike the corresponding section in the Maintenance Ordinance relating to deserted wives, the applicant in this case could not succeed in the action unless he proved that he was unable to maintain himself "through illness or otherwise." According to the facts adduced in court the applicant was unable to secure suitable employment owing to the suspension of his certificate of conformity. Moreover, he had made no attempt to find employment and it was the opinion of the court that his object in making this application was to get a pension, as it were, from his wife's property to enable him to live in idleness. Consequently, the court held that this was a "sordid and frivolous application" which could not succeed.

In *Perera* v. *Perera*,[218] too, the court refused an application for maintenance against a woman on the basis that there was no evidence whatever of the husband having attempted and failed to find employment. In other words, there was "not one iota of evidence that, through illness or otherwise he was unable to maintain himself." Consequently, the applicant was held not to have established a *bona fide* case for maintenance.[219]

Although there is a dearth of judicial opinion on this issue it appears from the two judgments set out above that the husband has to discharge a heavy burden in order to succeed in a claim for

216. Sec. 26
217. (1929) 31 N.L.R. 113
218. (1941) 43 N.L.R. 215
219. *id.* at p. 216

maintenance. While a woman is not expected to prove ineffectual attempts to obtain employment,[220] a husband is obliged to adduce cogent evidence of abortive attempts at securing employment. Perhaps this significant difference in attitude derives from the terms of the statute which specifies that a husband qualifies himself for maintenance only if "through illness or otherwise he is unable to maintain himself" while a corresponding onus is not imposed on a deserted wife.

It is indeed interesting that the English law, too, limits the availability of maintenance for a husband to a situation where the husband's earning capacity has been impaired through age, illness or disability of mind or body.[221]

Likewise, in the modern law of South-Africa, where the duty of support continues to be a common law obligation, the wife's liability of support surfaces only if there is evidence that the husband's health is in some way impaired and is thus unable to support himself.[222]

It is submitted that there is no warrant for this marked difference in attitude towards a wife's right of support and that of a husband. While it is conceded that in the generality of cases it is the husband who is the breadwinner and the main provider for the family it is not difficult to envisage situations in which the roles are reversed particularly in view of the improved status of women in most modern jurisdictions.

Moreover, in a situation where the wife is responsible for the disruption of the common life of the spouses and where, in addition, she is a woman of ample means, there would appear to be cogent reasons for compelling her to contribute to the financial welfare of her husband. It is submitted, therefore, that this statutory provision is truely an anachronism which is in urgent need of reform.

220. See *Cadera Umma* v. *Calendan* (1863-68) Ram. Rep. 141

221. See Matrimonial Proceedings (Magistrates' Courts) Act 1960, sec.1 (1) (i) j Matrimonial Causes Act 1973, sec. 27 (1)(b)

222. *Lyons* v. *Lyons* 1935 T.P.D. 345; *King* v. *King* 1947 (2) S.A. 517 at p. 522; H. R. Hahlo, *op.cit.* p. 116

VIII. Matrimonial Fault and the Maintenance Ordinance

The obligation of support is dependant on, and remains alive only so long as, the applicant for maintenance is free from matrimonial misconduct.[223] In other words, "the husband by the marriage contract takes upon himself the duty of supporting and maintaining his wife only so long as she remains faithful to the marriage vows."[224] This principle is also entrenched in the Maintenance Ordinance[225] which provides that "no wife shall be entitled to receive an allowance from her husband under section 2 if she is living in adultery, or if, without any sufficient reasons, she refused to live with her husband..."[226] Moreover, if an order for maintenance is already in existence, proof of the wife's adultery or desertion are statutory grounds for cancelling the order made.[227] According to Justice Nagalingam in *Vidane* v. *Ukkumenika*[228] the onus was on the applicant to prove that she was not guilty of adultery or desertion. However Dias J. rightly pointed out in *Selliah* v. *Sinnammah*[229] that there was a "presumption of innocence not only in regard to the commission of a crime but also in regard to any allegation of wrongdoing or immoral conduct."[230] Consequently, the burden is on the person who alleges immorality to prove it since the law presupposes that the wife is living a chaste life. This view was further reiterated by T. S. Fernardo J. in *Gallege Jaslin Nona* v. *Charles Singho*,[231] a case where the husband applied to cancel a maintenance order on the ground that his wife was guilty of desertion.[232]

223. Maintenance Ordinance No. 19 of 1889, sec. 4; *Menika* v. *Dissanayake* (1903) 7 N.L.R. 8; Voet 24.2.18; Van Leeuwen *Cen. For.* 1.1.15, 19; *Bing and Lauer* v. *Van der Heever* 1922 T.P.D. 279; *Excell* v. *Douglas* 1924 C.P.D. 472; For the English law see S. M. Cretney, *Principles of Family Law*, (3rd ed. London 1979) p. 330; Matrimonial Proceedings (Magistrates' Courts) Act 1960, sec. 2 (3); Matrimonial Causes Act 1973 sec. 27 (8); *Gray* v. *Gray* [1976] Fam. 324; Olive M. Stone, *Family Law* (London 1977) p. 184.
224. *per* Creasy C.J. *Ukko* v. *Tambya* (1863-68) Ram. Rep. 70.
225. No. 19 of 1889
226. Sec. 4. See also (1872) 1 Grenier Rep. 2
227. Sec. 5
228. (1946) 48 N.L.R. 256
229. (1947) 48 N.L.R. 261
230. *id.* at p. 264
231. (1957) 55 C.L.W. 44
232. See also sections 101,103 of the Evidence Ordinance

It is a well established precept of law that it will not encourage a wife to live apart from her husband by allowing her maintenance in a separate establishment.[233] His reply to her demands for maintenance will be that food and shelter are waiting for her in the matrimonial home.[234] If, however, she can adduce cogent reasons to justify her intention to live apart, she cannot be denied maintenance.[235] This principle has found expression in the Maintenance Ordinance in the following terms: "If such person offers to maintain his wife on condition of her living with him, the Magistrate may consider any grounds of refusal stated by her, and may make an order under section 2, notwithstanding such offer, if the Magistrate is satisfied that such person is living in adultery, or that he has habitually treated his wife with cruelty."[236]

Desertion is a continuing offence[237] and as such in the event of the wife's desertion, the duty of support is only suspended and it revives when the wife returns to the matrimonial home.[238] According to decided cases[239] and the Maintenance Ordinance[240] the husband would be guilty of constructive malicious desertion if there was evidence of acts of cruelty either by the husband or by others living in the house, and/or, proof of the husband's adultery.[241] In *Somawathie Dias* v. *Alwis*,[242] Justice Sinnetamby held that cruelty need not necessarily be physical cruelty inflicted person-

233. *Muttu Menika* v. *Punchi Rala* (1858) 3 Lorenz 90

234. H. R. Hahlo, *op.cit.* p. 114

235. *Rosa* v. *Adonisa* (1924) 6 C.L.Rec. 7; Voet 24.2.19; *Behr* v. *Minister of Health* 1961 (1) S.A. 629

236. Sec. 3.

237. (1872) 1 Grenier Rep. 10

238. *Lilly* v. *Lilly* [1959] 3 W.L.R. 306; *Price* v. *Price* [1951] 2 All E.R. 580; *Young* v. *Young* [1961] 3 W. L. R. 1109

239. (1872) 1 Grenier Rep. 5.

240. Sec. 3

241. See also *Ponnamah* v. *Ranganathan* (1913) 1 Cr.App. Rep.15; *Anohamy* v. *Anthony Annavirala* (1908) 3 App. Ct. Rep.19; 1857 1 Beling and Vanderstraaten Rep.114; *Gimara Hami* v. *Dines* (1927) 9 C.L.Rec.23; *Ukko* v. *Tambya* (1863-68) Ram.Rep.70; *Diwurenehamy* v. *Wirasinghe* (1909) 1 Curr L.Rep.98; (1872) 1 1 Grenier Rep. 5; *Marihamy* v. *Weerakodie* (1908) 2 Leader L.R.39; *Punchi Nonahamy* v. *Perera Appuhamy* (1905) 1 Leembrugen and Asiriwatham Rep. 81; (1872) 1 Grenier Rep. 9. In Koch's Rep. 9 according to the evidence led the husband had assaulted his wife on two occasions in four and a half years and Withers J. held that this was sufficient proof of habitual cruelty.

242. (1961) 66 C.L.W.30

ally by the defendant on the applicant. It may be physical or mental cruelty caused by persons whom the defendant has the power to remove from the matrimonial home. "This court has, more than once, held that a husband must maintain his wife with the dignity and consideration which befits her and that he must give her a home which, having regard to their circumstances, is one which she is entitled to have; if there is an interfering mother-in-law she should be removed." The court therefore concluded that the defendant, in permitting his mother to behave in the way she did, was guilty of cruelty. In *Rosa* v. *Adonisa*,[243] however, although the applicant claimed that she could not live in the same house with her in-laws, there was no proof of harassment and as such the court held that the fact of cruelty had not been proved.[244] In the event of the husband being at fault in driving the wife out of the marital home a *bona fide* attempt at a reconciliation will end his constructive desertion and terminate his obligation to maintain her in a separate establishment.[245] Of course his invitation to her must be such that, objectively determined, it would enable her to return.[246] In addition to offering her conditions suitable to her life style and in keeping with his financial status,[247] the offer must be made in good faith with the genuine intention of inviting her back and not merely in order to evade his obligation of support.[248]

In *Edwin Perera* v. *Bisso Menika*,[249] the applicant refused the defendant's invitation to return to the matrimonial home because he had accused her of adultery. There was, however, no evidence to prove it and Wijeyewardene J. held that this baseless charge of adultery was sufficient reason for a refusal to return and that the defendant had not made an honest invitation to the applicant but had merely made that offer with the sole object of escaping his obligation to maintain her. In the absence of proof of adultery or cruelty the court will not usually doubt the *bona fides* of an offer

243. (1924) 6 C.L. Rec. 7

244. See also (1889) Koch. Rep. 9; (1872) 1 Grenier Rep.5; (1872) 1 Grenier Rep.19; (1874) Grenier Rep. vol.3, p.32; (1873) Grenier Rep.41.

245. *Menika* v. *Dissanayaka* (1903) 7 N.L.R. 8

246. See *Gimara Harmi* v. *Dines* (1927) 9 C.L. Rec. 23

247. *Diwurenehamy* v. *Wirasinghe* (1909) 1 Curr. L. Rep. 98; *Valliamma* v. *Eliyatamby* (1932) 1 C.L.W. 372; *Manomani* v. *Vijeyeratnam* (1946) 33 C.L.W. 72;

248. *Sodial Hamy* v. *de Soysa* (1857) 2 Lorenz Rep. 136; *Thangachi* v. *Mohamadu Lebbe* (1930) 3 Cr. App. Rep. 43.

249. (1945) 46 N.L.R. 186

made. In *Richard* v. *Anulawathie*[250] the parties had quarrelled over their property rights and parted and there was evidence that the husband had made unfavourable remarks regarding his wife. The Magistrate observed that "no reasonable man, however well meaning or genuine he might be, would make such an offer to a woman who, he has said in evidence was not a fit and proper person to have custody of his children." He, therefore, concluded that the offer was not *bona fide*. In a recent case, *Sathasivam* v. *Manickaratnam*[250a] the court held that to test whether the offer is *bona fide* or not, one has to examine all the circumstances of the case. According to the evidence led in this case the defendant had a mistress and a child and had repeatedly refused to return to the applicant. Justice Sri Skanda Rajah thus declared that "His past conduct was that of a blackguard. In my view, the offer was not made *bona fide*."[251]

In *Manomani* v. *Vijeyeratnam*[252] the wife alleged that she had to leave her husband because he was living in adultery and consequently his offer to take his wife back was not considered by the court as being sufficient to terminate his constructive malicious desertion. In this connection, it must be pointed out that there is a significant difference in relation to the Mohammedan community in Sri Lanka among whom adultery is not an offence. A Mohammedan woman marries with the knowledge that she may have to share the matrimonial home with other wives. Consequently, she cannot refuse to live with her husband because he has contracted a second marriage during the subsistence of the first or because he was living with another woman.[253] *In Mammadu Nachchi* v. *Mammatu Kassim*[254] the defendant, a Mohammedan, offered to maintain his wife on condition she lived with him, but she refused to do so on the ground that he was"living in adultery." According to the evidence led the defendant had for four years kept in his house an unmarried Mohammedan woman to whom he claimed to be

250. (1971) 72 N.L.R. 383

250a. (1962) 66 N.L.R. 355

251. See also *Valliamma* v. *Eliyatamby* (1932) 1 C.L.W. 372; *Diwurenehamy* v. *Wirasinghe* (1909) 1 Curr. L.Rep. 98

252. (1946) 33 C.L.W. 72

253. *Amina Umma* v. *Dawood* (1920) 8 C.W. Rep. 115; *Pathumma* v. *Seeni Mohammadu* (1921) 23 N.L.R. 271

254. (1908) 11. N.L.R. 297

married. The marriage, however, was not proved. Nevertheless the Mohammedan Code[255] entitled him to keep, besides his lawful wife, "as many concubiness as he is able to maintain." Hence the court held that the fact of living with a mistress *per se* did not justify the wife's refusal to return to her husband. There was, however, another factor which supported the wife's refusal to return to her husband. The husband had invited her to live with him and his mistress in a house belonging to his mistress and the court held that this was not an offer as contemplated by section 4 of the Maintenance Ordinance. The husband's offer to maintain his wife in the matrimonial home should be an offer to maintain her with dignity and consideration which befits a wife. The status of a concubine is different from that of a wife and therefore to expect a wife to associate with a concubine on equal or even inferior terms is offensive to her self-respect.[256] Likewise in *Asia Omma* v. *Sego Mohamado*[257] a Mohammedan man brought another man's wife into the house as a concubine. Cayley C.J. held that although the Muslim law recognised concubinage as legal there was nothing in law to justify concubinage with another man's wife. The wife cannot be compelled to acquiesce in the shame and disgrace that must attach to a household in which the husband lives in open adultery with another married woman. The court therefore held that the wife was justified in living apart and the husband was obliged to maintain her.

An interesting feature of the judicial decisions in this area of the law is the different attitudes to the offence of adultery when it is alleged *per se* as a ground for disentitling a wife from making a claim for maintenance, on the one hand, and, when it is adduced as proof of constructive malicious desertion, on the other.

In *Marihamy* v. *Weerakodie*[258] the wife refused to return to her husband and alleged that she had left him because he was living with another woman. There was no evidence, however, that the husband was living in adultery at the time of the suit. Nevertheless Wood Renton J. declared that past adultery may

255. Sec. 101
256. See also *Pathumma* v. *Seeni Mohammadu* (1921) 23 N.L.R. 271.
257. (1881) 4 S.C.C. 12
258. (1908) 2 Leader L.R. 39

very well justify a woman's refusal to return to her husband and as such an order for maintenance was made. Similarly, in *Ebert* v. *Ebert*[259] where there was evidence only of past adultery, De Sampayo J. declared that "the stain of adultery cannot be obliterated by reform, nor can a wife be expected to overlook the fact in regulating her own life. Adultery strikes at the root of the marriage relationship and its consequences both legal and social continue."[260] When adultery is alleged as constituting constructive malicious desertion, therefore, proof of infidelity at sometime in the past has been held sufficient to justify a spouse leaving the matrimonial home and asserting a claim for support.

On the other hand, when adultery by the wife is pleaded as a defence to a demand for maintenance, the courts have required proof of continuous adulterous conduct or, at any rate evidence of an adulterous association at the time of the claim in order to preclude a successful action. Thus in *Arumugam* v. *Athai*,[261] Basnayake J. declared that the phrase "living in adultery" in section 4 of the Maintenance Ordinance "refers to a course of guilty conduct and not to a single lapse from virtue."[262] In other words, the defendant was required to prove that his wife was leading a life of continuous adulterous conduct to justify his refusal to maintain her. This was also the view of Pereira J. in *Reginahamy* v. *Johna*.[263] The Magistrate, in this case, had refused to make an order for maintenance because the applicant had at one time been living in adultery. Pereira J. however declared that the Maintenance Ordinance referred to the wife living in adultery[264] and consequently, if a husband chose to let the marriage tie remain in spite of the wife's adultery and the wife from choice or necessity later returned to an honourable life, the husband's liabilities unquestionably revived.[265] In *Sinno Nona* v. *Melias Singho*,[266] Jayawardene A.J. held that the wife was entitled to maintenance "although she may

259. (1925) 26 N.L.R. 438
260. *id.* at p. 440
261. (1948) 50 N.L.R. 310
262. *id.* at p. 311
263. (1914) 17 N.L.R. 376
264. Sec. 4
265. *id.* at p. 376
266. (1923) 26 N.L.R. 61

have left her husband and lived in adultery sometime ago."[267] In *Wijeysinghe* v. *Josi Nona*[268] the husband denied the paternity of a child who had been born of an adulterous union of his wife with another man. Nevertheless, Abraham C.J. refused to cancel the order for maintenance on the reasoning that at the time of the application the woman was not living in adultery. This view was further reiterated in the recent case of *Pushpawathy* v. *Santhirasegarampillai.*[269] In this case a husband against whom an order for maintenance had been made in favour of his wife, sought the cancellation of the order on the ground that the wife had given birth to a child who was not his. De Kretser J. however held that the birth of the child did not, by itself, establish that the wife was living in adultery. It only established that she had committed adultery which act might well be a single lapse from virtue. In arriving at this conclusion the court relied on Indian authority because the provisions of the Maintenance Ordinance are similar to those of the Indian Criminal Procedure Code.[270] In a recent Indian decision *Manickam* v. *Arputha Bhavani Rajam*,[271] Ratnavel Pandian J. interpreting the analogous section of the Indian Code declared that the phrase "is living in adultery" would not take into its fold stray instances of lapses from virtue, it would not also mean that the wife should be living in adultery on the date of the petition. The proper interpretation would be that there should be proof of adulterous living shortly before or after the petition, shortly, being interpreted in a reasonable manner viewing it in the light of the facts of the case."[272]

It is apparent from the case law, that although a single act of adultery by the husband is sufficient to deem him guilty of constructive malicious desertion and to justify the wife leaving the matrimonial home and enforcing his obligation of support, the wife does not forgo her right of support unless she is living in adultery at the time of action. In other words, if a wife

267. *id.* at p. 62. See also *Samaratunga* v. *Samaratunga* (1936) 15 C.L. Rec. 198; *Kiree* v. *Naida* (1910) 5 S.C.D. 28; *Rammalhamy* v. *Appuhamy* (1916) 4 C.W.R. 326

268. (1936) 38 N.L.R. 375

269. (1971) 77 N.L.R. 353

270. See *Mathein* v. *Maung Mya Khin* 1937 A. I. R. Rangoon, 67

271. 1980 Cr. Law Journal 354, April 1980, part 964

272. *id.* at p. 354

left the matrimonial home as a consequence of the husband's single act of infidelity and later if she, too, entered into an adulterous association, she would nevertheless be entitled to be maintained by her husband unless there was evidence that she was involved in that relationship at the time of petitioning court. This difference in interpretation, however, is not warranted by the provisions of the statute. The courts have construed the phrase "living in adultery" in section 4 of the Maintenance Ordinance to mean not a single lapse from virtue but a continuous adulterous association. Likewise, even when cancelling an order for maintenance already made, the courts have refused to treat evidence of an act of adultery sometime in the past as being sufficient to cancel an order already made. The point that requires emphasis, however, is that section 3 of the Ordinance, which refers to the conduct of the husband that may justify a wife living away from the matrimonial home, also uses the phrase "living in adultery." In other words, an offer made by a husband "living in adultery"[273] to maintain his wife on condition she lived with him is not an attempt at a genuine reconciliation and will, therefore, justify the wife's refusal to return. Consequently, the validity of decisions such as *Marihamy* v. *Weerakodie*[274] and *Ebert* v. *Ebert*[275] which held that a single act of adultery was sufficient to justify a woman's refusal to accept her husband's offer of reconciliation, may be seriously queried. Indeed, a consistent interpretation of the statute is called for and there appears to be no plausible rationale for the divergent attitudes adopted by the courts. In a situation where the husband who has been guilty of infidelity wishes to re-establish the marital tie the court should guard against compelling an unwilling spouse to condone the adultery or be faced with the alternative of being left destitute.[276] In other words, a wife should not be starved into reconciliation. On the other hand, it would be equally inequitable to compel a husband to support an unfaithful wife merely on the basis that at the time the claim was made she was not involved in an adulterous union although she had been unfaithful to him in the past.

273 Sec. 3

274. (1908) 2 Leader L.R. 39

275. (1925) 26 N.L.R. 438

276. See *Ebert* v. *Ebert* (1925) 26 N.L.R. 438 where the court stressed that condonation must be voluntary.

The essential point that emerges from this discussion, then, is that the court should not be hampered by any preconceived rules when deciding on a question such as this. Bearing in mind the most cogent consideration, namely, the need to secure a stable marital relationship, the courts should be free to exercise its discretion when deciding whether or not, in a given situation the merits of the case warrant a condonation of matrimonial guilt.

It has also been pointed out that direct proof of adultery may not always be forthcoming because "it is very rarely that the parties are surprised in the direct act of adultery."[277] Hence, it must be inferred from circumstances which lead to it by fair inference as a necessary conclusion.[278] Since it is impracticable to enumerate the infinite variety of circumstantial evidentiary facts, which of necessity are as various as the modifications and combinations of events in actual life, it is left to the jury to exercise their judgment with caution applying their knowledge of the world and of human nature to all the circumstances relied on in proof of adultery.[279]

In the law of South Africa, if the wife is the deserter, she cannot claim support and the husband's reply to her demands would be that food and shelter were available to her in the matrimonial home.[280] If she commits adultery the husband's obligation of support ceases.[281] But Hahlo points out that the court retains the discretion to condone her offence in appropriate cases,[282] and consequently on proof of the wife's adultery the maintenance order does not automatically cease to operate, it stands until it is varied or discharged by the court.[283]

In the early English law, under the Matrimonial Proceedings (Magistrates' Courts) Act[284] on proof of the wife's adultery an

277. *Ebert* v. *Ebert* (1921) 22 N.L.R. 310 at 312, *per* Schneider J. citing Sir William Scott in *Loveden* v. *Loveden* Hagg. Cons. 1, at p. 2

278. *ibid.*

279. *ibid.*

280. See H. R. Hahlo, *op. cit.* p. 114

281. *Peck* v. *Peck* (1889) 9 Natal L.R. 195; *Excell* v. *Douglas* 1924 C.P.D. 472; *Pugh* v. *Pugh* 1910 T.P.D. 792

282. *op.cit.* at p. 114

283. *op. cit.* at p. 115

284. 1960, Sec. 2(3); 8(2)

order for maintenance was not made or, if made, was revoked. In the modern law, however, this may be one of the factors that will influence the court when making a variation of the maintenance order.[285] If a maintenance order is sought in the High Court, the Matrimonial Causes Act 1973 declares that the conduct of the parties is one of the factors to be considered when making an order for support,[286] and a woman in receipt of maintenance will not necessarily forfeit this support if she subsequently commits adultery.[287] In other words, the English law gives both the Magistrates' Courts and the High Court total discretion to determine whether the circumstances of the particular case warrants that the conduct of the parties be taken into account, both when awarding maintenance for the first time and when varying an existing order.

IX. Consensual Separation

Although there is nothing contrary to public policy in a husband and wife agreeing to live apart when life together becomes intolerable, the Maintenance Ordinance provides that "no wife shall be entitled to receive an allowance from her husband under section 2 ...if they are living separately by mutual consent."[288] A vexed question in this connection is whether the effect of a consensual separation is to render the husband's obligation of support dormant, for the period during which both parties agree to live apart, or whether, notwithstanding any subsequent change of *animus* by either spouse, the original intention to separate has the effect of obliterating the husband's marital obligation while they are separated. This latter alternative was adopted by Wood Renton J. in *Micho Hamine* v. *Girigoris Appu*[289] according to whom "where a husband and wife agree to live separately by mutual consent, the wife cannot, thereafter, compel the respondent either to take her back as his wife or to pay her maintenance."[290] Accord-

285. See Domestic Proceedings and Magistrates' Court Act 1978; S.M. Cretney, *op. cit.* p. 356
286. Sec. 25(1); S. M. Cretney, *op. cit.* p. 330 *et. seq.*
287. Peter Seago and Alastair Bissett - Johnson, *Cases and Materials on Family Law* (London 1976) p. 75
288. Sec. 4
289. (1912) 15 N.L.R. 191
290. *Id.* at p. 192

ing to him the phrase "if they are living separately by mutual consent" in the Maintenance Ordinance actually meant "if they have separated by mutual consent." [291]

Fortunately, however, this stringent interpretation of the Ordinance was not favoured by subsequent cases. In *Goonewardene* v. *Abeyewickreme*[292] Pereira J. referring to consensual separations declared that "its continuance depends upon the continued consent of the parties. So far as I can see there is nothing to prevent either party from terminating it, provided he or she submits to the complete reversion of the *status quo ante*."[293] It would follow from this that if the wife, subsequent to a mutual separation, undertakes to return to her husband, it is his duty to provide her with conditions suitable for her return. If he fails to do so, however, he would become the deserter from that point onwards and his obligation of support would revive.[294] In *Maliappa Chetty* v. *Maliappa*,[295] Lyall Grant J. set out the limits of the dictum in *Micho Hamy* v. *Girigoris Appu*, and held that its application must be restricted to cases where the mutual consent has been entered into under circumstances which would justify a judicial separation.[296] According to Hahlo, however, even when a separation has been founded on evidence of *justa causa*, either party can resile from the agreement. The deed may be set aside at the instance of the innocent spouse, if he or she wishes to forgive the guilty spouse and resume cohabitation, or at the instance of the guilty spouse if he or she has reformed and genuinely desires to resume cohabitation.[296a] Justice Hearne in *Fernando* v. *Fernando*[297] doubted that Wood Renton J. intended his construction of the Maintenance Ordinance to be accepted as a principle of law and he went on to observe that "if the court finds that the husband and wife are living separately by mutual consent it can pass no order for the reason, as I think, that a court is not intended to be used for

291. *id.* at p. 192
292. (1914) 18 N.L.R. 69
293. *id.* at p. 69
294. *id.* at p. 70
295. (1927) 29 N.L.R. 78
296. *id.* at p. 80
296a. see H. R. Hahlo, *op. cit.* p. 360
297. (1939) 40 N.L.R. 241

creating facilities for separation between husband and wife or for fixing alimony. If they have separated by agreement and the wife, though anxious to terminate the separation, is under their agreement in receipt of an allowance which is being punctually paid, and to which she agreed outside court, it can, I think, no longer be said that the husband is guilty of neglect or refusal to maintain, and the jurisdiction of the Magistrates' Court comes to an end. But if, notwithstanding the agreement to separate, the wife, when she comes into court, is not being maintained by her husband, she is disqualified from asking the assistance of the court only if she is living in adultery or responsible for desertion or separation by mutual consent. If she is prepared to live with her husband, mutuality ceases to exist, her disqualification to obtain relief disappears and the law imposes on the husband, as his paramount duty, the duty of maintaining his wife. It is not so much that a wife is permitted to resile from an agreement into which she has entered in the past. It is that in law a husband's duty to maintain his wife overrides any agreement which absolves him from discharging his duty unless such agreement, founded upon mutual consent, subsists..." [298]

This view, namely, that the effect of a mutual separation is only temporarily to suspend the husband's obligation of support and that his duty of support revives if the wife wishes to restore the *status quo ante* and the husband declines the offer, is based on a strong current of judicial authority, apart from being consistent with reason and logic. In a situation such as this, however, it is of paramount importance that the *bona fides* of the wife's offer to return is firmly established. The impact of this offer on the husband's obligation of support warrants the exclusion of a situation where the wife makes a pretence of a change of *animus* merely in order to reap a monetary benefit. [299]

298. *id.* at p. 244

299. See *Maliappa Chetty* v. *Maliappa* (1927) 29 N. L.R.78 at p. 80; *Fernando* v. *Fernando* (1939) 40 N.L.R.241 at p. 244. Under the Vagrants Ordinance No. 4 of 1871 a consensual separation did not suspend the husband's obligation of support if his wife was destitute and had to be maintained by others. This was founded on the rationale that the primary objective of the Vagrants Ordinance was to avert a situation where the wife became a burden on society, and it did not purport to give effect to the common law duty of support. See (1873) 2 Grenier Rep. 92; (1874) 3 Grenier Rep. 30.

It is indeed interesting to note that in the Roman-Dutch law, as applied in South Africa, the husband's obligation of support is not affected by a consensual separation. If the wife is in need of financial assistance, in the absence of a maintenance agreement providing for her support, the common law obligation makes it incumbent on him to provide her with the necessities of life.[300] It is usual for spouses to enter into an agreement regarding the payment of maintenance and such deeds are effective provided they are entered into *justa causa*, that is, under circumstances which will justify a judicial separation,[301] and provided they do not purport to give to a spouse substantially more than what he or she would have received had a judicial decree of separation been made.[302] In other words, a deed which stipulates that reasonable maintenance should be paid will be upheld while an agreement to pay a sum of money far in excess of what the financial status of the spouse would normally warrant will be treated as a prohibited donation and denied legal sanction.[303] Maintenance agreements can be varied by the court in appropriate circumstances,[304] and they will be ineffective if the spouse entitled to maintenance commits a matrimonial offence,[305] or on death.[306]

In the English law, if the spouses mutually agree to separate and if they enter into a maintenance agreement, payment of maintenance will be governed by the terms of the contract.[307] Maintenance agreements are governed by the Matrimonial Causes Act 1973[308] and the Act also provides for the variation of such agreements if the sum agreed upon, though reasonable at the time the parties entered into the contract, is, due to changed circumstances,

300. *Excell* v. *Douglas* 1924 C.P.D. 472 at pp. 480-1; *Behr* v. *Minister of Health* 1961 (1) S.A. 629

301. H. R. Hahlo, *op. cit.* pp. 352, 354

302. *id.* at p. 355

303. *cf. Davies* v. *Davies* 1944 C.P.D. 23 at p. 27

304. *Roos* v. *Roos* 1945 T.P.D. 84; *Ex parte Durbach* 1948 (2) S.A. 410; *Butler* v. *Butler* 1951 (2) S.A. 88; *De Bruyne* v. *De Bruyne* 1948 (1) S.A. 491; *Mc Craw* v. *Mc Craw* 1927 W.L.D. 139; *Davids* v. *Davids* 1937 C.P.D. 160

305. *Peck* v. *Peck* (1889) 9 Natal L.R. 195

306. *Bennett* v. *Bennett Executrix* 1959 (1) S.A. 876

307. P. M. Bromley, *op. cit.* p. 167

308. Sec. 34

unreasonable.[309] Unlike in the South African law where, irrespective of the non-existence of a maintenance agreement, the wife can claim support by virtue of the husband's common law obligation, in the English law in an extra-judicial separation agreement if the parties had failed to stipulate the terms of maintenance the wife will not be entitled to support. Her only recourse would be to prove that her husband wilfully neglected to maintain her on the allegation that the separation was, either expressly or impliedly on the basis that he would continue to maintain her. In other words, in the English law proof of consensual separation without an agreement regulating the payment of maintenance will rebut the common law presumption of liability for support and, consequently, the onus is on the wife to prove this obligation to be still subsisting.[310] According to Lord Merriman P. in *Starkie* v. *Starkie*[311] "the separation was consensual, and there was no agreement express or implied to maintain the wife. In my opinion therefore, the finding of wilful neglect to provide reasonable maintenance for the wife cannot stand." The liability to maintain a wife may be implied in a situation where the wife has to support a very young child or a sick child, in other words, factors which would effectively prevent the wife from engaging in a job.[312]

Lord Denning, however, in *National Assistance Board* v. *Parker*[313] opined that although a separation agreement contained no provision for maintenance at all, if the wife was in need of support and, if this fact was brought to the notice of her husband, he was liable to maintain her and in these circumstances a refusal to do so would amount to a wilful neglect to maintain her. This *dictum* however was treated as *obiter* in *Pinnick* v. *Pinnick*[314] and the Divisional Court preferred the view that the wife must prove

309. Sec. 34. See also P.M. Bromley, *op. cit.* pp. 506,507; *Tulip* v. *Tulip* [1951] 2 All E.R. 91; *Dowell* v. *Dowell* [1952] 2 All E.R. 141

310. See Brown, "Separation Agreements and National Assistance" in 1959 (19) M.L.R. 623; *Stringer* v. *Stringer* [1954] 1 W.L.R. 98. See also *Baker* v. *Baker* [1949] 66, part 1, T.L.R. 81; *Chapman* v. *Chapman* [1954] 1 W.L.R. 98

311. [1953] 2 All E.R. 1519

312. See *Northrop* v. *Northrop* [1967] 2 All E.R. 961

313. [1955] 1 Q.B. 486

314. [1957] 1 W.L.R. 644

that her husband had accepted the liability of support either expressly or impliedly to be guilty of a wilful neglect to maintain her. This was also the view of the court in *Northrop* v. *Northrop*,[315] which case finally settled the law on this point.

In conclusion, then, it is submitted, that in the event of a consensual separation the wife in the Sri Lankan legal system is not under any circumstances entitled to support[316] whereas her counterpart in the English legal system is allowed support only if an agreement to this effect can be expressly or impliedly established. The wife, in an extra-judicial separation in the South African law, however, is in the most favoured position because she will be entitled to support even in the absence of an agreement.

It is indeed unfortunate that in a situation in which the spouses are unable to live together in the matrimonial home, but because of family and social pressures are unwilling to ventilate their domestic grievances in open court, the wife could be in grave danger of being left destitute if they mutually agree to part company. Although the objective of the statute in disallowing maintenance, when spouses are separated by mutual agreement, might have been to deter them from terminating the marital relationship, this provision is in fact counter productive because it leaves unhappy couples with no viable alternative but to enter into a judicial separation, which will, in all probability, be the interim step to a dissolution of a relationship, which might well have survived if they had been allowed to live apart for a while.

X. Cancellation and Variation of the Maintenance Order

According to the Maintenance Ordinance proof of adultery, desertion or mutual separation are grounds for cancelling a maintenance order. This has already been commented on.[317] In addition the statute provides that:

"On the application of any person receiving or ordered to pay a monthly allowance under the provisions of this Ordinance, and on

315. [1967] 2 All E.R. 961
316. Maintenance Ordinance, sec. 4.
317. See sec. IX. *Supra.*

proof of a change in the circumstances of any person for whose benefit or against whom an order for maintenance has been made under section 2, the Magistrate may either cancel such order or make such alteration in the allowance ordered as he deems fit, provided that the maximum monthly rate under the said section be not exceeded."[318]

The statute, therefore, permits a cancellation or variation of a maintenance order if there is proof of a "change in circumstances." Several judicial decisions have considered whether the resumption of cohabitation, subsequent to the award of maintenance, is a factor to be considered under this provision. In *Kadiravail Wadivel* v. *Sandanem*,[319] a married woman obtained an order for maintenance against her husband and thereafter the parties came before court and had it recorded that they were living together. When they subsequently separated, and the wife applied for the enforcement of the order of maintenance in her favour the court had to decide whether the fact of subsequent cohabitation had the effect of cancelling the original order. Akbar J. declared that the Maintenance Ordinance was self-contained and that once an order was made it could be cancelled only on proof of matrimonial misconduct or mutual separation. Evidence of cohabitation, however, did not have the effect of vitiating the maintenance order.[320]

This view was reiterated and followed by Maartensz J. in *Santiago* v. *Santiago*,[321] a case where, subsequent to an order for maintenance the husband had resumed cohabitation with his wife, and when she applied for arrears of maintenanee for the period during which they had lived together, the court directed that the husband pay the maintenance due for that period. In *Kandaswamy*

318. Sec. 10. It must be pointed out that by virtue of a recent amendment to the Maintenance Ordinance the monthly rate of payment that may be ordered has been varied from a maximum of one hundred rupees to vesting in the Magistrate the discretion to order such monthly rate as he thinks fit, having regard to the income of the defendant and the means and circumstances of the applicant. See Maintenance (Amendment) Act No. 19 of 1922, sec. 2 (1)

319. (1929) 30 N.L.R.351

320. *id.* at p. 352

321. (1937) 39 N.L.R. 219

v. *Puvaneswari*[322] Wijeyewardene J. held that the mere fact that the wife returned to her husband's house and lived with him for sometime would not have the effect of cancelling a maintenance order, although it may suspend the operation of the order. It must be pointed out that *Santiago* v. *Santiago* was not referred to in this case but the two decisions may be reconciled if one understands the word "suspend" to mean that during the period the parties are cohabiting there is no obligation to comply with the order, but if they should part again, the original order revives and permits, in addition, the claim for arrears of maintenance during the period of cohabitation.[323]

It is evident then that in the Sri Lankan law, a "change in circumstances" does not envisage a resumption of cohabitation, so that, evidence that the parties have resumed their marital relationship will not *ipso facto* cancel a maintenance order.

In relation to the South African law, Hahlo points out that a maintenance order in a decree for judicial separation is made only for the duration of the separation, and as such, the order becomes inoperative if the spouses resume cohabitation.[324] There is no evidence however in the South African law for the same consequence in the event of a resumption of cohabitation subsequent to a *de facto* separation.[325]

In the English law, the effect of cohabitation on a maintenance order differs depending on whether the order is obtained in the Magistrate's Court or in the Superior court. Although an order can be obtained in the Magistrate's court notwithstanding the fact that the parties are cohabiting at the time the order is made[326] if they continue to live with each other or subsequently resume living with each other for a continuous period of six months, the order for periodical payments ceases to be enforceable.[327] The

322. (1946) 47 N.L.R. 486
323. See also *Wimalawathie Kumarihamy* v. *Imbuldeniya* (1953) 55 N.L.R. 13.
324. H. R. Hahlo, *op. cit.* p. 344. See Matrimonial Affairs Act No. 37 of 1953, sec. 10 (1)
325. See H. R. Hahlo, *op. cit.* p. 117
326. Domestic Proceedings and Magistrate's Court Act 1978, s. 25 (1)
327. *Ibid.*

position under the former statute[328] was that an order was not enforceable during cohabitation and it automatically ceased to have effect if the parties continued to cohabit for three months or more, or if they resumed cohabitation for however short a period.[329] This principle perhaps derived from the rule that the English common law right to maintenance is "not a right to an allowance but to be supported by being given bed and board."[330]

It is clear, therefore, that the statute makes no provision for a wife who continues to live with her husband in spite of his failure to provide her with reasonable maintenance. A woman who decides to remain in the matrimonial home for the sake of her minor children, for instance, or one who has no desire to put her marriage asunder gets in return for her magnanimity the denial of a remedy which will be available to her counterpart who severs the marital tie. Moreover, her position is further exacerbated by the denial of her right to pledge her husband's credit for household necessaries.[331] The prevailing position then is that a woman who obtains a maintenance order from the Magistrate's court is not only encouraged to leave the matrimonial home but is also deterred, if she has been previously separated, from attempting a reconciliation for fear of financial sanction. Although the Law Commission[332] recommended that when the order is based on a failure to maintain, payments should be enforceable during the period of cohabitation, the Domestic Proceedings and Magistrates' Courts Act[333] made only a marginal change in the law.[334]

Unlike an order obtained by the Magistrate's Court, one from a High Court or a Divorce County Court has no restriction on the enforcement of the order merely because the parties continue to cohabit.[335] It must be pointed out, however, that the jurisdiction of the Magistrates' Courts affords speedy and cheap relief

328. Matrimonial Proceedings (Magistrate's Courts) Act 1960
329. S 7 (1)
330. *Lilley* v. *Lilley* [1959] 3 W.L.R. 306 *per* Hodso L. J.
331. See Matrimonial Proceedings and Property Act 1970, s. 41
332. Working Paper No, 53
333. 1978, s.25 (1)
334. See text at note 266, 267, *supra*
335. S. M. Cretney, *Principles of Family Law* (3rd ed. London 1979) p. 339

to women of the lower and middle income groups who cannot afford to take proceedings in the High Court. This as well as the comparative informality and privacy of the proceedings makes recourse to the Magistrates' Courts more attractive and popular.[336] Consequently, a provision disallowing maintenance on proof of cohabitation for a period of six months might well prove to be an obstacle to such persons obtaining relief in the Magistrates' Courts.

The Sri Lankan courts have also considered the question whether on proof of the wife's enhanced financial status the courts have a discretion to vary or cancel an order already made. In *Thankachiammah* v. *Sampanther*,[337] Ennis J. declared that in an action for enhancing a maintenance order "the court can act on finding that the husband's circumstances have improved, and is not bound to consider the circumstances of the wife." In *Sivasamy* v. *Rasiah*[338] however it was contended that section 10 of the Maintenance Ordinance, by implication, compelled the court to ascertain the means of the wife prior to enhancing an award because "conceivably, the only change of circumstances upon proof of which an order for maintenance *in favour* of a wife can be cancelled is that she has passed from a condition of incapacity to maintain herself to one of such capacity."[339] Soertsz S.P.J., while not denying this as a possible interpretation of the section, held that "that argument ignores the fact that an order made in favour of a wife may be cancelled upon proof of a change in the circumstances of the husband *against* whom an order has been made" and he thus declared that "section 10 although compendiously framed, refers to all the relevant changes in circumstances upon proof of which an order for maintenance may be either cancelled or altered at the instance of either party. The section must, however, be construed not independently, but in the light of the other provisions of the Ordinance."[340] He concluded, therefore, that maintenance may be withheld as a matter of judicial discretion where a wife was provided with ample means and the husband was not in a position to contribute to her support.

336. P. M. Bromley, *op. cit. p.* 180
337. (1922) 24 N.L. R. 250
338. (1943) 44 N.L.R. 241.
339. *id.* at p. 244
340. *ibid.*

It is submitted that section 10 gives equal emphasis to the "change in the circumstances of any person for whose benefit or against whom an order for maintenance has been made," and as such the means of both spouses should be relevant when considering a cancellation or variation of a maintenance order. Consequently, the phrase "change of circumstances" may well refer to a change of "pecuniary circumstances."[341] It could also refer to a change of status like for instance where the parties subsequently obtain a divorce. In *Fernando* v. *Fernando*[342] Justice Sinnetamby held that a divorced wife was entitled to make an application under section 10 of the Maintenance Ordinance to enhance an order obtained by her prior to the divorce. Similarly, in *Simon Appu* v. *Somawathie*[343] Swan J. opined that a deed of separation entered into between the parties brought to an end the wife's rights and the husband's liability under the Ordinance. Consequently, the husband was entitled to claim a cancellation of the order previously made.

XI. Enforcement of the Maintenance Order

Under the Maintenance (Amendment) Act [344] criminal sanction is imposed on a person who defaults in the payment of maintenance. The Act declares that "where any person against whom an order is made under section 2 (hereinafter called the 'defendant') neglects to comply with the order, the Magistrate may for every breach of the order sentence such defendant for the whole or any part of each month's allowance in default, to simple or rigorous imprisonment for a term which may extend to one month."[345] "The Magistrate may, if an application is made in that behalf by any person entitled to receive any payment under an order of maintenance, before passing a sentence of imprisonment, issue a warrant directing the amount in default to be levied in the manner

341. *Atarukandu Savariamuttu of Sundermaralen* v. *Kalenderpodi Eberahim kandu* Koch Rep. 24

342. (1958) 59 N.L.R. 522

343. (1953) 56 N.L.R. 275

344. No. 19 of 1972, sec. 4. This amendment repealed section 8 of the Maintenance Ordinance.

345. Sec. 4 of the Amendment; sec. 8 (1) of the principal enactment.

by law provided for levying fines imposed by Magistrates in the Magistrates' Courts."[346]

It must be pointed out that the above provisions of the Act are substantially the same as those of the Maintenance Ordinance[347] which it repealed. Consequently, cases decided under the Ordinance would be equally relevant to an interpretation of the Act.

In *Katherina* v. *Davith*,[348] the court held that the payment of an allowance and the order for imprisonment were alternatives. Consequently, if a party had suffered imprisonment the liability to pay the allowance in respect of which the imprisonment was imposed was extinguished. This interpretation, according to De Sampayo J., was consistent with the Ordinance which declared that a party may be sentenced to imprisonment for one month "for the whole or any part of each month's allowance."

Moreover, an essential prerequisite for the passing of a sentence of imprisonment in respect of a default in payment of maintenance is the issuing of a warrant of execution. This derives from the fact that the Magistrate has power to order imprisonment only in respect of what remains unpaid after the warrant has been executed.[349] In *Cornelia* v. *Sawodis*[350] the Magistrate ordered the respondent to give certified bail of Rs. 200/- to pay Rs. 50/- as arrears of maintenance for ten months or in default, within one month, to undergo rigorous imprisonment of 15 days for each month. Wood Renton J. in the Supreme Court held that the Magistrate's order was wrong. Reiterating this principle, Bertram C.J. held in *Kaluhamy* v. *Mudianse*[351] that a sentence of imprisonment without issuing a warrant of arrest, merely because of an admission by the respondent that he was not possessed of any immovable property was irregular.

Before a distress warrant can be issued, for non-payment of maintenance, there must be a disclosure *inter alia* that (1) an order

346. Sec. 4 of the Amendment; sec. 8 (2) of the principal enactment.
347. Sec. 8
348. (1917) 19 N.L.R. 500
349. *Cornelia* v. *Sawodis* (1908) 11 N.L.R 289
350. *ibid.*
351. (1922) 24 N.L.R. 204. See also *Kandaswamy* v. *Puvaneswari* (1946) 47 N.L.R. 486; *Saraneris* v. *Pemawathie* (1966) 69 N.L.R. 383

for maintenance had been duly made, and (2) such order specified a monthly sum.[352] In *Kanapathipillai* v. *Sornammah*,[353] in an application for maintenance made by a wife on behalf of herself and her children, the husband undertook to pay a composite sum every month to the wife for herself and five of the children. The settlement was recorded, but the court made no order of any kind. The Supreme Court held, in revision, that the settlement, by itself, was not a valid order for maintenance within the meaning of section 2 of the Ordinance, and moreover, that the composite sum did not connote any specified sum in favour of the wife for herself.

In *Kadija Umma* v. *Assena Lebbe*,[354] the nature of property which could be the subject of a seizure by warrant was in issue. The defendant was in default of payment of a monthly instalment payable by virtue of a maintenance order. In consequence of his default a warrant was signed by the Magistrate and issued for the levy of the amount by distress and sale of movable property. The warrant, however, was returned unexecuted on the ground that the defendant had no movable property out of which the amount could be levied. The Fiscal in his return reported that the defendant had immovable property sufficient to satisfy the levy, but the Magistrate declined to issue a warrant of distress against the defendant's immovable property. Withers J. upheld this decision on the reasoning that the order ought to be levied in the manner provided for levying fines imposed by Magistrates in the Police Courts; and section 378 of the Criminal Procedure Code enacts that whenever an offender is sentenced to pay a fine, the court passing the sentence may at its discretion issue a warrant for a levy of the amount by distress and sale of any movable property belonging to the offender. However, he declared that the mere fact that the defendant has no movable property on which to levy the amount of a maintenance order which is not paid at the proper time is not sufficient ground in itself for rescinding the order. If he has immovable property from which he derives any rent, profit, or income sufficient to make the payments as they fall due, he must be considered as having sufficient means to

352. *Kanapathipillai* v. *Sornammah* (1957) 59 N.L.R. 404
353. *ibid.*
354. (1896) 2 N.L.R. 202

pay them. If having this income he does not obey the order, he runs the risk of being sentenced to imprisonment for his default.

In *The Deputy Financial Secretary* v. *Sirisena*[355] the question was whether under a distress warrant issued under the Maintenance Ordinance the Fiscal could deal with movable property of an incorporeal nature. The Magistrate in this case had ordered the Fiscal to make distress by seizure of the respondent's "service gratuity" which he was entitled to claim on retirement from Government Service, and Wijewardene J. declared that the property distrained under a warrant should be movable property of a corporeal nature.

The recent amendment to the Maintenance Ordinance, however, contains the following provisions:[356]

8A (1) If on the application of a person entitled to receive any payment under an order of Maintenance, it appears to the Magistrate that the defendant has defaulted in the payment of Maintenance due for a period exceeding two months the Magistrate, may, after due enquiry, by an order hereinafter referred to as an "attachment of salary order" require the person to whom the order is directed being a person appearing to the Magistrate to be the defendant's employer, to deduct, for such period as may be specified in the order, such amount from the defendant's salary as may be specified in the order and forthwith to remit that amount to the Court.

(2) (*a*) Before an order is made under subsection (1) of this section, the Magistrate shall notice the person on whom he proposes to serve an order under that subsection to show cause, if any, why an order should not be made under that subsection and to require him to furnish to the Court, within such period as may be specified in such order, the salary particulars of the defendant. Any order made under subsection (1) of

355. (1941) 48 N.L.R. 175
356. Maintenance (Amendment) Act No. 19 of 1972, sec. 5

this section may be the subject of an appeal to the Supreme Court by any person aggrieved by such order but notwithstanding such appeal, the Magistrate may decide to continue proceedings under this Ordinance. The provisions of section 17 of this Ordinance shall apply to or in relation to every such appeal.

(*b*) The Magistrate may also by an order served on the defendant require him to furnish to the Court, within such period as may be specified in such order, a statement specifying—

(i) the name and address of his employer, or of his employers, if he has more than one employer;

(ii) such particulars as to his salary as may be within his knowledge;

(iii) and such other particulars as are required or necessary to enable his employer or employers to identify him.

(3) A document purporting to be such a statement as is mentioned in subsection (2) (b) of this section shall, in any proceedings in any Court, be received in evidence and be deemed to be such a statement without further proof unless the contrary is shown.

(4) The Magistrate shall not make an attachment of salary order if it appears to him that the failure of the defendant to make any payment in accordance with an order of maintenance in question was not due to his wilful refusal or culpable neglect.

(5) In determining the amount to be deducted in terms of subsection (1) of this section, the Magistrate shall have regard to the resources and needs of the defendant and the needs of the person, payment of whose maintenance is in default.

(6) An attachment of salary order shall not come into force until the expiration of fourteen days from the date on which a copy of the order is served on the person to whom the order is directed.

(7) An attachment of salary order, may, on the application of the defendant or the person entitled to receive payments under the order of maintenance be discharged or varied.

(8) A person to whom an attachment of salary order is directed shall, subject to the provisions of this Ordinance, comply with the order or, if the order is subsequently varied under subsection (7) of this section, with the order as so varied.

(9) For the purposes of this section—

(*a*) where the defendant is a public servant, the head of the department to which he is for the time being attached shall be deemed to be his employer, and,

(*b*) where the defendant is a member of the Local Government Service and employed in any local authority, the Commissioner, if it be a Municipal Council, or the Chairman, if it be an Urban Council or a Town Council or a Village Council, as the case may be, shall be deemed to be his employer.

(10) Where on any occasion on which any deductions have to be made from the salary of a defendant in pursuance of an attachment of salary order, there are in force two or more attachment of salary orders relating to such salary, then, for the purposes of complying with this section, the employer shall —

(*a*) deal with such orders according to the respective dates on which they came into force, disregarding any subsequent order until any earlier order has been dealt with; and

(*b*) deal with any subsequent order as if the salary to which such order relates was the residue of the defendant's salary after making any payments in pursuance of an earlier order.

(11) An employer who, in pursuance of an attachment of salary order, makes any payment to Court under this section shall forthwith give to the defendant a statement in writing specifying the amount deducted from his salary in pursuance of such order.

(12) Where any payment is made by an employer in pursuance of an attachment of salary order, the Court shall forthwith pay that amount to the person who is entitled to receive the same.

(13) Any employer who fails or neglects to comply with an attachment of salary order shall be liable on conviction by a Magistrate's Court to a fine not exceeding two hundred rupees and in the case of a second or subsequent conviction in respect of the same attachment of salary order, to a fine not exceeding five hundred rupees:

Provided that it shall be a defence for an employer charged with failing or neglecting to comply with an attachment of salary order to prove that he took all reasonable steps to comply with such order.

(14) The provisions of this section shall have effect notwithstanding anything in any other written law.

(15) For the purposes of this section the expression "salary" includes all allowances and wages.

8B (1) Where an order for maintenance is made under the provisions of this Ordinance, the Magistrate may direct the defendant that the amount of the payment due under such order shall be deposited each month on or before such date as may be specified in such order in favour of the person entitled to such payment at such post office,

bank or divisional revenue officer's office as may be specified in such order, and the amount so deposited may be drawn by such person from such post office, bank or divisional revenue officer's office, and it shall be the duty of the officer for the time being in charge of such post office, bank or divisional revenue officer's office to pay that amount to the person entitled thereto upon application made in that behalf.

(2) Where a direction has been made under subsection (1) of this section and there has been default in the deposit of payments as specified in such direction, the officer for the time being in charge of such post office, bank or divisional revenue officer's office shall report such default to the Court within seven days of such default and the Magistrate may in such event, notice the defendant to show cause why he should not be dealt with for such default, and if satisfied after due inquiry that there has been any default, impose such punishment as is provided by this Ordinance.

Section 8 of the principal enactment also stipulates that the Magistrates' Courts may sentence a person who has defaulted in the payment of maintenance for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to simple or rigorous imprisonment for a term which may extend to one month.

The interpretation canvassed before the Supreme Court in *Wijesuriya* v. *Silva* [357] was that the Ordinance limits the term of imprisonment to one month no matter how many months the offender is in arrears. In other words, for every breach of the order the applicant should apply for a warrant and if the wife permits her husband to fall into arrears for several months before applying for a warrant, the court cannot inflict a cumulative term of imprisonment. A contrary view had been expressed and accepted by the court in a previous decision, namely, *Sivakamam* v. *Velupillai*[358] where Macdonell C. J. opined that a sentence of six months' imprisonment following upon a single warrant

357. (1937) 38 N.L.R. 425
358. (1931) 34 N.L.R. 80

issued in respect of eighteen months' maintenance was perfectly valid. Reiterating this view, Abrahams C. J. declared in *Wijeysuriya* v. *Silva* that "it seems to me that the meaning to be preferred is that which, if I may so express it, leaps to the eye, and that is that for each month's breach (and the word 'each' in its simplest connotation has the meaning of separate indentity) a month's imprisonment can be awarded. That interpretation also seems consonant with reason since otherwise a defaulter in respect of several months would be in no worse position than a defaulter in respect of one month only, since, as I have said above, the Ordinance clearly contemplates the issue of one warrant in respect of more than one breach of a Magistrate's order."[359] It was contended by counsel for the appellant that if a woman in whose favour a maintenance order had been made against her husband, permitted him to fall into arrears and took no proceedings until an accumulation of arrears, she ought to suffer for her negligence. But it was rightly pointed out that an omission to proceed in respect of the first breach may not be due to negligence but rather to forbearance out of sentiment or to persuasion by fair promises ultimately unfulfilled.[360]

It has also been judicially declared that a court is not restricted when passing a sentence of imprisonment to limit it to a prescribed period. In *Siriwardana* v. *Emalin*[361] it was contended that the maximum term of imprisonment that could be awarded was six months, but T.S. Fernando J. declared that section 312 of the Criminal Procedure Code was not applicable to the Maintenance Ordinance which makes express provision for the enforcement of an order.[362] While agreeing with this view Garvin J. further declared in *Velupillai* v. *Sanmugam*[363] that the Ordinance did not impose a limit of any kind to the amount of arrears of maintenance recoverable nor did it prescribe a time within which such arrears should be recovered.

359. (1937) 38 N.L.R. 425 at p. 427
360. *id.* at p. 427
361. (1957) 59 N.L.R. 263
362. Sec. 8
363. (1928) 30 N.L.R. 50

Sithayamma v. *Sinniah*[364] involved an application to commit an insolvent to prison for failure to comply with an order for maintenance. Moselay J. held that an insolvent was protected from arrest. He declared that the arrears which had accrued at the date of the adjudication were, since they were capable of estimation, a debt provable in bankruptcy.

XII. Jurisdiction

The Maintenance Ordinance is silent on the question of jurisdiction and as such the courts have had to determine the criteria on which this question of jurisdiction could be decided. In an earlier case *Selestina Fernando* v. *Mohamado Cassim*,[365] a Maintenance order was sought in respect of an illegitimate child. The defendant, the alleged father, was resident in the district of Kalutara while the complainant and the child were resident in Colombo. Justice Wendt, sitting alone in the Supreme Court, declared that the Magistrate's Court in the place where the default was committed had jurisdiction to hear the case, and the proper district was Colombo since that was where the child was resident. In arriving at this conclusion Wendt J. relied on section 4 of the Indian Criminal Procedure Code which he said had been adopted in section 3 of our Code.[365a]

This decision was relied on by the Magistrate of Kandy in *Herft* v. *Herft* when he refused to entertain an application for maintenance on the reasoning that the applicant lived in Anuradhapura with the respondent and had moved to Kandy only on being compelled to do so because of his cruelty. In the Supreme Court[366] Dalton J. declared that since desertion was a continuing offence, it was continued in Kandy and as such the Police Magistrate of Kandy was not entitled to allege a lack of jurisdiction to hear the case. Justice Dalton, however, reversed his opinion, in *Jane Nona* v. *Van Twest*[367] and declared that the provisions of the Criminal Procedure Code were inapplicable to determine the question of

364. (1937) 39 N.L.R. 126
365. (1908) 11 N.L.R. 329
365a. Criminal Procedure Code (Cap. 20)
366. (1928) 29 N.L.R. 324
367. (1929) 30 N.L.R. 449

jurisdiction in a maintenance action since maintenance proceedings were civil rather than criminal actions. He further opined that since the Maintenance Ordinance, too, was silent on this question, the Civil Procedure Code[368] was the appropriate statute. According to this Code[369] an action must be instituted within the local limits of whose jurisdiction the cause of action arises. According to the evidence led the respondent was employed and was residing with her younger son in the Kalutara District. Moreover, she was doing so with the consent of the appellant. The cause of action therefore arose in Kalutara, where the claim had been brought and the Police Magistrate had jurisdiction to hear the matter.

The validity of this decision, however, was doubted by Basnayake J. in *Saraswathy* v. *Kandiah.*[370] In this case the appellant had applied to the Magistrate's Court of Point Pedro for an order for maintenance in respect of herself and her three children. The Magistrate, however, rejected her application on the ground that her residence was within the jurisdiction of the Magistrate's Court of Jaffna sitting at Mallakam, and that he had no jurisdiction to entertain the application. Basnayake J. declared that he was bound by the decision in *Jane Nona* v. *Van Twest*, a decision of two judges of the Supreme Court, and hence was governed by section 9 of the Civil Procedure Code, but he nevertheless declared that "The Maintenance Ordinance is a special enactment which enacts special rights and creates the machinery for enforcing them. It is self-contained and it has been held by this court in the case of *Anna Perera* v. *Emaliano* Nonis[371] that it supersedes the common law rights. I therefore find myself unable to reconcile the decision in *Jane Nona* v. *Van Twest* with the rules of interpretation of a special enactment such as the Maintenance Ordinance. In my view it is not correct, to say so with the greatest respect, to resort to other enactments to construe a self-contained instrument. Where as in this case a statute creates a new variety of a right which previously existed at common law, all common law incidents will attach to that new variety of right, but it is not permissible to import

368. No. 2 of 1889, sec. 9
369. Sec. 9
370. (1948) 50 N.L.R. 22
371. (1948) 50 N.L.R. 22

into it provisions of other statutes existing at the time of its enactment. My own view is that a Magistrate has jurisdiction to entertain an application under section 2 regardless of the residence of parties or the place where the cause of action arises. In my opinion the special provisions commencing with section 11 and ending with section 18 leave no room for holding that the absence of a provision such as section 9 of the Civil Procedure Code is a *casus omissus*. On the other hand those very provisions are an indication that the legislature has designedly abstained from imposing any limitation on a Magistrate's right to entertain an application thereunder."[372]

In a subsequent case, *Dingirimenika* v. *Kiriappu*[373] however, Nagalingam J. sitting alone, did not consider himself bound by the previous two bench decision. He opined that "There is no particular court that is prescribed for the institution of maintenance proceedings by an applicant. In fact, any Magistrate's Court would have jurisdiction to entertain a plaint irrespective of the question where the applicant or the respondent resides."[374] This case involved an application made by the appellant to recover arrears of maintenance. At the time of the application the respondent was living in Kandy and the Magistrate of Kegalle, where the application had been made, had refused to entertain the application on the reasoning that the respondent was living outside the jurisdiction of his court. According to Nagalingam J. however, this was clearly a wrong construction of the provisions of the Maintenance Ordinance. He declared that the whole framework of the Ordinance was intended to afford an expeditious machinery to enable an applicant to obtain an order for maintenance and to have such an order enforced from time to time. Consequently, the Magistrate who made the order for maintenance had the jurisdiction to proceed with the case and to make the appropriate orders from time to time even if the respondent moved out of the jurisdiction of the court. If, however, the maintenance order was to be executed in any other court, that is, other than the court in which the original order was made, the applicant had to show that the court was one

372. *id.* at p. 23. See also *Namasivayam* v. *Saraswathy* (1949) 50 N.L.R. 333
373. (1950) 52 N.L.R. 378
374. *id.* at p. 379

within the jurisdiction of which the respondent resided. But this does not in any way fetter the right conferred on the applicant to proceed with the enforcement of the order in the court in which the order was originally made.

Once again in *Tenne* v. *Ekanayake*[375] a bench consisting of three judges of the Supreme Court was convened to decide whether an application for maintenance could be made only in the Magistrate's Court within whose jurisdiction the defendant resided. In this case the application was made against the defendant for maintenance in respect of his wife and child. The applicant was the father-in-law of the defendant. The Magistrate to whom the application was made held that he had no jurisdiction because the defendant resided outside the jurisdiction of his court. In coming to this conclusion he followed two earlier decisions, namely, *Jane Nona* v. *Van Twest*[376] and *Saraswathy* v. *Kandiah*.[377] The question that had to be initially decided therefore was whether *Jane Nona* v. *Van Twest* was correctly decided, and whether it was permissible to apply section 9 of the Civil Procedure Code. Basnayake C. J. declared "I think not, for the reason that the Civil Procedure Code is made applicable only to actions falling within the ambit of that Code. The Maintenance Ordinance provides a special remedy and a special procedure in regard to what was before its enactment a civil right enforceable under the ordinary procedure. It has been told that since the enactment of the Maintenance Ordinance it is no longer competent for a woman to bring a civil action to recover maintenance for herself and her children as a debt due to her and them by the father.[378] By the enactment of the Ordinance the common law right became a statutory right enforceable by the procedure prescribed in the statute. Certain provisions of the Criminal Procedure Code[379] and the provisions of the Civil Procedure Code relating to costs so far as they may be applicable have been expressly made applicable to proceedings under

375. (1962) 63 N.L.R. 544
376. (1929) 30 N.L.R. 449
377. (1948) 50 N.L.R. 22
378. *Menikhamy* v. *Loku Appu* (1898) 1 Bal. 161
379. Chapters V. and VI, sections 338 — 352

the Ordinance.[380] It has been held [381] that it is not permissible to introduce provisions of the Criminal Procedure Code other than those expressly mentioned. By a parity of reasoning it would follow that it is not permissible to introduce provisions of the Civil Procedure Code other than those made applicable by the Ordinance."[382]

This view was reiterated by H. N. G. Fernando J. and Sinnetamby J. However, unanimity was reached only as regards the claim of the child who was living with the applicant. Basnayake C.J. and H. N. G. Fernando J. held that in regard to the mother, who was an inmate of the mental hospital Angoda, the application should be made in the Magistrate's Court of Colombo "for there is no ground on which jurisdiction can be said to be in the court within whose limits the applicant resides when the applicant is not the person seeking maintenance."[383]

More recently, the majority view expressed above was further reiterated in *Rajasinghe* v. *Bandara*.[384] G. P. A. Silva S.P.J. was of the opinion that the Maintenance Ordinance was silent on the question of jurisdiction for a very good reason, namely, in order to enable the applicant to file an application before any Magistrate. "For, a party filing an application for maintenance will, apart from other reasons, be ordinarily in somewhat straitened circumstances and it might well have been the intention of the legislature not to impose on such a party the obligation to go to a court where the defendant resided or where the cause of action arose which might entail heavy expenditure to the applicant."[385] Moreover, he pointed out that if an objection was to be raised to the jurisdiction of a court, particularly, local jurisdiction, it had to be raised at the commencement of a trial and not thereafter. In the given case, however, the defendant had acquiesced in the application being dealt with in the Magistrate's Court in which it was brought. Thereafter it was not open to the defendant, to raise objection to the jurisdiction of the court.

380. Sec. 9, 15 and 17
381. See *Anna Perera* v. *Emaliano Nonis* (1908) 12 N.L.R. 263
382. *id.* at p. 546
383. *id.* at p. 547. Sinnetamby J. dissented
384. (1973) 77 N.L.R. 175
385. *id.* at p. 176

B. The Ownership, Use and Enjoyment of Matrimonial Property

1. Introduction

At the very outset it is important to define what is meant by "matrimonial property" or "family assets". Kevin Gray defines it as property which constitutes the economic product of the constructive collaboration of husband and wife.[386] In other words, it comprises assets, the acquisition or retention of which is attributable to the economic interaction of the marriage partners.[387] "The concept of partnership elaborated here is not the concept of commercial partnership. It is instead that unique community of life and purpose which characterises the ideal relation of husband and wife. The enduring association of man and woman should be marked by a sharing of fortune and adversity, by love and constructive co-operation, by commitment, compromise and reciprocation."[388]

It is clear, therefore, that it is not appropriate to apply the normal rules of property law when adjudicating on the proprietary rights of spouses in relation to matrimonial assets. In general, the owner of property is the one vested with legal title. In the context of a marital relationship, however, this criterion may well do considerable injustice to the spouse in whose name the property was not purchased, but who had nevertheless made a contribution, either directly or indirectly towards the purchase of the property. Consequently the English law has considered the circumstances in which the contribution made by the non-owning spouse would enable that spouse to share in the beneficial interest of the property. Judicial decisions have also determined the type of contribution that is necessary to warrant the application of this rule.

In a discussion of the proprietary rights of spouses in modern Sri Lanka, the English law becomes relevant by virtue of the fact that since 1876, when community of property was abolished, the proprietary rights of spouses were governed by statutes modelled on English law legislation. Consequently, an interpretation of our

386. Kevin J. Gray, *Re allocation of Property on Divorce*, (England 1977) p. 117
387. *ibid.*
388. *id* at p. 23

statute warrants reference to the English law as opposed to the Roman-Dutch law.

II. The Statute Law

The Married Women's Property Ordinance[389] declares that "In any question between husband and wife as to the title or possession of property, the District Judge may make such order... as he thinks fit."[390] This provision is substantially the same as section 17 of the Married Women's Property Act of England.[391] Consequently, reference to English case law which has interpreted this statutory provision assumes importance. There are in the main two distinct judicial attitudes towards entitlement to matrimonial property. On the one hand, there is authority for the view that the "solid tug of money"[392] must be the criterion upon which legal entitlement is determined. This represents the orthodox property concept according to which title to the property purchased should vest in the spouse who provides the cash payment, the non-contributing spouse having no rights except those expressly agreed on in writing. According to this view, then, the normal rules of property are not relaxed merely because the parties are husband and wife.

On the other hand, there is support for the contention that irrespective of the precise allocation of economic roles within a marriage, husband and wife are equal partners in co-operative labour, both making, in the normal case, an essential contribution towards the economic viability of the family unit, and hence towards the accumulation of matrimonial property.[393] Therefore, by virtue of the fact that property acquired during the marriage is the outcome of a partnership effort, both spouses have a right to the property irrespective of the nature of the contribution made. Hence, judicial decisions have considered favourably the claims of a wife to share in the matrimonial property because she, being a wage-earner herself, had helped her husband towards the house-

389. No. 18 of 1923
390. Sec. 23 (1)
391. Married Women's Property Act, 1882
392. *Hofman* v. *Hofman* (1965) N. Z. L. R. 795, 800 *per* Woodhouse J. cited by Kevin J. Gray, *op. cit.* p.28
393. Kevin J. Gray, *op. cit.* p. 24

hold expenses, thereby relieving him of his financial commitments in the running of the house and enabling him to raise the money for the purchase of the property. Extending this principle even further, the courts have recognised the wife's role as a homemaker as sufficient to sustain her claim to a share of the property. In other words, it has been conceded that it is the wife's performance of her function which enables the husband to perform his and consequently, she is in justice entitled to share in its fruits.[394] Thus as Kevin Gray points out "the wife's domestic effort is regarded as a dynamic causal factor in the acquisition of matrimonial property, since the performance of her supportive and complementary role is a functional *sine qua non* of the viability of her family as an economic unit. It is her domestic achievement in general, and her performance of a child-bearing and child-rearing role in particular which in truth impart a 'matrimonial' character to the property nominally acquired by her husband."[395]

This latter mode of reasoning is opposed to the law applicable in a separate property regime as it exists in the English law. Nevertheless, it adds a new dimension to the legal rights of spouses paying adequate consideration to the true significance of the marital relationship.

III. Ownership of the Matrimonial Home

The matrimonial home is generally the most important if not the primary "family asset." Consequently, the law relating to matrimonial property will be elucidated in relation to the matrimonial home although the same rules are applicable *mutatis mutandis* to other forms of property which are the product of a partnership effort.

In circumstances where the husband, for instance, has paid the full purchase price and the property is transferred in his name, the courts have had to determine whether the wife had made a contribution to the acquisition of the property in order to decide on her right to share either equally or unequally in the beneficial interest of the property. Contributions made by the non-purchasing

394. *per* Lord Simon, cited by Kevin J. Gray, *op. cit.* at p. 34
395. *id.* at p. 35

spouse, for example, by the wife, could take one of several forms:

(i) she could have made a direct cash contribution towards the purchase price; or

(ii) she could have used her own earnings or her savings towards the household expenses thereby enabling him to use his money towards the mortgage instalments; or

(iii) the wife, by the performance of her role as an efficient homemaker or by the unpaid services she extends to her husband in his business may qualify for a share of the beneficial interest in the matrimonial property.

In all the above instances the task of the court will be to ascertain the intention of the parties at the time of the purchase. Obviously, if there is evidence of an agreement between the spouses, stipulating that the property, though transferred in the name of one spouse is to be held for the beneficial interest of both, there will be no difficulty in giving effect to that express intention by holding the property in trust for both spouses. Difficulty arises however, in situations where the courts are compelled to infer, from all available evidence, an intention to share the beneficial interest. The conduct of the parties will have to be examined to imply the existence of a trust. Indeed, if both parties had contributed towards the purchase price a proportionate resulting trust will be implied. Thus in an early case, *Re Roger's Question*,[396] although the property was conveyed in the name of the husband, both parties had made a cash contribution towards its acquisition. Consequently, the courts held that the beneficial interest in the property had to be shared in proportion to their contribution.[397]

In *Chapman* v. *Chapman*,[398] both husband and wife had contributed towards the purchase price and they had agreed that the wife should pay all the housekeeping expenses out of her earnings whilst the husband paid for the running expenses of the house

396. [1948] 1 All E.R. 328

397. See also *Cobb* v. *Cobb* [1955] 2 All E. R. 696; *Ulrich* v. *Ulrich* [1968] 1 All E. R. 67

398. [1969] 3 All E.R. 476

including the rates and the mortgage instalments. Lord Denning held that since each spouse had contributed what he or she could to the joint venture, "when that venture comes to an end, the Gordian knot has to be cut. It is done by holding that 'equality is equity'." [399]

If however, the wife's contribution is an indirect one, such as when she utilises her money for household expenses to enable her husband to pay the mortgage instalments there is a conflict of opinion in the English law as to the wife's right to a share in the beneficial interest in these circumstances. For instance, in the Court of Appeal, Lord Denning has canvassed the view that the courts have wide discretionary powers to vary proprietary rights to do justice between the parties.[400] Thus in *Fribrance* v. *Fribrance*,[401] Lord Denning declared "In the present case it so happened that the wife went out to work and used her earnings to help run the household and buy the children's clothes, whilst the husband saved. It might very well have been the other way round.... The title to the family assets does not depend on the mere chance of which way round it was. It does not depend on how they happened to allocate their earnings and their expenditure. The whole of their resources were expended for their joint benefit ... and the product should belong to them jointly. It belongs to them in equal shares."[402]

Lord Denning has extended this argument even further to situations in which the contribution made by the wife was not in the form of money but services rendered either in the home or in the husband's business. The governing rationale here is that the wife's unpaid services relieved the husband of the added expenditure he would have incurred had he engaged the services of a third party. This innovated idea was adopted by the Court of Appeal in *Hargrave* v. *Newton*.[403] According to Lord Denning, "the husband would not have been able to pay the premium on the policy securing the loan for the house or the other expenses on the

399. *id.* at p. 478.
400. See *Hine* v. *Hine* [1962] 1 W. L. R. 1124
401. [1957] 1 All E. R. 357
402. *id.* at p. 360
403. [1971] 1 W. L. R. 1611

house and car unless the wife had contributed substantial sums to the household expenses." [404]

It follows, then, that so long as it can be established that property was acquired by the joint efforts of both parties for their common benefit, irrespective of the nature of the contribution made, whether it was in terms of money or money's worth, the English Courts will impute a constructive or resulting trust. As such, the legal owner is bound to hold the property in trust for the benefit of both. In other words, an intention to create a trust is imputed in these circumstances and this inference is based on the conduct of the parties and the surrounding circumstances. [405] In *Cummins* v. *Thompson*,[405a] the wife had helped her husband in his grocery shop and the property was purchased out of that income. Lord Denning declared that although the wife did not make a financial contribution, she had nevertheless contributed towards the purchase of the asset by the services rendered. Consequently, she had to be given credit for it just as much as if she had gone out to work and brought her earnings into the pool. The wife becomes entitled not only to a share in the profits of the business itself but also to property acquired by these profits.

While advocating the policy of permitting a spouse to qualify to the beneficial enjoyment of the matrimonial asset by virtue of an indirect contribution, the Court of Appeal has advanced the view that a necessary prerequisite for this entitlement is proof of a causal nexus between the indirect contribution and the acquisition of the asset.[406] In *Allen* v. *Allen*[407] Lord Evershed M. R. declared that only if the wife's money was used for household expenses at her husband's request that he needed to save his money to pay for the house does she deserve a beneficial interest in the property. If on the other hand, he had left her to support herself as best she

404. See also *Hazell* v. *Hazell* [1972] 1 All E. R. 923; *Cummins* v. *Thompson* [1971] 3 All E. R. 782; *Nicholson* v. *Perks* [1974] 2 All E. R. 386

405. See *Cook* v. *Head* [1972] 1 W. L. R. 518; *Falconer* v. *Falconer* [1970] 3 All E. R. 449

405a. [1972] Chancery Division 62

406. *Falconer* v. *Falconer* [1970] 1 All E. R. 888 at p. 895; *Hargrave* v. *Newton* [1971] 1 W. L. R. 1611; *Hazell* v. *Hazell* [1972] 1 W. L. R. 301 at p. 304

407. [1961] 3 All E. R. 385

could, the nexus between her expenditure on the household and his payment of the purchase price would not be established. He declared that the doctrine of referability was the "life-line which once cut cast the courts adrift in unchartered, indeed forbidden waters."[408] This doctrine of referability was approved of by the House of Lords in *Gissing* v. *Gissing*.[409] Lord Diplock opined that the wife could not claim an interest in the matrimonial asset merely on the premise that she had contributed out of her own earnings or private income to other household expenses. He emphasised the need for evidence that her intention in making a contribution to the household expenses was to release the husband's money to pay off the mortgage.[410] The more recent decisions of the Court of Appeal however do not represent a consistent view. For instance, in *Falconer* v. *Falconer*[411] Lord Denning did not stress the importance of the doctrine of referability, but in *Hargrave* v. *Newton*,[412] he appeared to require proof of a nexus between the wife's indirect contribution and the asset acquired. More recently, in *Hazell* v. *Hazell*,[413] he once again disregarded the importance of a causal connection. "It is sufficient if the contributions made by the wife are such as to relieve the husband from expenditure which he would otherwise have had to bear. By so doing the wife helps him indirectly with the mortgage instalments because he has more money in his pocket with which to pay them. It may be that he does not strictly need her help — he may have enough money of his own without it — but, if he accepts it (and thus is enabled to save more of his own money), she becomes entitled to a share."

Eekelaar, [414] points out that the doctrine of referability is of considerable importance because the asset acquired by the husband may be a television or a car and if the wife can show that it was her contribution to the household expenses that enabled the husband to make that purchase, there would be nothing to prevent

408. See also J. M. Eekelaar, "The Matrimonial Home in the Court of Appeal" 1972, (88) *L.Q.R.* 333
409. [1970] 2 All E. R. 780
410. *id.* at pp. 792-793; 907-910
411. [1970] 3 All E. R. 499
412. [1971] 3 All E. R. 866
413. [1972] 1 All E. R. 926
414. "The Matrimonial Home in the Court of Appeal" 1972 (88) *L. Q. R.* 333

her from claiming a share in it simply because her contribution made it easier for the husband to make the purchase. "Likewise, if the doctrine of referability is severed, it will enable third parties who make financial contributions to the purchase of an item by a spouse to claim an interest in the items purchased."[415]

IV. Quantifying the Beneficial Interest

It has been queried, "should an attempt be made nicely to calculate what her share ought to be having regard to the amount that she put into the cost of the site and the value of her work separately, or ought one to approach the matter on the broader basis that the husband and wife are jointly entitled to the property, treating it not as being the subject of a mathematical division but as 'ours'."[416] Indeed, there would be no difficulty if both parties had made an outright financial contribution towards the purchase price. In that event each spouse would be entitled to a beneficial interest proportionate to the contribution made.[417] Likewise if the parties had entered into an agreement, either at the time of the purchase or subsequent to it, specifying the share each would be entitled to, the court would be called upon merely to give effect to that agreement when dividing the beneficial interest. In *Cowcher* v. *Cowcher*,[418] the wife, in addition to making a cash contribution towards the purchase of the matrimonial home, made a substantial contribution to their living expenses including making payments for central heating and the children's school fees. Nevertheless, the wife was held to be entitled only to a one-third of the equitable interest in the home. It is evident from the judgment of Bagnall J. that the court required cogent proof of the intention of the parties either at the time of the purchase or subsequent to it; the onus of proof in the latter instance being greater than in the former. Bagnall J. referred to a "money consensus", that is, an agreement that, irrespective of the actual payments to the vendor, as between themselves they were to be treated as having provided the money in, say, equal shares and, consequently, they would share the beneficial interest equally; and

415. *ibid.*
416. *Smith* v. *Baker* [1970] 2 All E. R. 826 at P. 829 *per* Windgery C. J.
417. See *Dewar* v. *Dewar* [1975] 1 W. L. R. 1532
418. [1972] 1 All E. R. 943

to an "interest consensus" which is an agreement that irrespective of the shares in which, as betweer themselves, the money had been qrovided, the property would be held on an express trust in, say, equal shares. "The first type of agreement or common intention could, in my judgment, be inferred from conduct antecedent, contemporaneous or subsequent, for it would be part of the arrangement which gives rise to the resulting trust and consistent with it. On the other hand, in my opinion, it would be extremely difficult to infer the second type of agreement from any conduct, because it would involve relying on conduct to substitute for the resulting trust that would otherwise have been implied also from conduct, a contractual express trust inconsistent with that resulting trust."[419]

Other cases, however, have favoured the view that the court should exercise its discretion so as to arrive at a "fair solution on broad principle."[420] According to Kevin Gray[421] the interests of justice can best be served only if a rebuttable norm of equal apportionment between husband and wife is accepted. In other words, the courts are not possessed of an unfettered judicial discretion but, rather, of a discretion to depart from this fundamental norm in certain circumscribed instances. Thus, for example, in *Heseltine* v. *Heseltine*,[422] when dividing the beneficial interest in the matrimonial home, which was the product of the joint efforts of both spouses, the court gave three-quarters to the wife and one-quarter to the husband. Judicial discretion was exercised thus, to take account of the share transferred to the husband by the wife with the object of saving estate duty. Consequently, the court ordered that that money be held in trust for her.

In *Leake* v. *Bruzzi*[423] the court had to decide whether the norm of equal apportionment could be deviated from by reference to the conduct of the parties. The spouses, in this case, were joint tenants and each party had contributed to the mortgage repayments

419. [1972] 1 W. L. R. 425 at p. 432. cf. *Hazell* v. *Hazell* [1971] 1 All E. R. 923. See also J. Levin, "The Matrimonial Home-Another Road" in 1972 (35) *M. L. R.* 547

420. Re Densham (A Bankrupt) [1965] 1 W. L. R. 1519 at p. 1530 *per* Goff J.

421. *Reallocation of Property on Divorce*, (England 1977) p. 115.

422. [1971] 1 W. L. R. 342

423. [1974] 2 All E. R. 1196

until the breakdown of the marriage. Having regard to the respective contributions made by the spouses the court held that the wife was entitled to one-third of the proceeds of the sale. The wife, however appealed, alleging that her husband should not be given credit for the mortgage repayment made subsequent to the separation since it was her husband's behaviour that caused the breakdown of the marriage. The Court of Appeal, however, held that the courts would not normally go behind title and, therefore, the wife was presumptively entitled to half the proceeds of sale and that it was undesirable to investigate the cause for the breakdown of the marriage under section 17. Consequently, the court held that the husband was entitled to credit for the mortgage repayments made after the parties separated, but only for the repayment of the capital and not of the interest. The rationale for this was that the interest was regarded as a rent for the exclusive use of the house.

The maxim "equality is equity" has not, however, been favoured by the House of Lords. In *Gissing* v. *Gissing*,[424] the husband had paid the entire purchase price of the house, which was in his name, while the wife had provided some furniture and equipment for the house and spent money on improving the garden. She had also met all expenses incurred in clothing for herself and her son. Lord Denning in the Court of Appeal was clearly of the view that irrespective of factors such as in whose name the house was purchased and who paid for what, or who went out to work and who stayed at home, if they had both contributed towards the purchase of the house it was a product of their joint effort and, therefore, the *prima facie* inference in such a situation was that it belonged to them equally. The House of Lords however, reversing the decision, held that there was insufficient evidence to establish an intention to share the beneficial interest. Lord Reid declared that "the high sounding brocard 'equality is equity' has been misused."[425] According to Viscount Dilhorne "there is not one law of property applicable when a dispute as to property is between spouses or former spouses and another law of property when the

424. [1969] 1 All E. R. 1043
425. *id.* at p. 783

dispute is between others.[426] He opined that in all matters of property rights there must be evidence of a specific intention to share the beneficial interest. "One cannot counteract the absence of any common intention at the time of acquisition by conclusions as to what the parties would have done if they had thought about the matter. If such a common intention is absent, in my opinion, the law does not permit the courts to ascribe to the parties an intention they never had and to hold that property is subject to a trust on the ground that that would be fair in all the circumstances."[427]

V. Improvements to the Matrimonial Home

Apart from the type of contributions that may be made to the acquisition of a matrimonial asset in order to acquire a beneficial interest in the property, the English law has also had to determine whether the spouse in whom legal title is not vested can acquire an interest in the property by virtue of the fact that he had effected improvements to the property owned by the other, as a consequence of which the property had appreciated in value. The consensus of judicial opinion appears to be that so long as the improvement made is a substantial one, and provided it enhances the value of the property, the improving spouse has an interest in the property.

In *Appleton* v. *Appleton*,[428] the husband had made improvements to the matrimonial home owned by the wife and Lord Denning declared that he should be entitled to so much of the enhanced value of the property as was due to his work and materials that he supplied. A percentage of the proceeds ought to go to him commensurate to the enhancement due to his work in improving the property or properties, and getting a better price on that account. Lord Denning concluded that the husband was entitled to a proportion of the proceeds of the sale of the house if and when the house was sold.[429] It has been stressed, however, that the improving spouse will not be entitled to a share simply by doing do-it-yourself jobs. In other words, the normal duties of a spouse

426. *id.* at p. 785. The same view was expressed in *Pettitt* v. *Pettitt* [1969] 2 All E. R. 385 at p. 397 by Lord Morris of Borth-y-Gest and Lord Upjohn.

427. *id.* at p. 786

428. [1965] 1 W. L. R. 25

429. See also *Jansen* v. *Jansen* [1965] 3 All E. R. 363

such as cleaning walls, maintaining a garden and other such work engaged in to maintain the property does not entitle that spouse to share in the proceeds.[430] If, however, the work done is an improvement in that it enhances the value of the property, then the court will infer that the parties, had they thought about it, should have agreed that if they separated, then, when adjusting their financial affairs, the improving spouse should be given a share in the proceeds of sale commensurate with the work done.[431] In *Pettitt* v. *Pettitt*[432] however, where the husband had decorated the house belonging to his wife and he had built in wardrobes, built an ornamental well in the garden and a side wall, the House of Lords refused the husband's claim for an interest in the house on the reasoning that the work was too ephemeral or insubstantial to give him a legitimate claim.

The same rules are applicable even if the improvements are effected by a third party. In *Hussey* v. *Palmer*,[433] a mother-in-law had expended money building an extension to the house. The Court of Appeal held that since the money spent was not intended as a gift, justice and good conscience required that a trust be imposed for the benefit of the plaintiff who was to have an interest in the property proportionate to her contribution. "Just as a person who pays part of the purchase price acquires an equitable interest in the house, so also he does when he pays for an extension to be added to it.... The legal owner cannot conscientiously keep the property for herself alone, but ought to allow another to have the property or the benefit of it or a share in it. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution."

In the English law this question is now governed by section 37 of the Matrimonial Proceedings and Property Act 1970, which provides that: "... where a husband or wife contributes in money or money's worth to the improvement of real or personal property in which or in the proceeds of sale of which either or both of them

430. *Pettitt* v. *Pettitt* [1969] 2 All E. R. 385; *Button* v. *Button* [1968] 1 All E. R. 1064
431. *Pettitt* v. *Pettitt* [1969] 2 All E. R. 385
432. *ibid.*
433. [1972] 1 W. L. R. 1286

has or have a beneficial interest, the husband or wife so contributing shall, if the contribution is of a substantial nature and subject to any agreement to the contrary express or implied, be treated as having then acquired by virtue of his or her contribution a share or an enlarged share, as the case may be, in that beneficial interest..."

The courts continue to have considerable discretion when ascertaining what constitutes improvements of a substantial nature.[434] Moreover, the nature of the improvement must be examined in order to distinguish it from essentially maintenance work which is not governed by the statute.[435] No criterion has been formulated for assessing the quantum of money to be paid. If the value of the improvements is not fixed by agreement, the court must award a sum which appears to be just in all the circumstances.[436]

VI. Use and Enjoyment of the Matrimonial Home

The wife's right to use and enjoy the matrimonial home is founded on two vital incidents of marriage:

(i) the obligation of support, and, (ii) the right of cohabitation.

(i) According to Hahlo,[437] "it is the husband's duty to provide the conjugal 'nest', the wife's to live in it." In the first Sri Lankan case on the subject, namely, *Canekeratne* v. *Canekeratne*, in the course of his judgment, T. S. Fernando J. declared that the award of substantial maintenance may be an alternative to the obligation to provide the spouse with accommodation.[438] It is submitted, however, that in the context of the socio-economic conditions prevalent in modern Sri Lanka, where the shortage of housing is an acute problem it is evident that although the allowance paid to a deserted

434. See *Davis* v. *Vale* [1971] 1 W.L.R. 1022; *Re Nicholson* [1974] 1 W.L.R. 476.

435. *ibid.*

436. See *Griffiths* v. *Griffiths* [1973] 3 All E.R. 1155.

437. H.R. Hahlo, *The South African Law of Husband and Wife*, (4th ed. Cape Town 1975) p. 121.

438. *id.* at p. 523

wife may well be a handsome one, it may nevertheless leave her and her family without suitable shelter; as such, to a woman who does not have alternate accommodation, the right to live in the matrimonial home, subsequent to a breakdown of the marriage assumes considerable importance. It follows that, in the event of the wife not qualifying for support, like for instance, when she is guilty of matrimonial misconduct, the obligation of support would *ipso facto* cease and consequently she would also lose her right to occupy the matrimonial home. If, however, the husband condones the wife's misconduct, she can continue to enforce his obligation of support and thereby reside in the matrimonial home. In *Wabe* v. *Taylor*[439] the wife, who had been deserted by her husband, was found to be living in adultery with a lodger in the matrimonial home. The husband, however, took no steps to eject her. When the landlord claimed possession of the house the court held that the offence of adultery was irrelevant to a dispute between the landlord and the wife. The wife's misconduct becomes relevant only if the husband seeks to revoke his authority. Consequently, if the possession is lawful *vis-a-vis* the husband, it is lawful *vis-a-vis* the landlord. Megarry[440] points out that in a situation such as this a decree for divorce would determine the wife's right of occupation automatically even though she was the successful petitioner "so that a desire to preserve her home may induce a deserted wife to refrain from taking proceedings for divorce, which otherwise would be beneficial to her."[441] It has also been pointed out that even when the wife does lose her right to occupy the matrimonial home she cannot be ejected forthwith. She must be given reasonable time to find alternative accommodation.[442]

439. [1952] 2 All E. R. 420
440. R. E. Megarry, "The Deserted Wife's Right to Occupy the Matrimonial Home", 1962 (68) *L. Q. R.* 379 at p. 387
441. *id.* at p. 387
442. See *Vaughan* v. *Vaughan* [1953] 1 All E. R. 209

In the South African case of *Cattle Breeders Farm (PVT Ltd.)* v. *Veldaman*[443] the matrimonial home was leased by a company, of which the husband had the controlling shares, and the husband sought to evict his wife whom he had previously deserted. The court however held that the company was the *alter ego* of the husband and that he possessed no greater rights to eject the wife.[444] The same principles apply *mutatis mutandis* if the wife is the registered owner of the matrimonial home, but in this instance the right would be founded not on the obligation of support but rather on the principle that "because he is her husband he has rights flowing from the marriage, which in relation to that property, puts him in a category differing *toto coeli* from that of a stranger. The wife's right to eject him must, therefore, flow from considerations which to a great extent must depend on the merits of the matrimonial dispute."[445]

(ii) Both the South-African and English legal systems protect the right and duty of cohabitation by the availability of a decree for the restitution of conjugal rights.[446] Although this decree is unknown in the modern Sri Lankan law, the right of cohabitation is a recognised incident of marriage in our legal system and as such if one spouse ejects the other from the matrimonial home and, consequently, out of the marriage, he or she will be guilty of desertion.

Elucidating on the status of a deserted wife to remain in occupation of the matrimonial home, Lord Upjohn declared[447] that "a wife does not remain lawfully in the matrimonial home by leave or licence of her husband as the owner of the property. She remains there because as a result of the status of marriage it is her right and

443. 1974 (1) S. A. 169

444. See also *Owen* v. *Owen* 1968 (1) S. A. 480

445. *Per* Vieyra J. in *Baden Horst* v. *Baden Horst* 1964 (2) S. A. 676. *Contra Hamman* v. *Hamman* 1949 (1) S. A. 1191 where Price J. held that "A wife is surely entitled to possession of her own property and a husband has no better right to occupy such property than any stranger."

446. See H. R. Hahlo, *op. cit.* p. 407; P. M. Bromley, *op. cit.* pp. 237; 111; 112.

447. *National Provincial Bank Ltd.* v. *Ainsworth* [1965] A. C. 1175 at p. 1232

duty so to do and if her husband fails in his duty to remain there that cannot affect her right to do so. She is not a trespasser, she is not a licensee of her husband, she is lawfully there as a wife, the situation is one *sui generis*." The wife's occupation of the matrimonial home, then, is of a unique legal character. She is "not a tenant of the husband owner... nor a bare licensee... but is in a special position—a licensee with a special right—under which the husband cannot turn her out except by an order of the court."[448] The wife, then, "has no legal or equitable interest in the house which she continues to occupy and in that respect is in no better position than any other licensee. On the other hand, her husband, the licensor, cannot bring proceedings against her in ejectment for the status of matrimony prevents it. He, accordingly, cannot effectively revoke her licence, and in this respect the wife is in a more favourable position than that of an ordinary licensee."[449]

If, therefore, the wife is entitled to occupy the matrimonial home *stante matrimonio* there should be no difference in principle if the marriage is brought to an end by the husband's desertion. In other words, the husband's matrimonial misconduct does not affect the status of the wife who can continue to live lawfully in the matrimonial home. Her right can be terminated only on dissolution of the marriage by death or divorce.[450]

In 1967, the English law pertaining to the right of a deserted wife to occupy the matrimonial home, was given statutory recognition. The Matrimonial Homes Act, enacted primarily to protect the interests of third parties applied "where one spouse is entitled to occupy a dwelling house by virtue of any estate or interest or contract or by virtue of any enactment... and the other spouse is not so entitled..."[451] The Act, therefore, did not govern spouses who were joint tenants of the matrimonial home, hence, in this situation the English common law continued to be relevant.[452] Moreover, it was not clear whether the Act governed a wife's

448. *Bendall* v. *Mc Whirter* [1952] 1 All E. R. 1307 at p. 1310 *per* Lord Denning.
449. *id.* at p. 1316, *per* Romer L. J.
450. See P. M. Bromley, *op. cit.* p. 478
451. Sec. 1 (1)
452. See P. M. Bromley, *op. cit.* p. 479

occupation when the legal estate was vested in the husband on trust for himself and his wife as joint owners. Consequently, by a further amendment, a wife who had an equitable interest in the house or in the proceeds of sale by virtue of having contributed to the purchase price was conferred protection.[453] The salient features of the Act are:

(i) the wife's right of occupation is a purely personal right which cannot be assigned;[454]

(ii) the wife's right of occupation comes to an end on termination of the marriage by death or divorce;[455]

(iii) the wife's right of occupation will be void against the husband's trustee in bankruptcy.[456] Consequently, his creditor's interests will take priority over her right of occupation and she cannot take any steps to prevent the sale.[457]

VII. The Deserted Wife's Equity and the Interests of Third Parties

English legal authority is riddled with conflicting and controverted opinions regarding the deserted wife's rights against third parties. In relation to her husband it has been accepted that he cannot revoke her right of occupation unless and until she foregoes her right to support. But the question that has caused considerable difficulty for the English courts is the nature of her rights against third parties, whether they be mortgagees, trustees in bankruptcy or *bona* or *mala fide* purchasers for value.

In the case of *Bendal'* v. *Mc Whirter*,[458] which was the progenitor of the deserted wife's irrevocable licence, the husband, had given his wife authority to remain in the matrimonial home when

453. Sec. 1 (9) added by the Matrimonial Proceedings and Property Act 1970, sec. 38

454. *Wroth* v. *Tylar* [1973] 2 W. L. R. 405

455. *Brent* v. *Brent* [1974] 3 W. L. R. 296; *Vaughan* v. *Vaughan* [1953] 1 All E. R. 209; *Morris* v. *Tarrant* [1971] 2 All E. R. 920

456. Sec. 2(5)

457. *Re Soloman* [1966] 3 All E. R. 255

458. [1952] 1 All E. R. 1307

he deserted her. Thereafter, when the husband became bankrupt the trustee in bankruptcy sued the wife for possession of the house in order to sell it. The Court of Appeal unanimously held that the action must fail. Somervell L.J. and Romer L.J. declared that the husband's inability to determine his wife's occupancy constituted a clog or fetter on his ownership of the house and that, since his property passed to the trustee subject to all the equities and liabilities which affected it while in his hands, the house in this case had to pass subject to the fetter of the irrevocable licence. Romer L.J. pointed out that if the mortgagee takes free from this restriction he would acquire "a larger beneficial interest in the property than that which the debtor had previously enjoyed."[459] Lord Denning went even further and declared that a deserted wife had a right of her own to occupy the matrimonial home, resembling her right to pledge her husband's credit for necessaries, and flowing from the status of marriage coupled with the fact of separation owing to the husband's misconduct. That right was an equity and as the trustee in bankruptcy took subject to equities, he took subject to the right, and was no more able to revoke it than was the husband. According to this view then the right of the wife is at least an equity, good against the whole world except a purchaser without notice,[460] and may even be effective against successors in title.[461] The implication then is that on desertion, the wife has a better right to remain in the matrimonial home than if the spouses were living together. To explain this further, if the spouses are living together when the husband goes bankrupt the trustee in bankruptcy may be under a duty to sell the matrimonial home. In those circumstances undoubtedly, both the husband and wife would have to leave. If, however, the husband becomes bankrupt subsequent to the desertion, on the authority of *Bendall* v. *Mc Whirter* the wife cannot be ejected. Then again, if the husband goes bankrupt subsequent to his desertion and thereafter returns to his wife, the trustee in bankruptcy could sell the matrimonial home. Indeed this anomaly has been referred to as the "fundamental error" in the judgment delivered in *Bendall* v. *Mc Whirter*.[462] This would

459. *id.* at p. 1316

460. *id.* at p. 1317

461. *id.* at pp. 1316, 1317

462. See *National Provincial Bank* v. *Ainsworth* [1965] A. C. 1175 at p. 1190

inevitably give rise to a policy of "no mortgages for married men."[463] The burden vested on the prospective mortgagee would indeed be unreasonable. Not only would he have to search for good title, but he would also have to ascertain the nature of the marital relationship if the mortgagor was married. The Court of Appeal, however, had no hesitation in declaring that the onus was clearly on the mortgagee to ascertain the existence of any equitable interest on property.[464]

Comparable protection has been conferred on the wife when a husband sells the property to his mistress,[465] when the husband conveys the house to a purchaser by a genuine conveyance but intending that the purchaser should sue the wife for possession,[466] or when the husband conveys the house to a company which is entirely under his control in return for fully paid shares. In this last mentioned instance Cross J. thought that it was inconceivable that the company could evict the wife. He declared, "I cannot think, however, that any court would allow the company to turn Mrs. Ainsworth out of the house without providing her with alternate accommodation."[467] Lord Denning pointed out that while the Bank desired to recoup themselves all that was owing to them, one had to consider the rights of the wife who together with her children received nothing from her husband. "Of all the creditors of the husband, she has the most crying claim of all."[468]

However, this "so-called deserted wife's equity, which enjoyed a chequered lifetime when its name burned sometimes brightly, and sometimes less brightly in the Court of Appeal, eventually expired in the House of Lords"[469] in *National Provincial Bank Ltd.* v.

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463. See R. E. Megarry, "The Deserted Wife's Right to Occupy the Matrimonial Home" 1952 (68) *L. Q. R.* 379 at p. 384
464. *National Provincial Bank Ltd.* v. *Hastings Car Mart Ltd.* [1964] 2 W. L. R. 751 *per* Lord Denning
465. *Street* v. *Denham* [1954] 1 W. L. R. 624; *Churcher* v. *Street* [1959] Ch. 251
466. *Ferris* v. *Weaven* [1952] 2 All E. R. 233; *Savage* v. *Hubble* (1953) C. P. C. 416
467. See *National Provincial Bank Ltd.* v. *Hastings Car Mart Ltd.* [1964] 2 W. L. R. 75
468. *ibid.* See also *Westminster Bank Ltd.* v. *Lee* [1956] Ch. 7.
469. *Miles* v. *Bull* [1969] 3 All E. R. 1585, *per* Bridge J.

Ainsworth.[470] The court had to decide in this case whether the wife's right of occupation of the matrimonial home was such that it was no longer transferable save subject to the clog upon it created by the wife's irrevocability. According to the House of Lords the wife's right of occupation was a purely personal right enforceable only against her husband. In other words, she did not have any estate or interest in the land which would continue to attach to the land irrespective of a change of ownership.[471] Lord Upjohn declared: "the right of the wife to remain in occupation even as against her deserting husband is incapable of precise definition, it depends so much on all the circumstances of the case, on the exercise of purely discretionary remedies, and the right to remain may change overnight by the act or behaviour of either spouse. So as a matter of broad principle, I am of opinion that the rights of husband and wife must be regarded as purely personal *inter se* and that these rights as a matter of law do not affect third parties."[472] Very cogent policy considerations, also influenced the House of Lords in arriving at this conclusion. "Of course an intending purchaser is affected with notice of all matters which would have come to his notice if such inquiries and inspections had been made by him as ought reasonably to have been made... But surely an inquiry, if it is to be made reasonably, must be capable of receiving a positive answer as to the rights of the occupier and lead to a reasonably clear conclusion as to what those rights are? The answer, 'I am a deserted wife' (if given) only gives notice of a right so imprecise, so incapable of definition, so impossible of measurement in legal phraseology or terms of money that if he is to be safe the mortgagee will refuse to do business and much unnecessary harm will be done... It does not seem to me that an inquiry as to the marital status of a woman in occupation of property is one which the law can reasonably require to be made; it is not reasonable for a third party to be compelled by law to make inquiries into the delicate and possibly uncertain and fluctuating state of affairs between a couple whose marriage is going wrong. Still less can it be reasonable to make an inquiry if the answer to be expected will probably lead to no conclusion which can inform

470. [1965] A. C. 1175
471. *id.* at pp. 1220, 1228
472. *id.* at p. 1233

the inquirer with any certainty as to the rights of the occupant. These considerations give strong support to the opinion I have already expressed that the rights of the wife must be regarded as purely personal between herself and her husband."[473] The conclusion then was that a deserted wife's equity being a mere 'equity' naked and alone, neither amounting to an equitable interest nor being ancillary to or dependent on an equitable interest, did not bind purchasers. "Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties and have some degree of permanence or stability. The wife's right has none of these qualities, it is characterised by the reverse of them."[474]

This case also discussed the effect of registration of title under the Land Registration Act 1925 on the rights of the deserted wife. According to the statute,[475] a registered disposition for valuable consideration can pass a legal title to the transferee subject only to over-riding interests. A list of "over-riding interests" is given[476] and includes[477] "the right of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed." Lord Denning in the Court of Appeal had favoured the view that the wife's right of occupation was an "over-riding interest,"[478] but Lord Wilberforce in the House of Lords pointed out that although the Act provided that certain rights were binding without registration and without the necessity for actual notice, "to ascertain what 'rights' come within this provision, one must look outside the Land Registration Act and see what rights affect purchasers under the general law."[479] "The whole frame of section 70, with its list that it gives of interests or rights, which are over-riding shows that it is made against a background of interests or rights whose nature and whose transmissible character is known, or

473. *id.* at p. 1234, *per* Lord Upjohn
474. *id.* at p. 1248, *per* Lord Wilberforce
475. Sec. 20
476. Sec. 70
477. Sub-sec. (1) (g)
478. [1964] Ch. 665, 689
479. [1965] A.C. 1175 at p. 1261

ascertainable, *aliunde*, that is, under other statutes or under the common law, So, if the right of a deserted wife is a purely personal claim against her husband, not specifically related to the house in question, but merely at its highest, to be provided with a house, there is no difficulty in seeing that this type of right cannot any more than any purely contractual right, be an over-riding interest."[480]

It was at this juncture that the need was felt for legislation clarifying this involved subject. Consequently, the Matrimonial Homes Act 1967 appeared in the statute books regulating *inter alia* the wife's right to the matrimonial home as against the claim of third parties. It was enacted that as against the husband's trustee in bankruptcy or his creditors the wife's right of occupation was void.[481] It follows, therefore, that a creditor's interests take priority over a wife's right of occupation and that she cannot take any steps to prevent the sale.[482] The Act also sought to balance the equities of the wife with those of the purchaser by providing that her right to occupy the matrimonial home would be a charge on the husband's estate or interest in the property.[483] Moreover, the charge could be registered as a Class F land charge.[484] In the case of registered land there was provision for entering a notice or caution under the Land Registration Act 1925.[485] Hence, adequate provision was made for providing notice to purchasers of an interest in the land.

The pith and substance of the Act is that henceforth, registration or non-registration would be the touch stone on which the enforceability of equitable interests would depend. In *Miles* v. *Bull*[486] the deserted wife had not registered her right of occupation under the Matrimonial Homes Act 1967 as a land charge under the Land Registration Act 1925. When the husband purported to sell the house the wife resisted the sale but the Court of Appeal

480. *id*. at. p. 1261
481. Sec. 2 (5)
482. *Re Soloman* [1966] 3 All E. R. 255
483. Sec. 2 (1)
484. Sec. 2 (7)
485. Sec. 2 (7)
486. [1969] 3 All E. R. 1585

held that the Matrimonial Homes Act, which effectively incorporated the provisions of the Land Registration Act 1925 had made provision for the steps to be taken by a spouse if she wished to protect her right of occupation in the event of the property being transferred into the hands of a third party; and that this provision superseded the old equitable doctrine which could not be revived to protect those who had failed to protect themselves. Bridge J. declared that although one feels every sympathy for the position of the wife, which is a very unenviable one, "it seems to me that the right approach to the question which I have to determine is to bear in mind that the Matrimonial Homes Act 1967 is an Act which, however socially desirable, creates new rights in favour of certain spouses and correspondingly takes away ... certain common law rights, which, apart from the Act, would be exercisable by property owners. When such an Act, particularly in that aspect of its operations which deprives a property owner of her common law rights, contains, as this statute and its effective incorporation of the provisions of the Land Registration Act 1925 does, provisions which make it perfectly clear what steps are to be taken in order that the spouse's right of occupation shall be appropriately protected if the property which the spouse is entitled to occupy comes into the hands of third parties, it does not seem to me that it is for the court to say that Parliament really had not provided adequate or effective protection, or that the old equitable doctrines of the court can be introduced for the purpose, in effect, of widening the protection to extend it to those who have not protected themselves by taking the appropriate statutory steps."[487]

Prima facie, then, this mode of reasoning appears to be totally acceptable because if the wife does not avail herself of the statutory protection by registering her right, she must shoulder the consequences irrespective of whether non-registration was due to negligence or ignorance of the law. Although there is much to commend this viewpoint, the English courts have not been blind to the realities that exist. For instance, during the tenure of a happy marital relationship it is inconceivable that the wife will anticipate a termination of the relationship and in addition, attribute to her husband malicious and vindictive action such as depriving

487. *id.* at p. 1590

her of shelter by selling their house to a third party. Moreover, even if she did foresee the likelihood of his defaulting in the payment of the mortgage instalments she would hardly conceive of a situation where the house would be seized on bankruptcy. The statute enables the wife to make payments in respect of rents, mortgage instalments etc. on behalf of her owner-husband, and it has been said that such payments are "as good as if made or done by the other spouse."[488] Hence, having the right herself to save the house from being seized for non-payment of the mortgage instalments, it is not likely that she would consider it essential to protect her rights against third party interests. Consequently, even after the enactment of the Matrimonial Homes Act, situations have arisen where the wife asserts her common law right to remain in occupation when the property is seized by, or transferred to, third parties. Moreover, her position is particularly vulnerable because the mortgagee is not bound to give her notice of her husband's default in payment thereby denying her the opportunity of discharging the obligation.[489]

The above mode of reasoning is reflected in the recent House of Lords ruling in *Williams and Glyn's Bank Ltd.* v. *Boland and Another*,[490] a case which was *in pari materia* with the previous House of Lords decision.[491] This case, like the former one, involved the interpretation of a provision of the Land Registration Act. Lord Wilberforce in the *Ainsworth* case had declared that "the whole frame of section 70, with the list that it gives of interests or rights which are over-riding, shows that it is made against a background of interests or rights whose nature and whose transmissible character is known or ascertainable, *aliunde*, that is, under other statutes or under the common law. So if the right of a deserted wife is a purely personal claim against her husband, not specifically related to the house in question, but merely at its highest, to be provided with a house, there is no difficulty in seeing that this type of right cannot any more than any purely contractual right, be an over-riding interest."[492]

488. Sec. 1 (5)

489. See *Hastings and Thanet Building Society* v. *Goddard* [1970] 3 All E. R. 954 *Watts v. Waller* [1973] Q. B. 153

490. [1980] 3 W. L. R. 138

491. *National Provincial Bank* v. *Ainsworth* [1965] A. C. 1175 with the one difference that in the present case the wife too had contributed towards the purchase price. Nevertheless the Court held that this was not a distinguishing feature.

492. *id.* at p. 1261

In the subsequent case of *Williams and Glyn's Bank Ltd.* v. *Boland and Another*, Lord Wilberforce declared that the question whether the wife's interest was an over-riding one or not "must be derived from considering in the light of current social conditions, the Land Registration Act 1925 and other property statutes." He pointed out that the primary objective of the system of land registration was to simplify and cheapen conveyancing and it was designed to free the purchaser from the hazards of notice — real and constructive. The only exception to the taking of unencumbered land was section 70 which listed the over-riding interests which would survive irrespective of notice, actual or constructive. Lord Wilberforce then went on to determine whether the wives in the case before him were in fact enjoying actual occupation of the house and this finding being in the affirmative he concluded that "the wives' equitable interests, subsisting in reference to the land, were by the fact of occupation made into over-riding interests, and so protected by section 70 (i) (g)."

The judgment of Lord Scarman emphasised the policy objectives of this decision. "While the technical task was the construction of a sub-clause in the sub-section of a conveyancing statute, it was their Lordships' duty to give the provision, if they properly could, a meaning which would work for, rather than against rights conferred by Parliament, or recognised by judicial decision, as being necessary for the achievement of social justice. The courts might not, therefore, put aside as irrelevant the undoubted fact that, if the two wives succeeded, the protection of the beneficial interest which English law now recognised a married woman had in the matrimonial home would be strengthened, whereas if they lost, that interest could be weakened and even destroyed by an unscrupulous husband." In connection with the impact of this decision on bankers and solicitors who would henceforth have to determine not only questions pertaining to title, before entering into a mortgage agreement, but also the state of the marital relationship in the event of the mortgagor being a married man, Lord Scarman declared that they "existed to provide the service which the public needed. They could adjust their practice if it was socially required... Since the bank made no inquiry of either wife before granting the husband a mortgage, its claim as mortgagee to possession was defeated by the wife's over-riding interest."

In view of the fact that in the above case the wives had a beneficial interest in the property it may be queried whether the *ratio* of *Williams and Glyn's Bank Ltd.* v. *Boland and Another* can be legitimately confined to the facts of the case or whether it is capable of wider applicability, bringing within its scope situations in which there is an absence of a beneficial interest as well. It is submitted that a restrictive interpretation is not desirable because the right of occupation is an incident of marriage founded on the obligation of support and it is therefore independent of any other claim a wife may have to the property in issue. Moreover, English law has recognised an indirect contribution as being sufficient to found a right to a beneficial interest in the property. If this same criterion was to be used to determine a right of occupation as well it will inevitably give rise to the need to differentiate between a "good wife" and a "bad wife" based on the efficiency of the wife as a homemaker. This is irreconcilable with the obligation of support which comes into being immediately on the solemnisation of a marriage and therefore prior to the opportunity afforded to a wife to establish her home-making ability.

It is therefore submitted that while the decision in *Williams and Glyn's Bank Ltd.* v. *Boland and Another* is a milestone in the evolution of the "deserted wife's equity" it must be treated as being capable of wider applicability encompassing within its ambit not merely wives who have a beneficial interest in matrimonial property but also all those legitimately entitled to be recipients of their husbands' obligation of support.

VIII. The Right of Occupation of Rent Controlled Premises

Rent restriction legislation in Sri Lanka and England has as its object the protection of tenants who cannot be evicted except on grounds specified by the statute. If then the husband is the tenant, a contractual nexus would be established between the landlord and the husband and the husband would be obliged to perform his duties in return for which he would enjoy the protection of the statute.[493] If this relationship of landlord and tenant was confined to the privy between the landlord and the husband, to the exclusion

493. Rent Act No. 7 of 1972

of the wife, it is not difficult to envisage a situation in which a husband deserts his wife leaving her behind in rent-controlled premises thereby denying her any status to remain in occupation. In fact, the husband may very well collude with the landlord to eject him from the premises with the ultimate object of evicting the wife, who then, in addition to being deserted would be rendered homeless by an unscrupulous husband. Consequently, the law has conferred on the wife of a tenant the right to discharge the obligation of the tenant by treating the wife's occupation as the husband's "so as to give her the benefit, against the husband, of the tenant's statutory protection."[494] The wife's possession is then not a possession independent of that of her husband but, rather, that of a licensee whose possession is tantamount to that of the tenant.[495] In one important respect, however, the wife differs from a licensee whose possession is dependent on that of the licensor who could terminate her right of possession at will. The differentiating feature is the fact that a wife is a licensee to the extent that her occupation is equivalent to that of her husband's. In other words, she is not in occupation by virtue of the generosity of her husband. She is in occupation because she has a right, and he a corelative duty to permit her to remain in the matrimonial home. In this respect the right of a deserted wife compares well with the right of a lessee whose possession, though referable to the lessor, is founded on an independent contractual right over which the lessor has no overriding authority. While the lessee's independent right is founded on contract, the wife's right derives from her right of support which comes into being on marriage. Consequently, her right is dependent on her in turn fulfilling her marital obligations. Therefore, for instance, if she was found guilty of matrimonial misconduct she would lose her right to support and her right to occupy the matrimonial home as well.[496]

Generally, therefore, the deserted wife's occupation of the matrimonial home is unaffected by any act or omission of the husband which might have as its object the termination of his

494. *National Provincial Bank Ltd.* v. *Ainsworth* [1965] A. C. 1175 at p. 1252 *per* Lord Wilberforce

495. *Brown* v. *Draper* [1944] 1 All E. R. 246

496. *Old Gate* v. *Alexander* [1949] 2 All E. R. 822

right of occupation. Hence in *Middleton* v. *Baldock*[497] the court held that although the husband might have waived the statutory protection afforded by the Act, it continued to be effective in relation to the wife. Likewise, the husband's refusal to perform a contractual obligation will leave his wife's position unaffected provided of course that she performs the duty herself.[498] In the Sri Lankan case *Alwis* v *Kulatunga*,[499] Justice Weeramantry declared that in relation to the right of the wife to tender payment of rent "the position would appear to be even stronger in our law, having regard to the principle of the Roman-Dutch law that a third party may make payment on behalf of a debtor."[500] It is a well established principle of Roman-Dutch law that the performance of a debt may be rendered by an independent third party in the name of the debtor even without his knowledge and against his will, unless the performance is of such a personal character that it cannot be effectively made except by the debtor in person.[501] "The payment of rent is not performance of such a personal character that it must necessarily be made by the debtor in person, and therefore, the exception referred to has no applicability in the present instance."[502] Justice Weeramantry thus concluded that "under our law the abandoned wife who remains on the premises can tender the rent on behalf of the husband so as to keep the tenancy alive and the landlord when the rent is tendered has an obligation to receive it."[503]

In the English law, the matrimonial Homes Act[504] states that: "where a spouse is entitled under this section to occupy a dwelling house or any part thereof, any payment or tender made or other thing done by that spouse in or towards satisfaction of any

497. [1950] 1 All E. R. 708

498. In *Old Gate* v. *Alexander* [1949] 2 All E. R. 822 Lord Denning observed that the wife can "pay the rent and perform the obligations of the tenancy" on the tenant's behalf. See also Megarry *Rent Acts* (10th ed.) p. 188.

499. (1970) 73 N. L. R. 337

500. *id*. at pp. 348, 349

501. R. W. Lee, An Introduction to *Roman-Dutch Law*, (5th ed.) p. 251. See also Grotius 3. 39. 10; Voet 46. 3. 1.

502. (1970) 73 N.L.R. 337 at p. 349 *per* Weeramantry J. See also the South-African cases *Rolfes, Nebel and Co.* v. *Zweigenhaft* 1903 T. S. 185; *Eckhardt* v. *Nolte* 2, Kotze 48.

503. (1970) 73 N. L. R. 337 at p. 351

504. 1967, sec. 1 (5)

liability of the other spouse in respect of rent, rates, mortgage payments or other outgoings affecting the dwelling house shall, whether or not it is made or done in pursuance of an order under this section, be as good as if made or done by the other spouse..."

It is submitted that although the infringement of a statutory obligation by the husband tenant *per se* will not deprive the wife of her right of occupation since she is in a position to satisfy that obligation herself, there may be instances where the nature of the contravention is such that the tenancy cannot be kept alive by the wife. For instance, if the husband, though being the deserter, continues to live in the matrimonial home and if he should use it for an illegal purpose or create a nuisance, he would be subject to eviction.[505] The position of the wife in this instance, however, will depend largely on whether the courts treat the situation as one arising during a going marriage, in which event she would evidently lose her right of occupation, or whether the courts treat the wife as having been deserted and as such worthy of protection. While this latter proposition is obviously more desirable from the point of view of the wife it may well open the doors to an unhealthy and impractical procedure of compelling the courts in all instances of a contravention of the statute to determine the state of the marriage of the parties. Moreover, it could lead to abuse if, when the husband of a perfectly happy relationship is evicted, the wife is permitted to plead that they had in fact been estranged and that she was not party to his conduct. From this point of view, a decision based on the ostensible facts of each case would appear to be more favourable although this would inevitably result in injustice to the wife in certain situations.

It is also evident from the case law that the courts are wary of an agreement entered into between a husband and a landlord with the object of contracting away the equitable right of the wife.[506] *Alwis* v. *Kulatunga*[507] involved the legality of a consent decree entered into by the landlord and tenant whereby the tenant had admitted guilt to a charge of non-payment of rent and agreed to the

505. Rent Act No 7 of 1972 Sec. 22
506. *Middleton* v. *Baldock* [1950] 1 All E. R. 708
507. (1970) 73 N. L. R. 337

issuing of a writ of possession forthwith. It was further agreed between the parties that in the event of the landlord obtaining vacant possession of the premises, satisfaction of the decree was to be entered in respect of the money claimed. At the stage of the execution of the writ the petitioner, the wife of the tenant, sought to intervene and obtain a stay of execution averring that she was the lawful wife of the defendant and that she and her five children were in danger of being left homeless. She further declared that she had been deserted by her husband and that since that day she had been paying the rent to the rent department of the Municipality. The Supreme Court had to decide on the validity of the consent decree which, if accepted would have deprived the wife of her right of occupation. It was pointed out that an essential prerequisite for the validity of such a decree was the *bona fides* of the parties. The importance of good faith was stressed because it was pointed out that the court should at all times guard against situations in which there was:

(i) collusion between the husband and the wife to defeat the rights of the landlord;

(ii) collusion between the husband and the landlord to eject the wife from rent-controlled premises;

(iii) fraud or lack of *bona fides* on the part of the husband (not necessarily with the concurrence of the landlord) to have the wife evicted from the premises.[508]

Founded then on the principle that "fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice,"[509] a consent decree entered into *mala fide* is liable to be annulled. On the facts of this case there was ample evidence of fraud on the part of the husband who, notwithstanding the fact that he was aware of his wife's payment of rent monthly, admitted that the rent was in arrears and therefore consented to a liability in damages taking care to arrange the settlement so as to save himself from any financial liability whatever in the event of ejectment. Moreover, in spite of his knowledge that his wife and children were on

508. See the judgment of Alles J. *id* at p. 342

509. Duchess of Kingston's case 1776, 2 Smiths Leading Cases (13th ed.) p. 664 at p. 651, cited by Justice Weeramantry at p. 352.

the premises he permitted the specific insertion into the terms of the settlement the "harsh if not cruel provision that writ of possession is to issue forthwith—a term we rarely if ever find any tenant consenting to in any court of trial, and least so when it means the ejectment of a member of his own family." [510] By that provision, the husband secured the dual result of the immediate ejectment of his wife and family whom he was powerless in law to eject so long as his protection lasted, as well as of a total immunity as far as he was concerned, to damages. [511] Hence, the existence of fraud was found to be conclusively proved. In addition, there was evidence suggesting collusion on the part of the landlord though it was not proved to exist. On these findings, the court concluded that the consent judgment was a nullity.

It is apparent from the foregoing that the courts are zealous in their protection of the interests of the deserted wife "in the special and intricate world of rent control." [512] Just as the English courts have worked out "empirical solutions to prevent injustice being done", [513] so too have the Sri Lankan courts been conscious of the need to provide the deserted wife with adequate protection against the wiles of men.

IX. The Right to Exclude a Spouse from the Matrimonial Home

In the unhappy event of a marital relationship becoming embittered, divorce action would be initiated and the spouse's right to live in the matrimonial home would have to be decided upon. [514] During the interim period, however, the physical safety of the wife and children might necessitate the owner-husband, for instance, being excluded from it. Moreover, even during a going marriage one spouse may wish to exclude the other from the matrimonial home for fear of physical harm. Consequently, the English legal machinery has provided certain remedies to the spouse who wishes to be protected from the use of violence.

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510. (1970) 73 N. L. R. 337 at p. 353, *per* Weeramantry J.
511. *ibid.*
512. *National Provincial Bank Ltd.* v. *Ainsworth* [1965] A. C. 1175 at p. 1252 *per Lord Wilberforce*
513. *ibid.*
514. See *Silverstone* v. *Silverstone* [1953] P. 174; *Phillips* v. *Phillips* [1973] 2 All E. R. 423; *Robinson* v. *Robinson* [1964] 2 W. L. R. 138; *Vaughan* v. *Vaughan* [1953] 1 All E. R. 209

Lord Denning has adverted to the availability of an injunction which can be obtained independent of a matrimonial action.[515] A wife may also apply to the Magistrate's Court for a non-cohabitation order which may be included in the matrimonial order made by the Magistrate.[516] This is akin to a decree for judicial separation although it is ineffective for purposes of succession on intestacy. Moreover, this order is merely declaratory and consequently unenforceable and does not provide adequate protection to the wife.

The Married Women's Property Act[517] gives the court the discretion to control the spouses' right of possession and it can order one of them to leave the premises if it is in the best interest of the family. The power of the court is a discretionary one and as such there has been considerable difficulty in ascertaining the circumstances which will warrant the exercise of this power. In *Akingbehin* v. *Akingbehin*,[518] for instance, the majority of the Court of Appeal thought that mere unpleasantness and inconvenience were not sufficient grounds for ordering one spouse out. This view was reiterated by Lord Denning in *Hall* v. *Hall*[519] when he pointed out that an order to exclude one spouse or the other from the matrimonial home was a drastic order and as such it should not be made unless it was proved that it was impossible for them to live together in the same house. He also stressed the importance of making an order in keeping with the interests of the children on the reasoning that "the longer they can be brought up together in one home with their parents, the better for them." Sachs L.J. declared that it is impossible to lay down general rules as to when orders evicting a spouse from the home should be made, but he reinforced the view that a necessary prerequisite for the making of such an order was cogent proof of the need to protect the interests of the spouse and children. A significant extension of this principle was recognised in *Phillips* v. *Phillips*[520] when the court declared that there was a right to protection not only in the event of physical harm but also when the mental health of the

515. *Gurasz* v. *Gurasz* [1969] 3 W. L. R. 482
516. Under the Matrimonial Proceedings (Magistrates' Courts) Act 1960
517. Sec. 17
518. [1964] 108 Sol. Jo. 520
519. [1971] 1 W. L. R. 404
520. [1973] 2 All E. R. 423

spouse was endangered.[521] Some guidelines which would help the court in the exercise of its discretionary powers were set out by the Court of Appeal in *Bassett* v. *Bassett*.[522] According to the facts of this case the wife had left the matrimonial home with her baby and she alleged that she had been the victim of at least two serious assaults. Accordingly, she applied for an order to exclude her husband from the matrimonial home and for an injunction against molestation. Ormrod L.J. in an illuminating judgment pointed out that on the one hand the court had to consider the balance of hardship likely to be caused by an order excluding a spouse from the matrimonial home, and in this connection, the difficulty of finding alternate accommodation had to be borne in mind. On the other hand the court had to determine the hardship that would ensue to the unsuccessful spouse if the order was refused. Moreover, he opined that the state of the marital relationship was of considerable importance when balancing the equities of the parties. If, for instance, the relationship had completely broken down, then the hardship might be significantly less on the spouse who was required to leave, because sooner or later the question of the occupancy of the matrimonial home would have to be decided upon and one or other of the spouses would leave in any event. Alternatively, if a reconciliation was on the cards the courts should be slow to order the parties to live apart. Ormrod L.J. also supported the contention that an order was warranted not only for protection from physical harm but also from mental anguish. Cumming-Bruce J. in a separate judgment said that "where there are children whom the mother is looking after, a major consideration must be to relieve them of the psychological stresses and strains imposed by the friction between their parents, as the long term effect on a child is liable to be of the utmost gravity. This factor ought to weigh at least as heavily in the scales as the personal protection of the parent seeking relief".

According to Bromley[523] if both spouses have a beneficial interest in the property and the marriage has irretrievably broken down, the court will implement a trust for sale in order to enable both parties to realise their capital. If, however, a postponement

521. *id.* at p. 429
522. [1975] 1 All E. R. 513
523. *op. cit.* p. 480

is justified in the interests of the children, to enable a spouse to look for alternative accommodation, or if there is a reasonable chance of reconciliation, the order is withheld.[524]

The Matrimonial Homes Act[525] which now regulates this right declares that "So long as one spouse has rights of occupation, either of the spouses may apply to the court for an order declaring, enforcing, restricting or terminating those rights or regulating the exercise by either spouse of the right to occupy the dwelling house." The court is given wider powers to make "such order as it thinks just and reasonable having regard to the conduct of the spouses in relation to each other and otherwise their respective needs and financial resources, to the needs of any children and to all the circumstances of the case."[526]

This Act, in conjunction with the Domestic Violence and Matrimonial Proceedings Act[527] enables the court to "prohibit" either spouse from exercising his right to occupy the dwelling house even if he is the sole owner of the house in law and equity."[528] It has thus been said that a "drastic inroad into the common law right of property" has been made.[529]

524. See also *Bedson* v. *Bedson* [1965] 3 All E. R. 307

525. Sec. 1 (2)

526. Sec. 1 (3)

527. 1976, sec. 3

528. S. M. Cretney, *Principles of Family Law* (3rd ed., London 1979) p. 209

529. *Davis* v. *Johnson* [1978] 2 W. L. R. 553 at p. 565, *per* Lord Dilhorne

CHAPTER 7

SUSPENSION OF MARRIAGE

A 1. Judicial Separation

Judicial separation is a valuable mode of redress for spouses who are either unable to obtain or are reluctant to ask for a dissolution of marriage. The primary consequence of this remedy is that it suspends the obligation of *consortium* for the duration of the separation. The grounds on which an application for a separation *a mensa et thoro* can be made have undergone several changes in the law of Sri Lanka.

According to the 1889 Civil Procedure Code, an application could be made "on any ground on which by the law applicable to Ceylon such separation may be granted..."[1] It is clear from a perusal of the case law that although our courts directly introduced the Roman-Dutch law grounds for separation into our legal system, by virtue of this statutory provision, they also relied on English law authority on the reasoning that the English law influenced the South African law, which latter jurisdiction provided guidance to the development of our own law on the subject. Of course, there is no material distinction between the grounds for separation in either jurisdiction. In the Roman-Dutch law, for instance, the plaintiff has to show:

(*a*) that further cohabitation with the defendant has become dangerous or intolerable for him or her; and

(*b*) that this state of affairs was brought about by the unlawful conduct of the defendant.[2]

Since these requisites are couched in broad terms it necessarily includes the Roman-Dutch law grounds for divorce as well.

1. Sec. 608
2. H. R. Hahlo, *The South African Law of Husband and Wife*, (4th ed., Cape Town 1975) p. 330

Consequently, the lesser remedy of judicial separation may be obtained on proof of adultery or malicious desertion if the aggrieved spouse does not wish to terminate the marital relationship.[3]

In the English law the grounds for judicial separation are the same as those for divorce. According to Bromley,[4] "For spouses who have a conscientious objection to divorce a decree of judicial separation may mark the *de facto* end of the marriage, and it is arguable that they should be able to obtain a decree only in similar circumstances to those who wish to bring their marriage to a *de jure* end by a decree of divorce." According to the Matrimonial Causes Act[5] the grounds for divorce are adultery, the respondent's behaviour which makes life with him intolerable, desertion, two years' separation and five years' separation.[5a] Moreover, the Magistrates' Courts have jurisdiction to enter a non-cohabitation clause which has the effect of relieving the complainant of his or her obligation to cohabit with the defendant; and it has been said of this remedy that except in relation to intestate succession, it has the effect in all respects of a decree of judicial separation.[6] The grounds on which this order may be made are; adultery, persistent cruelty, desertion, assaults and sexual offences, venereal disease, habitual drunkenness or addiction to drugs, compulsory submission to prostitution, husband's wilful neglect to provide reasonable maintenance, wife's wilful neglect to provide reasonable maintenance.[7]

It is clear then, that there is no material difference between the requisites for judicial separation in the two jurisdictions which have influenced the Sri Lankan law.

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3. *ibid.*

4. P. M. Bromley, *Family Law* (5th ed., London 1976) p. 175

5. 1973, sec. 17(1)

5a. In relation to the last two grounds for divorce it must be noted that apart from a difference in the period of separation divorce on proof of five years' separation may be obtained without the respondent's consent. In the case of divorce on proof of two years' separation however, the respondent's consent to a decree being granted is essential. See P.M. Bromley *op. cit.* p. 252

6. P. M. Bromley, *op. cit.* p. 230

7. Matrimonial Proceedings (Magistrates' Courts) Act 1960, sec.1(1)

Reported cases on the subject of judicial separation involve the allegation of cruelty as a ground for separation. It has been repeatedly pointed out that the grounds for divorce in our law are equally relevant to obtain the lesser remedy of separation. "For the larger remedy of divorce includes separation *a mensa et thoro*, and if the injured party is satisfied to ask for the smaller remedy it is difficult to see on what grounds it could possibly be refused."[8] However, the requirements to be proved when alleging matrimonial misconduct as a ground for the dissolution of marriage differs materially from that to be established when asserting the lesser remedy of separation. The distinction involves a difference in the *animus* of the defendant because when requesting a divorce the plaintiff must prove that the defendant had the intention of terminating the marital relationship, whereas if the remedy sought is a separation, it is sufficient if the acts of the defendant amount objectively to cruelty.[9] In *Babunona* v. *Albin Kemps*,[9a] for instance, the wife assaulted her husband who had, by his own adulterous misconduct in the matrimonial home, rendered cohabitation intolerable for the wife and the court held that since cruelty *per se* was not a ground for the dissolution of marriage in our law, it was not open to the husband to sue for divorce even if the assault amounted to cruelty. Consequently, acts of cruelty when pleaded as a ground for a decree of separation need not be accompanied by a malicious or cruel intention, and as such the *factum* component of this offence assumes considerable importance. In such cases, therefore, the court embarks upon a detailed secrutiny of alleged acts of cruelty and considers the effect of such acts on the particular plaintiff.

In an early case, *Wright* v. *Wright*,[10] according to the evidence led there was no physical cruelty or harshness, no perpetual quarrels or dissensions, nothing which threatened danger to life, no intolerable habits, and no plotting the death of a spouse, but there was at worst a wrongly obstinate mind maintaining a condition of things the defendant knew to be untrue, and inducing thereby in

8. *Keerthiratne* v. *Karunawathie* (1938) 39 N.L.R. 514, *per* Poyser S.P.J. See also *Silva* v. *Silva* (1905) 8 N.L.R. 280

9. H. R. Hahlo, *op.cit.* pp. 394, 395; *Feldman* v. *Feldman* 1949 (3) S.A. 493; *Belfort* v. *Belfort* 1961 (1) S.A. 257

9a. (1962) 67 N.L.R. 183

10. (1903) 9 N.L.R. 31

the sensitive marital partner a feeling of coldness and indifference culminating in mutual dislike. In these circumstances, the Supreme Court was reluctant to admit the allegation of cruelty. Middleton J. declared that "In my opinion it was not proved that the defendant's course of conduct would be dangerous to the life, limb, or the bodily or mental health of the plaintiff...."[11] The court in arriving at this criterion of cruelty relied on the writings of the Roman-Dutch law jurists. According to Van Leeuwen[12] and Van der Linden,[13] the fundamental basis of the action for separation was the danger to life which would accrue if cohabitation were not dissundered and the parties ordered to live apart. Voet,[14] however, sets out the grounds for separation disjunctively, and danger to life is an alternative ground to perpetual quarrels and dissensions, excessive cruelty and harshness. Middleton J. having reviewed these authorities observed that "At the time when Voet and Van Leeuwen wrote, sensitiveness of disposition and neurotic tendencies had probably not reached that stage in human nature they have attained at the present age, and it is highly improbable that those jurists had them under consideration to any extent when enunciating the crude and simple grounds upon which they deemed the courts had a right to act. There is no indication that they had in view what merely would be mental feelings, but rather actions accompanied by personal evidence or the menace of it. No decisions in the Roman-Dutch law have been quoted to us to show that there has been any modification of ideas amongst the Dutch jurists founded on these reasons since their promulgation, and we are left as best we can to give a construction to them consistent with right reason and sound sense in the present day."[15] Middleton J. concluded that "in such matters it is the duty of the courts to act strictly, and not to allow legally married persons to be separated merely on the ground that they cannot live together in harmony."[16]

A far more liberal attitude, however, was adopted by the court

11. *id.* at p. 43
12. *id.* at p. 34
13. *ibid.*
14. 24.2.17
15. (1903) 9.N.L.R. 31 at p. 35
16. *ibid.* See also *Pavalamma* v. *Arumugam* (1928) 10 C.L.Rec. 2 which approved of *Wright* v. *Wright* (1903) 9 N.L.R. 31

in *Wijesinghe* v. *Wijesinghe*.[17] Sansoni J., delivering the judgment of the Supreme Court declared that, cruelty, as a ground for a decree of judicial separation need not be physical, moral cruelty would suffice; and that to entitle a wife to a decree on that ground it was sufficient for her to show that her husband had been guilty of conduct which had impaired her health and made it intolerable for her to continue to live with him.[18]

Likewise in *Orr* v. *Orr*[19] the findings of the District Judge were that the plaintiff and the defendant were a very ill-matched couple. There was trouble between them from the beginning of their marriage, and there were brawls and quarrels, not infrequently after liquor. There was incompatibility of temper. There was no forbearance or patience on either side and there was suspicion and mutual distrust. On these findings De Sampayo J. held that a judicial separation was justified. He declared that to succeed in a claim for separation it was not necessary to prove cruelty or harshness or display of personal violence so as to give rise to a reasonable apprehension that life, mind or health would be endangered. "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 although a wife or husband may reasonably be expected to bear with occasional outbursts of ill temper, yet occasional assaults, however slight, accompanied by habitual intemperance, will make cohabitation insupportable."[20]

It has been pointed out that while it is not necessary to prove that the defendant acted maliciously or that he intended to be cruel, it is essential to prove that the conduct complained of was intended.[21] Consequently, in *Appuhamy* v. *Julihamy*[22] the court held that although the communication of venereal disease to a wife by her husband does not *per se* constitute an act of cruelty, if it is shown

17. (1954) 57 N.L.R. 489
18. *id*. at p. 493
19. (1920) 22 N.L.R. 57
20. *id*. at p. 61. See also *Vethanayage* v. *Arumugam* (1934) 2 C.. W. 387 which approved of *Orr* v. *Orr* (1920) 22 N.L.R. 57
21. See H. R. Hahlo, *op. cit*. pp. 332, 333
22. (1912) 16 N.L.R. 83

to have been wilful, it is converted to an act of cruelty for which a judicial separation may be granted. Moreover, it has been stressed that the element of fault or misconduct is an essential prerequisite for an action for separation. In *Joseph* v. *Joseph*,[23] the District Judge had entered a decree of separation upon the consent of the parties. The Supreme Court, however, reversed the decision and declared that considering the effects of such a decree on the wife's contractual and proprietary rights[24] a decree could not be entered based entirely on the consent of the parties.

An important change in the law was effected in 1975 by the Administration of Justice (Amendment) Law.[25] This statute declared that:

> "A husband or wife may institute an action praying for a judicial separation on any ground on which a divorce may be sought, and the Court, upon being satisfied that such ground exists, may enter judgment accordingly. The Court may, however, at any time thereafter, upon the application of both spouses, discharge the decree of separation."[26]

According to this statutory provision, then, cruelty, for instance, which did not amount to constructive malicious desertion could not be availed of to obtain a separation. The only grounds that could be pleaded were adultery, desertion or incurable impotency.[27] It must be pointed out that unlike in the English law, where the grounds for divorce are couched in broad terms and its scope of application sufficiently wide, in the Sri Lankan law the allegations of misconduct which may be availed of for the dissolution of marriage were limited to two specific acts, namely adultery and malicious desertion.[28] Moreover, to plead either of these two grounds for divorce successfully, the plaintiff was required to prove a specific *animus*, namely, the defendant's intention to put

23. (1940) 42 N.L.R. 119
24. Sec. 609, 610
25. No. 25 of 1975
26. Sec.627(1)
27. See Marriage Registration Ordinance No. 19 of 1907 as amended by Ordinance No. 22 of 1955, sec.19
28. Incurable impotency has been alleged as a ground for the annulment of a marriage, rather than a dissolution. See chapter 8 *infra* sec. 111

the marriage asunder. Consequently, the onus of proof cast on the plaintiff was heavy. It is, therefore, regretted that the legislature in 1975 thought it fitting that a spouse, who wished to obtain the lesser remedy of *separatio a mensa et thoro*, should nevertheless satisfy the requisites for a divorce to succeed. Indeed, the inevitable consequence of this would have been to encourage spouses to put a permanent end to their relationship instead of being persuaded to give themselves an opportunity to reconcile their differences by initially obtaining a *de facto* separation.

There was however a further provision in the Administration of Justice (Amendment) Law which perhaps provided the rationale for unifying the grounds for divorce and separation. The statute provided that "Either spouse may, after the expiry of a period of two years from the entering of decree of separation, apply to the Court by way of summary procedure to have such decree of separation converted into one of dissolution of marriage, and the Court may, upon being satisfied that the spouses have not resumed cohabitation, enter judgment accordingly..." [29]

In a fault-based jurisdiction like that of Sri Lanka, where the Marriage Registration Ordinance requires proof of adultery or desertion to terminate a marriage, a two year separation can be converted into a decree of divorce, while maintaining consistency in the law, only by providing that the grounds for separation are the same as those for divorce. It is submitted, however, that this reasoning does not vitiate the objection to the statutory provision which did not have the effect of encouraging spouses to enter into a *de facto* rather than into *de jure* separation.

This was how the law stood upto 1977 when the Civil Procedure Code, [30] repealing the provisions of the Administration of Justice (Amendment) Law, once again reverted to the pre-1975 law by enacting that an application for a separation *a mensa et thoro* may be made "on any ground on which by the law applicable to Ceylon such separation may be granted." [31] This provision, therefore had the effect of reintroducing the Roman-Dutch law grounds for,

29. Sec. 627(2)
30. Incorporating Amendments upto 31st December 1977, sec. 608(1)
31. Sec. 608(1)

separation thereby requiring the plaintiff to prove that further cohabitation with the defendant was dangerous or intolerable and that that state of affairs had been brought about by the unlawful conduct of the defendant.[32] It is clear then that a significantly lesser burden of proof was imposed on a plaintiff who desired a separation as opposed to a divorce on the ground of adultery or malicious desertion.[33]

A significant feature of this statute is that while reintroducing the Roman-Dutch law grounds for separation, thereby encouraging spouses initially to enter into a *de facto* rather than a *de jure* separation, it obliquely facilitates the final repudiation of the marriage tie as well. This is brought about by retaining in the statute book the provision which first appeared in the Administration of Justice (Amendment) Law, that after the expiry of a period of two years from the entering of a decree of separation a decree of divorce may be obtained.[34] It is important to note that although such a provision cannot be assailed when the grounds for separation are the same as those for divorce,[35] it is incompatible with a jurisdiction which continues to regard matrimonial fault as a basis for divorce.[36] Of course the Civil Procedure Code appears to have as its objective the liberalising of the divorce laws for it further enacts that separation for a period of seven years is sufficient to obtain a termination of the marriage. It is submitted that if the grounds for divorce founded on matrimonial misconduct, had been effaced and replaced by a Code which recognised the right to divorce on proof of mere separation for a required period, there would have been consistency in the law regulating the dissolution of marriage. The position at present, however, is that two incompatible and irreconcilable grounds for divorce co-exist thereby breeding uncertainty in the law.

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32. See H. R. Hahlo, *op.cit.* p. 330
33. See however sec. 608(2)(b) which provides for a decree of divorce merely on proof of separation for seven years
34. See sec. 608(2) (a)
35. As for instance under the Administration of Justice (Amendment) Law
36. See Marriage Registration Ordinance No. 19 of 1907. sec.19

II. Consequences of Judicial Separation

(*a*) Proprietary and Contractual Consequences

The Civil Procedure Code[37] enacts that:

> "In every case of such separation under this Chapter the wife, shall, from the date of the sentence and whilst the separation continues, be considered as unmarried with respect to property of every description which she may acquire, or which may come to or devolve upon her."[38]

> "Such property may be disposed of by her in all respects as an unmarried woman, and on her decease the same shall, in case she dies intestate, devolve as the same would have devolved if she had died unmarried."[39]

"Provided that if any such wife again cohabits with her husband, all such property as she may be entitled to when such cohabitation takes place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate."[40]

In regard to the contractual rights of a separated woman the Code enacts that:

> "In every case of such separation under this Chapter the wife shall, whilst so separated, be considered as an unmarried woman for the purposes of contract and wrongs and injuries and suing and being sued in any civil proceedings; and her husband shall not be liable in respect of any contract, act, or costs entered into, done, omitted, or incurred by her during the separation.

"Provided that where, upon any such separation alimony has been decreed or ordered to be paid to the wife, and the same is not duly paid by the husband, he shall be liable for necessaries supplied for her use to the persons who supplied them:

37. Chap. 101 (incorporating amendments upto 31st Dec. 1977)
38. Sec. 609(1)
39. Sec. 609(2)
40. *ibid.*

"Provided also that nothing shall prevent the wife from joining at any time during such separation, in the exercise of any joint power given to herself and her husband."[41]

In relation to the above mentioned concessions conferred upon a separated woman it must be pointed out that a married woman was vested with full proprietary and contractual rights by the Married Women's Property Ordinance.[42] Subsequent to 1923, therefore, a married woman was capable of acquiring, holding or disposing of movable or immovable property as her separate property in the same manner as if she were a *feme sole* [43] and, movable and immovable property was defined as that which belonged to her at the time of her marriage or which devolved on her after marriage, including any wages, earnings, money or property gained.[44] Moreover, she was deemed to be capable of entering into any contract and of suing and being sued in either contract or tort without her husband being joined as plaintiff or defendant, and her husband was held not to be liable merely on the ground that he was her husband in respect of any tort committed by her. Any damages or costs recovered by her in any action accrued to her separate estate and any damages or costs recovered against her were payable out of her separate estate.[45] In addition, the Ordinance provided that "every contract entered into by a married woman otherwise than as an agent was deemed to be a contract entered into by her with respect to her separate property and was to bind all separate property which she may at that time be possessed of or entitled to, and that it shall be enforceable by process of law against all property which she may thereafter be possessed of or entitled to."[46]

In the light then, of the 1923 statute, which conferred upon a married woman unfettered rights over her property and removed the last vestige of control her husband had previously exercised over her contractual powers, the provisions of the Civil Procedure

41. Sec. 610
42. No. 18 of 1923
43. Sec. 5
44. Sec. 7
45. Sec. 5
46. Sec. 5 (2)

Code which relate to a separated wife's proprietary and contractual rights[46a] appear to be superfluous. Indeed they would have been meaningful in 1889[47] when the Roman-Dutch law principles of community of property and the marital power of the husband were consequences of marriage but subsequent to the Married Women's Property Ordinance of 1923 these provisions should have been effaced from the Civil Procedure Code.

The Civil Procedure Code also provides for the protection of third parties dealing with a wife subsequent to a decree of separation. The Code enacts that: "Every decree for separation or order to protect property obtained by a wife under this Chapter shall, until reversed or discharged, be deemed valid, so far as necessary for the protection of any person dealing with the wife.[48] No reversal, discharge or variation of such decree or order shall affect any rights or remedies which any person would otherwise have had in respect of any contracts or acts of the wife entered into or done between the dates of such decree or order and of the reversal discharge or variation thereof.[49] All persons who, in reliance on any such decree or order, make any payment to, or permit any transfer to be made, or act to be done by the wife who shall have obtained such decree or order, shall (notwithstanding the same may then have been reversed, discharged or varied, or notwithstanding the separation of the wife from her husband may have ceased or may at some time since the making of the decree or order have been discontinued) be protected and indemnified as if at the time of such payment, transfer, or other act, such decree or order were valid and still subsisting without variation, and the separation had not ceased or been discontinued, unless at the time of the payment, transfer, or other act such persons had notice of the reversal, discharge, or variation of the decree or order or of the cessation or discontinuance of the separation."[50]

46a. The wife's right to pledge her husband's credit for personal necessaries is relevant in the modern law as it is an aspect of the husband's obligation of support.

47. Ordinance No. 2 of 1889. These provisions were first enacted in the 1889 Ordinance.

48. Sec. 626(1)

49. Sec. 626(2)

50. Sec. 626(3)

(*b*) Support Obligation During Separation

The Civil Procedure Code provides for the payment of alimony *pendente lite*. "In any action under this Chapter, whether it be instituted by a husband or a wife, the wife may present a petition for alimony pending the action. Such petition shall be preferred and dealt with as of summary procedure, and the husband shall be made respondent therein; and the court, on being satisfied of the truth of the statements therein contained, may make such order on the husband for payment to the wife of alimony pending the action as it may deem just: Provided that alimony pending the action shall in no case be less than one-fifth of the husband's average net income for the three years next preceding the date of the order ..."[51] These principles will apply *mutatis mutandis* if a husband presents a petition for alimony pending the action.[52] The Code also provides that "where one of the spouses is not possessed of sufficient income or means to defray the cost of litigation, the court may at any stage of the action order the spouse who is possessed of sufficient income or means to pay to the other spouse such sum on account of costs as it considers reasonable."[53]

Upon a decree of separation being ordered "The court may, if it thinks fit,...order for the benefit of either spouse or of the children of the marriage or both, that the other spouse shall do any one or more of the following:

(*a*) make such conveyance or settlement as the court thinks reasonable of such property or any part thereof as he may be entitled to;

(*b*) pay a gross sum of money;

(*c*) pay annually or monthly such sums of money as the court thinks reasonable;

(*d*) secure the payment of such sums of money as may be ordered under paragraph (b) or paragraph (c) by the

51. Sec. 614 (1)
52. Sec. 614 (2)
53. Sec. 614 (3)

hypothecation of immovable property or by the execution of a bond with or without sureties, or by the purchase of a policy of annuity in an insurance company or other institution approved by court."[54] Moreover, "the court may at any stage discharge, modify, temporarily suspend and revive or enhance an order made under subsection(1)."[55]

A separated wife retains the right to pledge her husband's credit for personal necessaries.[55a] For a discussion of this see Chapter 4.

III. Reversal of a Decree of Separation

"Any husband or wife, upon the application of whose wife or husband, as the case may be, a decree of separation has been pronounced, may, at any time thereafter, present a petition to the court by which the decree was pronounced, praying for a reversal of such decree, on the ground that it was obtained in his or her absence at the hearing, and that there was reasonable excuse for such absence, and also for the alleged desertion, where desertion was the ground of such decree."[56] The Code also provides that: "Such petition shall be deemed and shall be dealt with by the court as a plaint in a regular action, and the party in whose favour the decree of separation sought to be reversed was passed shall be made a defendant therein. And the court may, after trial in regular course of procedure, on being satisfied of the truth of the allegations of such petition, reverse the decree accordingly, but such reversal shall not prejudice or affect the rights or remedies which any other person would have had in case it had not been decreed, in respect of any debts, contracts or acts of the wife incurred, entered into, or done between the time of the sentence of separation and of the reversal thereof."[57]

54. Sec. 615 (1)

55. Sec. 615 (2). It must be pointed out that in *Mathew* v. *Mathew* (1956) N.L.R. 511, a case decided under the 1889 Code, the court held that a hypothecation of the property could not be ordered in order to secure a payment of maintenance to the wife. The amended Code however specifically refers to the right to hypothecate the property. See for a discussion of this section chapter 10 *infra*

55a. See Sec. 610 C.P.C.

56. Sec. 611(1)

57. Sec. 611(2)

B. Private Separation Agreements

(i) The Legal Nature and Validity of Separation Agreements

A jurisdiction which predicates the sacrosant nature of a marital relationship must necessarily provide spouses with interim measures that could be availed of should their union cease to be a harmonious and compatible one. Indeed, a hasty putting asunder of a marriage is to some extent averted by the availability of the right to enter into a private separation agreement.[58] This mode of separation has the distinct advantage of being one that can be entered into outside court and as such it provides a valuable means by which unhappy spouses can be spared the humiliation of ventilating their grievances in open court.[59] Such agreements are therefore recognised by the modern English, South African and Sri Lankan jurisdictions. It is, however, an essential prerequisite for the validity of such agreements that they are not *contra bonos mores*.[60] In *Pinghamy* v. *Baby Nona*[61] the parties had entered into a deed of separation according to which they had agreed to live apart and they further agreed that their "deeds, acts, conduct and behaviour can and shall be independent of one another and as each party shall separately will and desire, and that both of us shall not hereafter seek any legal remedy against one another according to law."[62] When the plaintiff subsequently brought an action for divorce on the ground of adultery committed prior to the separation agreement, the defendant pleaded the agreement which he claimed was a bar to the action. The Supreme Court upheld this contention and held that the agreement was not *contra bonos mores* because all it sought to do was to bind the parties not to sue each other in respect of any transaction which took place before and which they were aware of at the date of the agreement. The object of the agreement was not to give the parties licence to live anyway they pleased and to shut out a right of action for divorce in those circumstances. In *Soysa* v. *Soysa*,[62a] the court

58. See R. C. Elliott "Notarial Deeds of Separation Between Husband and Wife" 1929 (46) *S.A.L.J.* 145

59. *ibid.*

60. See Voet 23.4.16, 19, 20; Van der Linden 1.3.4; Vander Keesel *Th.* 228

61. (1911) 5 Weerakoon's Rep. 51

62. *id.* at p. 52

62a. (1914) 17 N.L.R. 385

had to decide whether the separation agreement entered into between the parties had the effect of conducing matrimonial misconduct and facilitating divorce proceedings thereby rendering the agreement wholly bad and contrary to public policy. The relevant clause was one which, after providing that neither party should molest the other or endeavour to compel the other to cohabit with him or her by legal proceedings for restitution of conjugal rights or otherwise, proceeded to state that "Provided always and it is hereby expressly agreed that it shall be lawful for either of them to sue for and obtain from a court of competent jurisdiction a dissolution of their marriage by reason of any misconduct which has heretofore taken place or which may hereafter take place, and the dissolution of the said marriage... shall not in any manner affect or prejudice the provision by these presents made for (the plaintiff), and the (defendant) shall, notwithstanding the dissolution of the said marriage, continue to pay the annuity hereinbefore provided." De Sampayo J. declared "I cannot see that this clause has the tendency contended for; it probably has the opposite tendency for the defendant is thereby obliged to pay the agreed annuity and no more, while the court in divorce proceedings may compel him to pay more, or if the plaintiff were the offending party, may cut down the provision so that both parties, so far as material considerations are concerned, are interested in preserving the *status quo*. Nor do I think that there is any foundation for the further argument that the agreement is bad because it provides for a future separation. The document itself recites that the parties had already begun to live apart thereafter at all times. Both by intention and by actual provision the separation was to be immediate."[62b]

In the English law, a provision in an agreement which shuts out matrimonial proceedings for conduct that has occurred in the past is frequently referred to as a *Rose* v. *Rose* clause[63] since this was the name of the leading case on the subject in the Court of Appeal. Of course this clause will be binding only so long as the agreement is enforceable. In other words if the agreement falls, the provision cannot stand.

62b. *id.* at p. 378, 388

63. P. M. Bromley, *Family Law* (5th ed. London 1976) p. 168. See also *Gooch* v. *Gooch* [1893] P. 106

Although the modern South African law recognises the right to enter into a private separation agreement[64] there appears to be a sharp difference of opinion on the circumstances that would justify such agreements. In the Cape Provincial Division, for instance, the deed of separation should be entered into *justa causa*, that is, under circumstances which would justify a judicial decree of separation for it to be given legal validity. However, according to the Transvaal practice, an agreement to live apart is treated as valid notwithstanding the fact that it is entered into without *justa causa*.[65]

Hahlo submits that it is more in accordance with public policy that an agreement to live apart be upheld only in circumstances that would have justified a judicial separation. He endorses the view of Davis J. who declared that "A voluntary separation without good and sufficient cause and merely at the wish of the spouses seems to me to be against public policy."[66] However, Hahlo points out that the difference in approach is not in fact a substantial one. In the Cape Provincial Division a separation agreement entered into without *justa causa* is treated as a nullity, whereas in the Transvaal Provincial Division it is treated as valid until it is set aside on the ground that there were no reasons justifying the separation.[67]

In the English law, however, there is no reference to the requisite of *justa causa*, a separation agreement being valid so long as it conforms to the law of contract.[68]

The Sri Lankan case law reflects some difference of opinion on the question whether the Roman-Dutch law or the English law is applicable in our jurisdiction. In an early case *Soysa* v. *Soysa*[69] one of the issues to be decided was the effect of a decree for the dissolution of marriage on the terms and conditions of a separation agreement previously entered into between the parties. The deed

64. In the Roman-Dutch law such agreements had no legal effect. See H. R. Hahlo, *op. cit.* p. 351
65. See H. R. Hahlo, *op. cit.* p. 357
66. See *Lobley* v. *Lobley* 1940 C.P.D. p. 428
67. H. R. Hahlo, *op. cit.* p. 358
68. See P. M. Bromley, *op. cit.* p. 164
69. (1914) 17 N.L.R. 385

of separation in this case expressly provided that the plaintiff should, out of the provision made for her before and by the deed, maintain herself, and should not take any action or proceedings against the defendant for the recovery of any sum of money by way of maintenance or alimony. Accordingly, when the plaintiff brought the divorce action, she stated in her plaint that she made no claim for alimony in that action as the defendant had already made provision for her in that respect. The defendant filed no answer, and, as a matter of fact, the decree for divorce was entered after *ex parte* trial. It was nevertheless argued that she should have obtained an order for alimony or have sought an inquiry into the antenuptial and postnuptial settlements and have had an order made, and that in default she would not be entitled to enforce the covenant in the agreement. De Sampayo A. J. however declared that under the English law a dissolution of the marriage does not of itself affect the provisions in a separation deed as to a settlement of property, or the liability of the husband on a covenant to pay an annuity to the wife by way of a permanent provision though, of course, such provisions may be varied by the court in pursuance of its jurisdiction in that behalf.[70] He then went on to declare: "I know of nothing in the Roman-Dutch law which compels us to hold otherwise, and I think that the English law, which is in accordance with reason, should be followed. Whatever doubts may arise on this point in the case of a marriage with community of property, there can be no difficulty in this case because the parties here are governed by the Matrimonial Rights and Inheritance Ordinance, No. 15 of 1876, which itself is based on English legislation regarding the status and property of a married woman."[71]

This view was reiterated by the Privy Council on appeal. Lord Shaw, delivering the opinion of the Board declared that it was unnecessary to determine the validity of the agreement in relation to Roman-Dutch principles because "the entire rights of parties so far as they are in question in the case are, in their Lordships' opinion, regulated by Ordinance No. 15 of 1876."[72]

70. See Halsbury, *Laws of England*, (Vol. XVI.) 450

71. (1914) 17 N.L.R. 385 at p. 387

72. (1916) 19 N.L.R. 146 at p. 147

However, in *Silva* v. *Silva*[73] when the validity of an extra-judicial separation agreement was questioned, Pereira J. proceeded on the assumption that the Roman-Dutch law was applicable and he declared that "As to the validity of such an agreement under the Roman-Dutch law, in the absence of positive proof by the party seeking to enforce it of the fact that at the date of the agreement circumstances existed that would have justified an action for a judicial separation *a mensa et thoro*, I have my doubts."[74] Nevertheless he felt obliged to follow the ruling of the court in *Soysa* v. *Soysa*, which upheld the validity of such agreements entered into without *justa causa*. In *Frugtneit* v. *Frugtneit*[75] the court was of the opinion that the modern South African law was relevant to the Sri Lankan law, and in *Maliappa Chetty* v. *Maliappa*[76] there was reference to separation agreements entered into in circumstances that would justify a judicial separation.[77]

In the modern South African law the deed must not only have been entered into *justa causa* but it must also not amount to a prohibited donation between the spouses.[78] This prohibition however is irrelevant to the law of Sri Lanka because as pointed out by the Privy Council in *Soysa* v. *Soysa*,[79] the proprietary rights of spouses in modern Sri Lanka are not governed by Roman-Dutch law principles. That case was decided under the Matrimonial Rights and Inheritance Ordinance.[80]

(ii) Cancellation of a Deed of Separation

Decided cases do not reflect a uniform principle in relation to the cancellation of a separation agreement. The agreement being founded on the mutual consent of the spouses, if they should become reconciled, the deed will automatically cease to be effective.[81]

73. (1914) 18 N.L.R. 26
74. *id.* at p. 26
75. (1941) 42 N.L.R. 547
76. (1927) 29 N.L.R. 78
77. See also *Kandappa* v. *Arupalavanam* (1932) 35 N.L.R. 105
78. H. R. Hahlo, *op. cit.* p. 352
79. (1916) 19 N.L.R. 146
80. No. 15 of 1876. This Ordinance has now been replaced by the Married Women's Property Ordinance No. 18 of 1923
81. See H. R. Hahlo, *op.cit.* p. 359

Judicial decisions in Sri Lanka, however, have queried the right of one spouse to resile from the agreement by manifesting an intention to resume cohabitation. This question was raised for the first time in *Silva* v. *Silva*[82] where Pereira J. opined that a separation agreement was terminable at the will and option of either party. Nevertheless this was only an *obiter dictum* since the issue did not have to be decided upon in this case. In *Frugtneit* v. *Frugtneit*,[83] however, a contrary view was expressed. In this case the spouses had agreed to live separately and the husband agreed to pay the wife a monthly allowance for the support of herself and their child. The husband then claimed that he desired a reconciliation and as evidence of his intention he produced a letter he had written to his wife which read as follows:

"Dear Lilian, — This is to give you notice that I desire you to come and live with me. This is best in your interest, in my interest and more than all in the interest of our child. The incidents of December 1938, make it perfectly clear that you were not keen about resuming married life. I can assure you that in the event of your coming back to live with me, I shall provide you with all facilities to live separately. I am making this offer in the interest of our daughter who is now growing to be a woman. You are hereby to take notice that no further allowance will be paid to you. Yours sincerely..."

De Kretser J. observed that both at the beginning and at the end of the letter the defendant gave his wife "notice". He invited her to come back and offered to provide her with "all facilities to live separately." There was no pretence of any affection for her nor any desire expressed that they should resume marital relations. Moreover, the defendant had himself wished for a divorce and consequently there was no reason to believe that he desired the *consortium* of his wife. The trial judge had held that the defendant's offer was not made in good faith, and De Kretser J. declared that he had no reason to disagree with that view.

It is clear then that the *mala fides* of the defendant's offer was established and the court held that in making the offer for a

82. (1914) 18 N.L.R. 26
83. (1941) 42 N.L.R. 547

reconciliation all that the defendant wanted to do was to evade a pecuniary liability he had undertaken. The court was, therefore, compelled to view the defendant's application with disfavour.

This case, then, is not authority for the proposition that under no circumstances can one party to the agreement resile from it. All that the *ratio* of *Frugtneit* v. *Frugtneit* asserts is that a *mala fide* offer for a reconciliation will not be tolerated by the law. In other words, if the defendant had made a genuine effort at restoring the *consortium* and if in those circumstances the plaintiff had rejected his offer, she would be guilty of malicious desertion unless she proved a *justa causa* for her refusal.

This view is in consonance with the judgment of the court in *Goonewardene* v. *Abeyewickreme*,[84] a case involving an obligation to pay maintenance upon a consensual separation. According to Pereira J. either party to the agreement can terminate it by submitting to the complete reversion of the *status quo ante*. Consequently, if a genuine offer to resume married life is made and the other spouse rejects the offer, that spouse will become the deserter from that point onwards; unless of course he or she is able to establish a *justa causa* which will justify a refusal.[84a] This view is further supported by the judgment of Sansoni J. in *Canekeratne* v. *Canekeratne*,[84b] a case which involved the legality of a divorce action subsequent to a *de facto* separation. He declared that "Even though the separation which took place...was consensual, it can change its quality and malicious desertion can supervene if an *animus deserendi* supervened...it should also be remembered that a spouse may offer to resume cohabitation after a separation has taken place, but it is for the court to decide whether the offer is genuine. It is only genuine if there is a fixed and settled intention to offer a resumption of marital life under reasonable conditions; and it will not be a fixed and settled intention if it is a mere 'fluctuating desire to resume cohabitation.' When either spouse has made such an offer, a rejection of it by the other will turn him or her into a deserter."[84c]

84. (1914) 18 N.L.R. 69
84a. *Contra. Micho Hamine* v. *Girigoris Appu* (1912) 15 N.L.R. 191
84b. (1961) 66 N.L.R. 380
84c. *id.* at p. 382

In the ultimate analysis, then, the position in Sri Lanka appears to resemble the principles applicable in the Transvaal Provincial Division[85] and *justa causa*, though not necessary for the validity of a private separation agreement, is not totally irrelevant because it has a material bearing in determining whether either spouse is entitled to resile from the agreement by making an offer to resume conjugal rights.

(iii) The Obligation of Support

Separation agreements usually provide for the support of the needy spouse during the tenure of the separation. For a detailed discussion of the relevant law see chapter 6, A(V); (IX).

85. See H. R. Hahlo, *op. cit.* p. 354

CHAPTER 8

DISSOLUTION OF MARRIAGE

1. Introduction

A salient feature of the statutory grounds for divorce applicable in modern Sri Lanka, is the concurrent application of two widely differing criteria for the dissolution of a marriage. On the one hand, the Marriage Registration Ordinance[1] requires proof of adultery subsequent to marriage, malicious desertion or incurable impotency to terminate a marriage,[2] and on the other hand, the recently amended Civil Procedure Code[3] enacts that a decree of judicial separation may be converted to a decree of divorce after the lapse of two years[4] and that a mere separation *a mensa et thoro* for a period of seven years is sufficient to found an action for divorce.[5] In other words although the rigid standard of matrimonial misconduct continues to apply, the legislature has introduced a body of liberal divorce laws which enable spouses to end their marital relationship permanently merely on proof of *de facto* separation, for a prescribed period of time.

At the very outset it must be pointed out that by the appearance of these additional grounds for divorce, far from introducing reform the legislature has brought about a serious anomaly into the existing law. The unsuitability of a mixed body of divorce laws is evident from a perusal of the arguments adduced by the group appointed by the Archbishop of Canterbury in 1964 to suggest reform of the divorce laws of England. The group had to decide whether the principle of breakdown of marriage could be injected into the existing law in the form of an additional "ground" for divorce. They reasoned that if justice requires that divorce be granted only as relief to an injured party, then it would be wrong

1. No. 19 of 1907
2. Sec. 19 (2)
3. No. 2 of 1899 as amended by Law No. 20 of 1977
4. Sec. 608 (2) (a)
5. Sec. 608 (2) (b)

to grant it where no legally recognised injury had been done or where petition was made by the offending party. Conversely, if it is morally right to dissolve marriages when they have irreparably broken down and only then, it must be wrong to grant divorce simply on evidence of an offence committed, without further inquiry into the state of the marriage.[5a] It was further pointed out that the introduction of the principle of breakdown in the form of a new verbally formulated "ground" would not reform the law. The inevitable outcome of a mixed divorce law would be to give people wanting to rid themselves of marriage a last resort when they find that they cannot succeed on any other "ground." Matrimonial misconduct and the breakdown theory are therefore mutually inconsistent grounds and the Sri Lankan legislature should either substitute the breakdown theory for the theory founded on matrimonial guilt or improve the application of the fault based grounds for divorce entrenched in the Marriage Registration Ordinance. "...choosing between the doctrine of the matrimonial offence and the doctrine of breakdown of marriage remains, when all has been said, a choice of evils, and any attempt to combine the two doctrines in one divorce law would assuredly throw into relief the worst point of both."[5b]

The additional grounds for divorce set out in the Civil Procedure Code have not up to date been the subject of judicial interpretation. It will be interesting to see, therefore, whether the courts will require proof of a minimum *animus* before dissolving a marriage on proof of separation *per se*. While it is obvious that the termination of a marriage by mere proof of separation, irrespective of the reasons which brought it about, is manifestly unhealthy because it will enable spouses who have parted for reasons of employment, medication, or even on compulsory service, to obtain a repudiation of the marriage tie, this may well be the outcome of the statutory provision, unless the courts read into the statute the requisite of irretrievable breakdown thereby conferring upon itself the authority to determine the state of the marital relationship and to grant a dissolution of the marriage only if it is satisfied that the union is dead for all intents and purposes. Indeed,

5a. *Putting Asunder. A Divorce Law for Contemporary Society.* The Report of a Group appointed by the Archbishop of Canterbury in January 1964 (London S.P.C.H. 1966) pp. 31, 32.

5b. *id.* at p. 59

this was stressed by those witnesses who testified before the Sri Lanka Commission on Marriage and Divorce in 1959, when they recommended that a *de facto* separation for a period ought to be a ground for divorce. They pointed out that long separation was proof that the marriage had broken down and that in those circumstances it was futile to attempt to keep the form of marriage without its substance.[5c] As the law stands today, however, a divorce may be obtained by consent or even by an unilateral desire to terminate the relationship. The court would be called upon to ascertain the existence of a factual separation and upon that evidence alone grant a decree of divorce. Indeed the unsuitability of such a course of conduct, prompted by the provision in the recently amended Civil Procedure Code, is self-evident particularly when viewed against the background of a jurisdiction which continues to retain in the statute book, matrimonial fault as a basis for divorce. Of course, it should be pointed out, that divorce by consent was, in fact taking place as seen by the law in practice. In other words, whatever legal theory might have been, legal practice was condoning undefended matrimonial suits thereby admitting mutual consent as a basis for divorce. To this extent then it may be asserted that our society had long ceased to predicate the marriage covenant as a life-long union, and that the legislature only gave statutory recognition to an established practice. While this may be a plausible explanation for the enactment of these liberal divorce laws, it is submitted that it does not in any way whittle down the unsuitability of the law which may well serve to undermine the stability of the family and inflict its consequences on society at large.

It is interesting to note that the Sri Lankan divorce laws, as set out in the Civil Procedure Code, are an innovation which do not resemble either the South African or the English law position. Both the recently enacted Divorce Act[6] of South Africa and the Matrimonial Causes Act[7] of England require proof of an irretrievable breakdown of the marriage as a prerequisite for the award of a decree of divorce. Consequently, the court is the

5c. Ceylon Sessional Papers 1959

6. No. 70 of 1979, sec. 4

7. 1973, sec. 1 (1); (2)

ultimate arbitrator on the state of the marriage relationship and inevitably this helps to ensure that only a union which is utterly and hopelessly broken down receives judicial sanction. In other words, the courts, in effect, confer *de jure* recognition on a *de facto* state of affairs and this is clearly justifiable on the premise that both from the point of view of the parties concerned, and society at large, it is far more equitable to come to terms with the reality of a situation, thereby providing every encouragement to the unfortunate parties to rehabilitate and adjust to a new way of life, rather than to perpetuate the unhappy existence of an empty shell of marriage.

It must also be pointed out that although both the English law[8] and the South African law[9] provide for the dissolution of a marriage either on the basis of a consensual or on an unilateral desire, accompanied by separation for a prescribed period of time, the all important difference between these two jurisdictions and our law is the total absence, in our law, of any criteria by which the viability of the marriage may be ascertained. Quite apart from the lack of reference to the requisite of proof of irretrievable breakdown of the marriage, the Civil Procedure Code makes no provision for safeguarding the interests of the respondent, particularly when the divorce is requested by the petitioner alone. For instance, the English statute[10] provides that if a plea for divorce is founded on separation for a continuous period of five years, since this may be relied on even against the will of the respondent,[11] the respondent "may oppose the grant of a decree on the ground that it would in all the circumstances be wrong to dissolve the marriage."[12] Moreover, the English law does not permit a petition for divorce before the expiration of three years from the date of the marriage, unless it is shown that the case is one of exceptional hardship suffered by the petitioner or one of exceptional depravity on the part of the respondent,[13] the declared object of this provision being that it constitutes "a useful safeguard against

8. Matrimonial Causes Act 1973, sec. 1 (2) (d) (e)
9. Divorce Act No. 70 of 1979, sec. 4 (2) a)
10. Sec. 5 (1)
11. P. M. Bromley, *Family Law* (5th ed. London 1976), p. 256.
12. Sec. 5 (1)
13. Sec. 3

the irresponsible or trial marriages and a valuable external buttress to the stability of marriage during the difficult early years."[14]

In the South African law, too, the Divorce Act provides that "A decree of divorce shall not be granted until the court is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependant child of the marriage are satisfactory or are the best that can be effected in the circumstances."[15]

Kruger v. *Kruger*[16] is a recent South African decision, the first defended action to be decided under the 1979 Divorce Act, which highlights the discretionary powers vested in the courts to dissolve a marriage if it is satisfied that no useful purpose can be served in perpetuating a union which has irreparably broken down although the divorce is requested by one spouse while the other objects to a termination of the relationship. The facts of this case assume considerable importance. The plaintiff a man of 76 years of age, wished to dissolve a marriage of 40 years for the sole reason that he wanted to marry the woman with whom he had been living in adultery for a period of 27 years. The defendant, however, a woman of deep religious convictions, declared that she still loved the plaintiff and that she did not wish to grant a divorce not out of spite but because she still hoped that the plaintiff would one day return to her and because she believed that the marriage vows committed her to a lifelong union not to be put asunder. There was evidence of the defendant's *bona fides* for she had nursed the plaintiff's invalid mother until the latter's death and had alone cared for the son of their marriage. There was no rancour or bitterness between the spouses and it was clear that the only reason for the plaintiff's desire to end the marriage was because he wished to marry the woman he had been living with for a long period of time. Brink J. in an illuminating judgment declared that whatever bond existed between the spouses

14. "Field of Choice", The Law Commission, Reform of the Grounds of Divorce, para 19

15. Sec. 6(1)

16. 1980 (3) S.A. 283

it did not "have its origin in the love and affection which persons, happily married, normally have for each other."[17] The marriage, in this case was dead because the plaintiff was adamant not to resume life with the defendant and, therefore, whatever the wishes of the other spouse may have been Brink J. was of the opinion that the marriage had come to an end.[18]

In this connection it is interesting to see what the group appointed by the Archbishop of Canterbury to recommend reform of the divorce laws of England, had to say about a divorce granted against the will of the respondent. They declared that in cases where the petitioner had not only been patently responsible for ending the common life but had blatantly flouted the obligations of marriage and treated the other party abominably to grant a decree would be against the public interest. It would shake confidence in the administration of justice and cast doubt on the reality of the State's concern for marriage. The group, therefore, recommended a necessary safeguard. " What we recommend is that the court should have a duty to refuse a decree, even though breakdown had been proved, if to grant it would be contrary to the public interest in justice and in protecting the institution of marriage... This provision would do something to discourage the unscrupulous from thinking that desertion and the formation of an irregular union would in due course win a decree automatically."[19]

The all important point, therefore, is that divorce by consent, in the sense of it being a private agreement between the spouses, or even an unilateral desire to obtain a decree of divorce is not tolerated either in the English or the South African legal systems. If, however, there is, in addition, cogent proof of a total breakdown in the marital union, a fact which is within the courts' jurisdiction to ascertain, then a decree of divorce would be granted.

In Sri Lanka, on the other hand, the law as laid down in the statute book would appear to enable spouses who desire to

17. *id.* at p. 286

18. *id.* at p. 286. See also a case note by June Sinclair, "The Divorce Act 70 of 1979: The First Reported Case, 1980 (97) *S.A.L.J.* 353

19. *Putting Asunder A Divorce Law for Contemporary Society* (London S.P.C.H. 1966) p. 21

terminate their relationship to do so irrespective of the viability of their marriage and despite the consequences suffered by dependant children or an unwilling spouse.

It is also a noteworthy feature of our law that it is significantly easier for a spouse to obtain a dissolution of his marriage than to ask for a judicial separation, which latter remedy, being one which continues to leave the door ajar for possible reconciliation, should be the remedy more readily available. In the modern law of Sri Lanka a judicial separation may be obtained "on any ground on which by the law applicable to Ceylon such separation may be granted."[20] This provision, therefore, introduces the Roman-Dutch law grounds for separation according to which if continued cohabitation becomes either impossible or intolerable, a decree of separation may be obtained.[21] The emphasis, then, is not on the nature of the act committed but rather on the consequences of the act, and in addition, the applicant has to satisfy a prescribed criterion to bring a successful claim. In vivid contrast to this are the requisites to be satisfied to obtain a final repudiation of the marriage tie. The claimant must either prove matrimonial fault, as set out in the Marriage Registration Ordinance, or he can have recourse to the Civil Procedure Code to achieve this end. It is submitted that although proof of misconduct is comparable to the requirements to be established for a separation order, in that both impose on the claimant a substantial onus of proof, a divorce founded on separation for seven years must indeed be far easier to establish than the requirements of impossibility or intolerability of continued cohabitation. According to the statute, this provision neither necessitates proof of an *animus* on the part of the spouse to terminate the marriage, nor requires proof of the unworkability of the marriage. It follows, therefore, that since separation *per se* is a ground for divorce in our law spouses will be encouraged to seek a decree for dissolution rather than for judicial separation.

Of course it must be pointed out that in the interpretation of section 608(1)(b) of the Civil Procedure Code it may well be

20. Civil Procedure Code, sec. 608 (1)
21. H.R. Hahlo, *The South African Law of Husband and Wife*, (4th ed., Cape Town 1975) p. 330

possible for our courts to take the view that a dissolution on proof of separation for seven years will be granted only if the conditions necessary for a judicial separation are present, although the parties had not in fact obtained a decree of separation. If this view is accepted divorce by mutual consent will not be tolerated and proof of fault, though of a lesser degree, will still be a necessary requirement for the termination of a marital union.

II. The Grounds for Divorce

The Marriage Registration Ordinance[22] stipulates that: "No marriage shall be dissolved during the lifetime of the parties except by judgment of divorce a *vinculo matrimonii* pronounced in some competent court.[23] Such judgment shall be founded either on the ground of adultery subsequent to marriage, or of malicious desertion, or of incurable impotency at the time of such marriage.[24] Every court in Ceylon having matrimonial jurisdiction is hereby declared competent to dissolve a marriage on any such ground."[25]

A. Adultery

(i) The Legal Notion of Adultery and its Consequences

In Roman law, adultery was defined as the "defiling of the mother of another's household."[26] According to Voet, adultery could be distinguished from seduction which is an offence committed on a virgin or on a widow who is leading a decent life.[27] The essential ingredient of this offence is that it involves sexual intercourse with a person out of lawful wedlock. Consequently, the adulterer must necessarily be a married person irrespective of the civil status of the other.[28]

22. No. 19 of 1907 (Cap. 112)
23. Sec. 19 (1)
24. Sec. 19 (2)
25. Sec. 19 (3)
26. D.L. 16,225; XL. vii, 5, 6, 1.
27. Voet 48. 5.2; See also *Rex* v. *Robinson* 1911 C.P.D. 319 at p. 321
28. See Van Leeuwen 4. 37. 7; Van der Keesel 2.7.2.

In early society adultery was a heinous crime which entailed the reprobation of the spouse as well as that of society. Hence, the husband, for instance, could assuage his wounded feelings by inflicting various penalties both publicly and privately[29] and he had the right to kill an adulterous wife if caught in the act.[30] The State, on the other hand, could banish the adulterer, and deprive him of his civil rights and he was also liable to be flogged and cropped and to have his nose cut off so that he may carry about a permanent reproach for the crime perpetrated in the shape of a dishonourable wound and one which was plain to everybody.[31]

Indeed, there is authority in the ancient Sinhalese laws for the contention that the murder of an adulterer was condoned.[32] According to Hayley,[33] "Adultery was in strict law, an offence and in some cases was punished with slight corporal punishment, fine or imprisonment. If, however, as usually happened, the husband took private vengeance, which he was entitled to do, both upon the paramour and the unfaithful wife, the courts did not trouble themselves into the matter."[34]

The modern Sri Lankan law, however, does not treat adultery as an offence.[35] The Penal Code, which is a comprehensive code of criminal offences, does not list it as a criminal offence. There is also judicial authority for the view that the Roman-Dutch law Placaat of 1674, which prohibited a marriage between persons who had previously had an adulterous union, was not introduced to Ceylon.[36] The only consequences of adultery then, are that it serves as a ground for divorce and enables the aggrieved spouse an action for damages against the co-respondent.[37]

29. Voet 48: 5. 10
30. Voet 48. 5. 13
31. Voet 48. 5. 10
32. Robert Knox, *An Historical Relation of Ceylon* (1681 Part III), Chap.VII
33. F. A. Hayley, *The Laws and Customs of the Sinhalese* (Colombo 1923)
34. *id.* at p. 114
35. See *Chelliah* v. *Fernando* (1937) 39 N.L.R. 130 at p. 134 *Per* Soertsz J. *cf.* reference to adultery being a criminal act in *Wallbeoff* v. *Mitchell* 1829 Ram. Rep. 135
36. See *Karonchihamy* v. *Angohamy* (1904) 8 N.L.R. 1
37. See Marriage Registration Ordinance 19 of 1907, Sec. 19 (2)

Law reformers, have, at various times urged that adultery be made a criminal offence in our legal system. For instance in 1925, A. F. Molamure introduced a motion in the Ceylon Legislative Council for an amendment to the Penal Code making adultery a criminal offence. He declared that the purpose of the motion was to protect the sanctity of the home and to protect the sacredness of the name of "wife" and "mother." The motion, however, was opposed by the Attorney General who said that it would be contrary to the settled policy of over a hundred years to make adultery a crime, though the law should continue to look upon adultery with extreme disfavour.[38] In 1959, once again the commission, appointed to suggest reform in the law of marriage and divorce, considered the question and concluded that "though we view adultery with extreme disfavour, we are not convinced that there is much to be gained by burdening the State with the investigation of individual acts of adultery or of prosecuting adulterers and adulteresses in the criminal courts. We are doubtful whether the commission of adultery will be appreciably affected by penal legislation. Making adultery a criminal offence and leaving it to private parties to prosecute offenders in court would perhaps not make much difference."[39] Moreover, they pointed out that an elaborate and expensive machinery might be required for the implementation of the proposal to make adultery a criminal offence, if the state was to undertake the investigation of these offences and the prosecution of offenders. "This would also entail an undesirable intrusion by Government officials into the private lives of individuals. The commitments of such an undertaking are not likely to be commensurate with the benefits, if any, to be derived from it."[40]

(ii) The Quantum of Proof

In keeping with the presumption of innocence in favour of the defendant the onus of proving adultery is clearly on the person alleging it.[41] When deciding on the requisite standard of proof

38. See Ceylon Sessional Papers 1959—Report of the Commission on Marriage and Divorce

39. *id.* at p. 204

40. *ibid.*

41. *Churchman* v. *Churchman* [1945] P. 44; *Marczuk* v. *Marczuk* [1956] P. 217; *Galler* v. *Galler* [1954] P. 252; *Redpath* v. *Redpath and Milligan* [1950] 1 All E.R. 600

to establish adultery, the Sri Lankan courts have been primarily influenced by the English law on the subject for two reasons:

(*a*) The English law of evidence was introduced to the Sri Lankan legal system in 1834[42] and it continues to be applicable under the present Ordinance.[43] The statute provides for a *casus omissus* in the law and declares that "wherever in a judicial proceeding a question of evidence arises, not provided for by this Ordinance or by any other law in force in Ceylon, such question will be determined in accordance with the English law of Evidence for the time being."[44] The Evidence Ordinance is silent on the degree of proof required in criminal and civil proceedings, consequently, recourse to the English law on the question of proof of adultery is justified.[45]

(*b*) The Civil Procedure Code[46] declares that the court may pronounce a decree declaring a marriage dissolved if it "is satisfied on the evidence that the case of the plaintiff has been proved."[47] These words have been reproduced from an English law statute[48] and consequently, the courts have adopted the practice of looking to English decisions for guidance when interpreting our Code.[49]

Although it is an established tenet of English jurisprudence

42. Ordinance No. 6 of 1834
43. No. 14 of 1895
44. Sec. 100
45. See G.L.Peiris, *The Law of Evidence in Sri Lanka*, (2nd ed., Colombo 1977) p. 437
46. No. 2 of 1889, as amended by Law No. 20 of 1977
47. Sec. 602
48. English Act of 1857 is largely the foundation of chapter XLII of our Civil Procedure Code
49. See, for example, *Dissan Appu* v. *Babahami* (1907) 10 N.L.R. 343 ; *Ziegan* v. *Ziegan* (1891) 1 S. C. Rep. 3. *Contra. Karunatilleke* v. *Karunatilleke* (1951) 52 N.L.R. 300; *cf. Commissioner of Stamps, St. Settlements* v. *Oei Tjong Swan* [1933] A.C. 387

that adultery is a civil and not a criminal offence,[50] judicial tendency in the early English law was to vest this essentially civil action with the characteristics of a criminal action. A criminal offence requires proof beyond reasonable doubt. "The guilt of the accused should be fully proved by evidence which generates full belief of the fact to the exclusion of all reasonable doubt;" hence it is essential that the evidence is of a conclusive nature.[51] In other words, a criminal offence requires the highest standard of proof known to the law of evidence. A civil action, on the other hand, requires proof on a preponderance of probabilities. The difference, then, between these two standards is that "normally in a civil case, account must be taken of a doubt only if it results in a rational opinion that a fact in issue, is less likely than not, whereas in a criminal case, account must be taken of a doubt if it results in a rational opinion that the contradiction of the issue is more than a remote possibility."[52] It has been pointed out that the requirement of the higher standard "was a measure of mercy 'thrown' to those who were potentially liable to punishment at the suit of the Crown."[53] The stricter view, has been commended in favour of the presumption of innocence for the protection of a party who cannot be heard in his own defence, and to provide all reasonable safeguards against erroneous convictions, which in some cases may be followed by irrevocable sentences.[54] It has been asserted however that this rationale was inapplicable to matrimonial proceedings where one party was seeking redress against another.[55] In other words, the requirement of a higher standard of proof is misplaced in civil proceedings and may well be iniquitous to the plaintiff because "to be more than just to the one is to be less than just to the other."[56] Nevertheless, there is ample judicial authority for the application of the more onerous standard. In

50. See P.M. Bromley, *Family Law*, (5th ed., London 1976) 182; *Blunt* v. *Park Lane Hotel Ltd.* [1942] 2 K.B. 253; *Branford* v. *Branford* [1879] 4 P.D.73; *Redfern* v. *Redfern* [1891] P. 139; *Cavendish* v. *Cavendish* [1926] P. 110

51. Starkie's Evidence (1824) at pp. 451, 453

52. See G. L. Peiris, *op.cit.* at pp. 441-442

53. See J.A.Coutts, "The Standard of Proof of Adultery" 1949 (65) *L.Q.R.* 222 at p. 224

54. See *Magee* v. *Mark* (1861) 11 Ir. C.L.R. 449 at p. 463

55. J.A.Coutts, "The Standard of Proof of Adultery" at p. 224

56. *ibid.*

Ginesi v. *Ginesi*,[57] a separation order had been obtained on the ground of the husband's wilful neglect to maintain his wife and the husband applied for the discharge of this order on the ground of his wife's adultery. Tucker L. J. declared that "adultery must be proved with the same degree of strictness as is required for the proof of a criminal offence."[58] Likewise in *Preston-Jones* v. *Preston-Jones*,[59] Lord Oaksey declared that "the onus on the husband in a divorce petition for adultery is as heavy as the onus which rests on the prosecution in criminal cases."[60]

The oft used phrase "beyond reasonable doubt," however, defies a comprehensive definition. Its connotation varies in practice according to the nature of the case and the punishment which may be awarded. Soertsz A.C.J. once declared that "the word 'prove' involves the idea of placing beyond reasonable doubt; and to speak of proving 'beyond reasonable doubt' has the sound of tautology."[61] In an early Sri Lankan case Cayley C. J. declared that "the conscience of the court must be satisfied by proof that a case has been made out for its interposition before it should claim a dissolution of the marriage."[62] It has also been asserted that the quantum of proof depends on the ultimate object sought to be achieved by the imposition of the penalty.[63] According to this view then "the requirement of the higher standard of proof arises not from the nature of the act to be proved but from the potential legal consequences of the proceedings taken."[64] Hence, if adultery was alleged to amount to bigamy, rape or incest, a higher standard of proof would be required than if a prisoner accused of murder, for instance, pleaded the wife's adultery to sustain a plea of provocation. In this latter situation, the prisoner should be given the benefit of such a defence if a *prima facie* case is made out.[65] On the same reasoning, when proof of adultery

57. [1948] 1 All E.R. 373
58. *id.* at p. 374. See also *Gower* v. *Gower* [1950] 1 All E.R. 804, D.C. Potter, "The Burden of Proof in Adultery Cases" 1948 (11) *M.L.R.* 344
59. [1951] 1 All E.R. 124
60. *id.* at p. 133. See also Lord Hodson at p. 438
61. *The King* v. *Vidanalage Abraham Appu* (1939) 40 N.L.R. 505 at p. 510
62. D.C.Colombo No. 80, 966 (1881) 4 S.C.C. 107 at p. 108
63. J. A. Coutts "The Standard of Proof of Adultery" at p. 224
64. *id.* at p. 225
65. See Mancini's Case [1941] 3 All E.R. 272; P.A. Landon, (58) L.Q.R. 39

results in illegitimizing a child, proof beyond reasonable doubt is warranted.[66] Likewise, a legal system which predicates that there is a duty reposed in the courts to protect the sanctity of marriage, should require a higher standard of proof than, for instance, one which adopts a liberal attitude to the dissolution of the marriage tie.[67] It must be admitted, then, that the degree of proof required to establish adultery cannot be finally determined. According to Lord Denning in *Gower* v. *Gower*[68] "I do not think that this court is irrevocably committed to the view that a charge of adultery must be regarded as a criminal charge to be proved beyond reasonable doubt."[69]

While conceding that a varying quantum of proof is inevitable in this context it must be pointed out that this is necessitated not by the nature of the divorce action, which is *sui generis* but rather by the object sought to be achieved and the policy considerations which sustain the action, which in turn is founded on the general social policy of a given legal system.[70] If, therefore, adultery is considered a grave matter of public importance, then the highest standard of proof would be called for,[71] but, on the other hand, if it is thought that "its gravity is not so widely appreciated and accepted as it used to be"[72] then a lesser standard would suffice. Although more recent English law decisions have reflected a lenient attitude,[73] the matter has not been authoritatively settled. In *Bastable* v. *Bastable*,[74] the Court of Appeal declared that a high standard of proof or "a degree of probability... commensurate with the occasion" was required. Bromley, however, points out that this definition is "vague and unhelpful."[75] Bromley cautions that whatever standard is adopted for proof of adultery,

66. J.A. Coutts, "The Standard of Proof of Adultery" at pp. 223-224; G.L. Peiris, *op. cit* 445; *Francis* v. *Francis* [1959] 3 All E.R. 56; 1951 (67) *L.Q.R.* 427 at 428
67. See Latey on Divorce (13th ed.) p. 112
68. [1950] 1 All E.R. 804
69. See also *Mordaunt* v. *Moncreiff* 30. *L.T.* 649; *England* v. *England* [1953] P. 16; *Galler* v. *Galler* [1954] 2 W.L.R. 395
70. See (67) *L.Q.R.* at p. 428
71. *ibid.*
72. *Per* Vaisey J. in *Ginesi* v. *Ginesi* [1948] 1 All E.R. 373 at p. 376
73. See *Blyth* v. *Blyth* [1966] 1 All E.R. 524; *Gollins* v. *Gollins* [1964] A.C. 667
74. [1968] 3 All E.R. 701 at p. 704
75. P. M. Bromley, *op. cit.* p. 182

it must be commensurate with that accepted for proof of legitimacy, for the recognition of two different standards in the above two situations can lead to the absurd conclusion that the child is illegitimate although the mother is not guilty of adultery.[76]

It is of interest to note that the modern South African decisions have clearly inclined towards proof on a balance of probabilities. In other words, all that is required is that degree of proof which will be required to convince the reasonable mind.[77] "But the reasonable mind is not so easily convinced in such cases because in a civilized country there are moral and legal sanctions against immoral and criminal conduct and consequently probabilities against such conduct are stronger than they are against conduct which is not immoral or criminal."[78] According to Miller J. in *Van Deventer* v. *Van Deventer and Another*[79] when a divorce on the ground of adultery is claimed, the inference of adultery may and should be drawn "if, with due caution, the court is satisfied that that inference is the correct one on the probabilities notwithstanding that there are doubts of the sort which are invariably present when the court, being unable to say that it is satisfied beyond reasonable doubt that the inference drawn by it is the necessary and only one, which could be drawn, nevertheless considers that it is the one which is shown on a preponderance of probabilities to be the correct one."[80]

In Sri Lanka the courts have been firmly of the view that the standard of proof required to establish adultery is the highest, namely, proof beyond reasonable doubt. *Jayasinghe* v. *Jayasinghe*[81] involved an action for divorce on the ground of adultery. Gratiaen J., having declared that the phrase "satisfied on the evidence" in the Civil Procedure Code[82] had to be interpreted by reference to English law, concluded that the same

76. *ibid.*
77. See Watermeyer J.A. in *Gates* v. *Gates* 1939 A.D.150 at p.154
78. *id.* at p. 153-154. See also *Roux* v. *Roux and Another* 1939 N.P.D. 256; *Botha* v. *Botha* 1944 C.P.D. 40; *Louw* v. *Louw* 1946 C.P.D. 117 at p. 128; *Bagus* v. *Estate Moosai* 1941 A.D.71
79. 1962 (3) S.A. 969
80. See also *Truter* v. *Truter* 1938 N.P.D. 350; *Money and Eaton* v. *Money* 1911 E.D.L. 241
81. (1954) 55 N.L.R. 410
82. Sec. 602

standard of proof was required to establish a charge of adultery as in the case of a criminal charge, and he reiterated the *dictum* of Lord Mac Dermott in *Preston-Jones* v. *Preston-Jones*,[82a] a House of Lords decision, where it was said that "the jurisdiction in divorce involves the status of parties and the public interest requires that the marriage bond shall not be set aside lightly or without strict inquiry." Moreover, Justice Gratiaen dismissed the theory that in actions for divorce there are various gradations of the concept of "reasonable doubt."[83] According to him the words "beyond reasonable doubt" have a very clear connotation in the context of criminal law and it must receive the same meaning whenever the alleged commission of a matrimonial offence is made the ground of a prayer for divorce in matrimonial proceedings. "It is quite wrong, therefore, to approach the evidence led in support of a charge of adultery on the assumption that the standard of proof, though higher than in an ordinary civil suit, falls short of what is necessary to support a conviction on indictment in criminal proceedings."[84]

This strict standard of proof is entirely consistent with the quantum of proof required to rebut the presumption of legitimacy in Sri Lanka. Our law continues to confer a considerable measure of protection on a child born in lawful wedlock and, therefore, the courts have zealously guarded against an easy rebuttal of the presumption of legitimacy. According to the Evidence Ordinance the conclusive proof of legitimacy cannot be rebutted unless "it is shown that that man had no access to the mother at any time when such person could have been begotten or that he was impotent."[85] The word "shown" in the Evidence Ordinance has been construed to mean "convince" or to "make clear"[86] and it has been likened to "clear and cogent evidence which admits of no reasonable doubt or proof beyond reasonable doubt."[87] It has been pointed out that a standard of proof of this strictness

82a. [1951] 1 All E.R. 124

83. See *Bater* v. *Bater* [1951] P. 35, *per* Lord Denning

84. (1954) 55 N.L.R. 410 at p. 415

85. Sec. 112

86. *Persona* v. *Babonchi Baas* (1948) 49 N.L.R. 442 at 445 *per* Basnayake J.

87. *ibid.* See also *Sopi Nona* v. *Marsiyan* (1903) 6 N.L.R. 379 where Grenier A.J. declared that the proof necessary to rebut the presumption was

has been insisted upon because of the strong reasons of public policy which requires a child born in wedlock to be treated as legitimate.[88] Consequently, "whenever it is necessary to decide that question great care must be taken, regard being had to this, that the evidence is to be received under a law, which respects and protects legitimacy, and does not admit any alteration of the *status et conditio* of any person, except upon the most clear and satisfactory evidence."[89]

It must be pointed out, however, that there are cogent reasons for reform in the law relating to the presumption of legitimacy and in relation to proof of adultery in our legal system. This presumption was meaningful in a bygone era when a social stigma attached to the status of illegitimacy and the law imposed certain disadvantages in the hope that it would act as a deterrent to persons begetting children out of lawful wedlock. The mores of modern Sri Lanka do not support these sentiments any longer. This is amply borne out by the Legitimacy Act,[90] for instance, which provides for the legitimization of adultrine bastards. In a society that has liberalised its divorce laws[91] and where remarriage is not an uncommon feature, it would be in the interest of the child that his true paternity be known, rather than that he be foisted on an ostensible father to be brought up in an environment of doubt and suspicion. Likewise, the interests of society would be better served if the truth were out thereby perpetuating only unions that are truly compatible, and enabling marriages that have lost their significance and objectives to be put asunder. It is therefore far better that "empty" legal ties are dissolved and *de facto* unions and their issue are legitimized.

A departure from the attitude reflected in the early case *Jayasinghe* v. *Jayasinghe*[92] is discernible in the judgment of the

"counter proof of an overwhelming character," and in *Menchy Hamy* v. *Hendappoo* (1861) Ram. Rep. 90, it was referred to as "cogent and almost irresistible proof of non-access in a sexual sense."

88. *id.* at p. 445

89. *Head* v. *Head* 1917 E.D.L. 34 *per* Lord Chancellor Eldon cited and approved in *Persona* v. *Babonchi Baas* (1948) 49 N.L.R. 442 at p. 445 *per* Basnayake J.

90. No 3 of 1970

91. See the amendments to the Civil Procedure Code, Law No. 20 of 1977

92. (1954) 55 N.L.R. 410

Supreme Court in *Alarmalammal* v. *Nadarajah*.[93] According to Fernando J. "An action for divorce or for a declaration of nullity of marriage is a civil proceeding. Where, under the Civil Procedure Code, the plaintiff is entitled to a decree in case the court is satisfied on the evidence, it would seem that our Evidence Ordinance lays down the degree of satisfaction that has to be reached. It may therefore be unnecessary to look for guidance from other jurisdictions."[94] Having regard to the decision of the House of Lords, in *Blyth* v. *Blyth*[95] the court doubted the continued relevance of the decision in *Jayasinghe* v. *Jayasinghe*,[96] nevertheless this question was not decided upon in this case. More recently, however, the Supreme Court once again approved of, and followed, the ruling in *Jayasinghe* v. *Jayasinghe* and proof beyond reasonable doubt was held to be necessary to establish adultery.[96a]

Consistent with the need to adduce proof beyond reasonable doubt, the Sri Lankan courts have been reluctant to dissolve a marriage merely on the admission of adultery. "A decree for divorce cannot be made merely on pleadings and admissions. The conscience of the court must be satisfied by proof that a case has been made out for its interposition before it should claim a dissolution of the marriage."[97] In fact a confession has been held to raise a strong presumption of collusion and "even where it is proved that the defendant has been guilty, a divorce is refused if there is proof that the plaintiff is not innocent of collusion and of acquiescence in the wife's misconduct."[98] If, however, the court is satisfied as to the *bona fides* of the confession, it will be admitted even though it is not corroborated by other evidence. In *Todd* v. *Todd*[99] the husband's suit was for the dissolution of his marriage on the ground of the wife's adultery with X, and the question was whether the court should act on an uncorroborated

93. (1972) 76 N.L.R. 56
94. *id.* at p. 57
95. [1966] 1 All E.R. 524
96. (1954) 55 N.L.R. 410
96a. See *Dharmasena* v. *Navaratne* (1967) 72 N.L.R. 419
97. D. C. Colombo No. 8,966 (1881) 4 S.C.C. 107 at p. 108 *per* Cayley C.J.
98. *Don Carnelis Ratnavira* v. *Patabendige Ensohamy* (1885) 7 S.C.C. 116 at p. 117 *per* Lawrie J. See also Batticaloa 2,111, March 4, 1851 in [illegible]'s Reports 170
99. (1943) 44 N.L.R. 497

confession made by the wife. Three letters had been written by the respondent to the petitioner and in one of them she had stated that she had lived with X in Colombo. Moseley J. declared that although the respondent's admissions were to facilitate the obtaining of her freedom, since the letters were extremely frank and there was no reason to doubt the genuineness of the admission, there was no suggestion of collusion and, as such, a decree of divorce was granted.

Both the English[100] and South African[101] courts have accepted the admissibility of confession as proof of adultery provided it is thought to be genuine. The *bona fides* of the admission assumes importance because the courts have to guard against collusion between the parties to put false evidence before the court in order to make it appear to the court that a matrimonial offence has been committed.[102] It is submitted that although collusion and the other absolute and discretionary bars to divorce, which were a part of our law, were deleted from the statute book in 1971[103] and inspite of the fact that they have not been re-enacted,[104] so long as the grounds for divorce founded on matrimonial fault continues to apply in our jurisdiction, collusion, in the sense of being a fraud on the courts, will continue to be an effective bar to divorce.[105]

The Sri Lankan courts have adverted to the need to specify the date and place of the act complained of when an allegation of misconduct is made in an action for divorce. In *Samaraweera* v. *Jayawardena*[106] the plaintiff alleged the misconduct of the defendant in the following way: "That since the last few months the first defendant, who is the wife, has been living in adultery with the second defendant, who also threatens and abuses the plaintiff and has often attempted to strike him." The defendant, however, objected to this allegation on the basis that it was too vague. Bonser C.J. pointed out that there was substance in this

100. S. M. Cretney, *Principles of Family Law* (3rd ed., London 1979) p. 106
101. H. R. Hahlo, *op.cit.* p. 382
102. *id.* at p. 364
103. Administration of Justice (Amendment) Law No. 25 of 1975
104. See the 1977 amendments to the Civil Procedure Code
105. See chapter 9
106. (1900) 4 N.L.R. 106

objection and that the District Judge ought to have called upon the plaintiff to specify the particulars as to the date and place of the act complained.[107]

Hahlo [108] points out that the declaration in an action for divorce on the ground of adultery in the South African law must contain sufficient specific allegations as to time and place to enable the defendant to plead properly to them and prepare a defence.[109] However, if adultery has been proved, proof of time or place or the person with whom it was committed is not important.[110]

(iii) The Co-Defendant

Matrimonial actions are regulated by the Civil Procedure Code and the earliest enactment[111] declared that in any plaint "presented by a husband, in which the adultery of the wife is the cause or part of the cause of action, the plaintiff should make the alleged adulterer a co-defendant to the said action unless he is excused from so doing on one of the following grounds, to be allowed by the court upon an application for the purpose: (1) that the defendant is leading the life of a prostitute, and that the plaintiff knows of no person with whom the adultery has been committed; (2) that the name of the alleged adulterer is unknown to the plaintiff although he has made due efforts to discover it; (3) that the alleged adulterer is dead; and it shall be lawful in any such plaint to include a claim for pecuniary damages against such co-defendant."

It has been said that this provision is imperative and not merely directory. Consequently, in *Ziegan* v. *Ziegan*[112] the divorce proceedings were treated as a nullity because, although the name of the alleged adulterer had been inserted as a co-defendant in the plaint he had not been served with notice, nor had a charge been made against him. Dismissing the validity of the proceedings

107. See also *Blok* v. *Blok* (1940) 42 N.L.R. 70 See also *Dharmasena* v. *Navaratne* (1967) 72 N.L.R. 419
108. H. R. Hahlo, *op. cit.* p. 382
109. *id.* at p. 379
110. *id.* at p. 381
111. Ordinance No. 2 of 1889
112. (1891) 1 S.C. Rep. 3

Burnside C. J. declared that "Divorce suits cannot be regarded in the same light as ordinary litigation between individuals affecting them and them alone. The policy of the law has always been to regard them in the light of suits affecting the social status of the Country and has been careful to hedge them round with precautions so that the marriage tie may not be loosened by the mere consent or laches or indifference of the parties to it."[113] Likewise, in *Annakedde* v. *Myappen*[114] Garvin J. declared that the co-respondent in an adultery case should unquestionably be made a party to the action and "no decision on that question can be considered satisfactory which has been arrived at in a proceeding to which he has not been made a party."[115] This was also the view expressed in *Josline Nona* v. *Samaranayake*[116] by Basnayake J. who opined that the provisions of sections 598 and 599 of the Civil Procedure Code are imperative. When, therefore, a plaintiff sues for divorce on the ground of adultery but does not make the alleged adulterer a defendant nor apply for an excuse in terms of section 599, the plaint should be rejected.[117]

However, a restrictive interpretation of the Civil Procedure Code is reflected in the judgment of Basnayake J. in *Karunatilleke* v. *Karunatilleke*.[118] The defendant in this case, accused the plaintiff of misconduct with three persons A, B, and C, and asserted that although he was willing to condone her acts of adultery with these persons he desired a divorce on the ground that the plaintiff was living in adultery with his brother X. The question for decision in this case was whether those against whom judgment was not asked for should be made parties to the action. Basnayake J. delivering the judgment of the court declared that section 598 of the Civil Procedure Code provides that upon a plaint presented by a husband, in which the adultery of the wife is the cause or part of the cause of action, the plaintiff shall make the alleged

113. *id.* at p. 6 See also *Amarasekera* v. *Amarasekera* (1925) 6 C. L. Rec. 119 which reiterated this view.
114. (1932) 33 N.L.R. 198
115. *id.* at p. 200
116. (1948) 49 N.L.R. 381
117. *cf. Todd* v. *Todd* (1943) 44 N.L.R. 497
118. (1951) 52 N.L.R. 300

adulterer a co-defendant to the action, unless he is excused, upon application, by the court from so doing. The defendant does not make the adultery of his wife with those whom he has not made parties to the action "the cause or part of the cause of action." "He is under no obligation, therefore to make them parties to the action. Apart from statute even the rules of natural justice do not require that a party against whom no judgment or order is asked for should be afforded the opportunity of a hearing. A husband is free to condone his wife's adultery with any person against whom he does not wish to proceed. For everyone is allowed by our law to renounce his right and forgive the person at whose hands he has suffered injury. What the law does not allow him to do, except in the circumstances stated in section 598, is to obtain a decree for divorce on the ground of his wife's adultery with any person whom he does not bring in as a party to the action."[119]

It was however asserted that if the adultery with the other parties was not material to the case their names should not have been mentioned in the answer. If, however, a particular fact is mentioned, it is presumed that it is relevant to the action although it might not be directly the cause or part of the cause of the action. Consequently, natural justice demands that those persons against whom a grave allegation has been made, should be given the right to refute the charge.[120]

It must be pointed out that the 1889 Civil Procedure Code did not permit a wife who presented a plaint, for the dissolution of her marriage on account of her husband's adultery, to join the woman as a co-defendant.[121] This might have been influenced by the fact that the Code also provided for the recovery of damages from the co-defendant and since a married woman did not have any separate proprietary rights at that time, there was no warrant for making a woman a co-defendant.[122] However, in the vastly

119. *id*. at p. 302
120. See C. E. Jayawardene, *The Roman-Dutch Law of Divorce* (Colombo 1952) pp. 21,23
121. See *Alloe Nona* v. *Mannuel Perera* (1920) 2 C.L.Rec. 182
122. See Sessional Papers 1959, sec. 211

altered conditions of modern Sri Lanka such a provision would be an anachronism and, therefore, the Administration of Justice (Amendment) Law[123] provided that "where the matrimonial offence alleged is adultery with a person who is named such person shall be made a co-defendant to the action."[124] Likewise, the recent amendment to the Civil Procedure Code enacts that a husband as well as a wife can make the party with whom the alleged adultery was committed a co-respondent in a divorce suit.[125] The statute also provides that in certain circumstances the alleged adulterer need not be joined as a party to the action. The exceptional situations listed are: when,

(1) the defendant is leading the life of a prostitute, and the plaintiff knows of no person with whom the adultery has been committed;

(2) the name of the alleged adulterer is unknown to the plaintiff, although he has made due efforts to discover it;

(3) the alleged adulterer is dead.[126]

Eliyatamby v. *Gabriel*[127] is an interesting case which discussed the nature of the evidence that may be adduced against the co-defendant. The plaintiff in this case brought an action against his wife for divorce on the ground of adultery with the second defendant. As proof of her misconduct with the second defendant he produced a series of letters written by his wife to the second defendant in which reference was made to the acts of adultery, and which letters he had intercepted. At the trial, which the wife did not contest, the plaintiff's counsel produced the letters as evidence against the wife. The counsel for the second defendant, however, contended that the letters were not evidence against him, and fearing that the letters might prejudice his client in the mind of the court and the public, required all the letters to be

123. No. 25 of 1975
124. Sec. 625 (2)
125. Sec. 598, 599, 599A
126. See Sec. 598
127. (1923) 25 N.L.R. 373

produced but reserved to himself the right to object that the letters were not evidence against his client. However, he referred to the letters freely in his cross-examination of the plaintiff, and went so far as to challenge the whole case even as against the wife. The letters, therefore, became an inseparable part of the trial. The issue in appeal was the relevance of the letters as evidence against the second respondent and Bertram C.J. concluded that they were admissible evidence of the second respondent's misconduct. In coming to this conclusion he declared that according to English law practice, the letters would constitute hearsay evidence and that "the mind of a lawyer bred on English principles revolts at the idea of a man being prejudiced by the production of a letter written by a person not called as a witness and not subjected to cross-examination."[128] The Chief Justice, however, was of the opinion that "In the courts of our Colony, we are governed not by the general principles of the law of England, but by the express enactments of the Evidence Ordinance. It is a singular thing, however, that our Evidence Ordinance contains no general prohibition of hearsay, nor does it anywhere specifically prohibit the use of a remark or a letter against a person not responsible for it, where the remark or the letter was not brought before him in such circumstances as to affect his action."[129] Having cited several sections of the Evidence Ordinance, which according to the Chief Justice did not prohibit the admissibility of the letter as evidence against the co-respondent, he declared: "I am conscious that by bringing the letters under this head I am in fact laying down that any intercepted correspondence between the respondents in divorce cases may be considered as evidence against the person to whom it is addressed, and I appreciate the danger of this latitude but our duty is to interpret the words of the section."[130]

This decision, however, was over-ruled by the Privy Council.[131] Lord Darling delivering the opinion of the Board, dismissed all the arguments adduced by Bertram C. J., and was firmly of the view that the letters could not be used as evidence against the co-respondent. "A man does not draw his sword upon another who

128. *id.* at p. 378
129. *id.* at p. 379
130. *id.* at p. 380
131. (1925) 27 N.L.R. 396

being mannacled, snatches the weapon from an assailant's hand and strikes him with it."[132]

This case was approved of and followed in *Dharmasena* v. *Navaratne*.[132a] H.N.G.Fernando, C.J. declared that the wife's confession of adultery made outside court was not admissible as evidence against the co-respondent.

(iv) An Action Against the Co-Respondent for Damages

(*a*) The Legal Basis for the Award of Damages

Adultery entails the reprobation of the spouse as well as that of society,[133] and as such quite apart from the right to terminate the marriage the innocent spouse has a claim for damages in respect of the *injuria* sustained. The claim for damages is founded on the notion that a husband has a property in the body and services of his wife and it rests on the same juristic basis as the right of a citizen in the days of the Roman Empire to bring an action for physical injury caused to his slaves by the wilful or negligent act of ouster.[134] It has been pointed out, therefore, that the legal foundation of the claim for damages for adultery has not changed from its inception over 200 years ago to the present time.[135]

In relation to the objectives sought to be achieved by the award of damages various views have been advanced. It has been suggested that one of the original objects of this award was to maintain the purity of married life and to defend the honour of husband, wife and children. Consequently, the threat of damages was thought effectively to deter the wanton inclinations of an intending adulterer.[136] In addition, it has been asserted, in the English law, that the basis of the award is not exemplary or punitive but merely compensatory. Thus Sir Francis Jenne said to the Jury "It is not your duty to punish the co-respondent; this court

132. *id*. at p. 400
132a. (1967) 72 N.L.R. 419
133. See *Eliyatamby* v. *Gabriel* (1923) 25 N.L.R. 373 at p. 382 *per* Bertram C.J.
134. *Ewer* v. *Ewer and Chalton* 123 L.T. (N.S.) 240 at p. 241
135. *ibid.*
136. *Butterworth* v. *Butterworth* [1920] P.D. 126 at p. 133

does not sit as a court of morality to inflict punishment on those who offend the social law."[137] In similar vein, Mc Cardie J. declared that "a judge who should give punitive damages for adultery is acting beyond the settled law."[138]

South African cases, however, appear to favour the punitive objectives of the award. In *Viviers* v. *Kilian*,[139] for instance, Solomons C.J. declared that "It is not desirable that actions of this nature should be encouraged; but on the other hand it is only right that profligate men should realise that they cannot commit adultery with married women with impunity";[140] and again in *Valken* v. *Berger*[141] Justice Ramsbottom said that it was equally right that women should realise that they could not with impunity seduce married men from their duty to their wives."[142] This rationale is further illustrated by the judgment of Hiemstra J. in *Potgieter* v. *Potgieter*[143] a case where the husband had shot at the wife's paramour. "In my opinion this assault must have an important effect on the question of damages. The money is awarded to the claimant to assuage his injured feelings. He has, however, in a more robust way richly obtained balm for his wounded soul. The cry of pain, the writhing form of his adversary must have given the plaintiff intense satisfaction in some primitive way. The punishment inherent in damages for *injuria* has likewise already been richly inflicted upon him. The plaintiff's self-righteous action must bring about a massive reduction in the amount he would otherwise have received."[144]

In the Sri Lankan case of *de Silva* v. *de Silva*[145] the court was clearly of the view that damages are compensatory rather than punitive. Schneider J. accorded with the view of Mc Cardie J.

137. See *Evans* v. *Evans and Platts* [1899] P.D. 195 at p. 202
138. *Ewer* v. *Ewer and Charlton* 123 L.T. (N.S.) 240
139. 1927 A.D. 449
140. *id.* at p. 457
141. 1948 (3) S.A. 532
142. *id.* at p. 537, See also *Fuller* v. *Viljoen* 1949 (3) S.A. 852
143. 1959 (1) S.A. 194
144. See also *Sutcliffe* v. *Sutcliffe and Westgate* 1913 T.P.D. 686; *Oliver* v. *Oliver and Peckover* 1891 I.C.T.R. 51
145. (1925) 27 N.L.R. 289

in *Evans* v. *Evans and Platt*[146] where it was said that the duty of the court is not to punish those who have acted contrary to the social law.[147] Likewise Dalton J. declared that "the damages are to compensate the plaintiff for the loss or injury he has sustained and not to punish the second defendant for his misconduct."[148] In *Alles* v. *Alles*[149] too, there is reference to the fact that damages awarded in a divorce action are compensatory and not punitive,[150] but in *Eliyatamby* v. *Gabriel*[151] the court, conceding that an injury of this nature cannot adequately be assessed in pecuniary terms, declared that "If damages are awarded it is for the purpose of expressing the reprobation of the court and society.[152]

It is evident, therefore, that damages have been awarded for different purposes and, therefore, Amerasinghe[153] declares that the rationale for awarding damages varies with the facts of the particular case. In other words, while "ordinarily damages are awarded to compensate the injured spouse for the injury he or she has sustained" there may be extenuating circumstances where the third-party adulterer has behaved in such a high-handed and malicious fashion that the court is called upon to award exemplary damages.[154] This mode of reasoning then explains the divergent views expressed in the decided cases. The behaviour of the third party adulterer would have a material bearing on the objective sought to be achieved in a given case.

(*b*) Assessment of Damages

In quantifying the damages to be awarded the court will have regard to the following factors:

(i) sentimental damages for *injuria* consisting of

146. 1889 L.J.P. 70
147. (1925) 27 N.L.R. 289 at p. 301
148. *id.* at p. 310
149. (1945) 46 N.L.R. 217
150. *id.* at p. 231, *per* Wijeyewardene J.
151. (1923) 25 N.L.R. 373
152. *id.* at p. 382
153. C. F. Amerasinghe, *Aspects of the Actio Injuriarum in Roman Dutch Law* (Colombo 1966) at pp. 138, 139
154. *id.* at p. 138

(*a*) *contumelia* or insult and (*b*) loss of *consortium* or the other spouse's company;

(ii) damages for patrimonial loss arising out of (*a*) loss of the other spouse's service and (*b*) other material damage resulting from the adultery.[155]

Of course it has been aptly pointed out that it is "difficult to fix in financial phrases the amount which should be given as a legal solace to a man claiming compensation for a hurt to the deepest and most sacred feelings which can be possessed by a human being."[156] The court is therefore called upon to consider a variety of facts in order to carry out this task. For instance, the character and conduct of the husband is as fully in issue as the character and conduct of the wife. The extent to which the petitioner valued the society of his spouse and the rank and position of the petitioner also become relevant factors.[157] Consequently, if the wife be of wanton disposition or disloyal instincts, her general value to the husband is so much the less, so also if she thrusts herself upon the adulterer or lightly yields to his desire. But if, on the other hand, the adulterer has only gained his wish by assiduous seduction, and by practiced artifice, it may well be inferred that the moral character and general worth of the wife was an asset of value to the husband.[158] Schneider J. adopted the criteria for assessment set out by Mc Cardie J. according to which the pecuniary value depends on the wife's fortune, her assistance in her husband's business, her capacity as a housekeeper, and her ability generally in the home, while the *consortium* aspect is broader and depends on the wife's purity, moral character, affection, and her general qualities as a wife and mother.[159] Mc Cardie J. also pointed out that since the blow and the shock to the injured spouse's feelings depend to a large extent on the conduct of the adulterer, any feature of treachery, any grossness of betrayal, any wantonness of insult and the like circumstances may add deeply

155. C. F. Amerasinghe, *op. cit.* p. 136

156. *Ewer* v. *Ewer and Charlton* 123 L.T. (N.S.) 240 at p. 242 *per* Mc Cardie J.

157. *ibid.*

158. *Butterworth* v. *Butterworth and Englefield* [1920] P.D. 126 at p. 143 cited and followed in *De Silva* v. *De Silva* (1925) 27 N.L.R. 289 at p. 301

159. *ibid.*

to the husband's sense of injury and wrong and therefore call for a larger measure of compensation.[160] He further declared that: (1) no damages should be given against an adulterer when he is not shown to have known that the woman was married; (2) no damages should be given which an adulterer cannot pay; and (3) that a co-defendant ought not to be mulcted in costs, because when he has knowledge too late to repair the wrong that has been done, he does not then and there abandon the woman.[160a]

Applying these principles to the facts of *de Silva* v. *de Silva*[161] Schneider J. observed that there were mitigating circumstances to be considered. He declared that the pecuniary value of the wife to the husband was "nil." She was not an efficient housekeeper nor did she help in any business. Moreover, in relation to the *consortium* aspect Justice Schneider was of the opinion that the husband's description of his wife's character and his story of their matrimonial life, embittered by constant quarrelling and the exchange of blows, did not warrant heavy damages.[162] It was also pointed out that a mitigation of damages was called for in view of the plaintiff's own conduct of leaving his wife alone in a public hotel without suggesting to her that she lives with her parents in his absence, thereby exposing her to temptation and providing her with the opportunity to elope.

Dalton J. in a separate judgment endorsed the above criteria and added that evidence that the co-defendant was an "out-of-work planter," might possibly aggravate the injury to the husband's feelings and make him feel keenly the blow to his marital honour. In *Alles* v. *Alles*[163] Justice Wijeyewardena endorsed the view of the District Judge, who opined that the actual value of the wife to her husband was nil. He also declared that the co-respondent had betrayed the trust reposed in him by the husband, but the husband too, was partly responsible in that he had acted very indiscreetly by encouraging the co-respondent "a man of a

160. *ibid.*
160a. (1925) 27 N.L.R. 289 at p. 302
161. (1925) 27 N.L.R. 289
162. *id.* at p. 302
163. (1945) 46 N.L.R. 217

different race and a different creed, to be on terms of closest friendship with his wife, although the co-respondent's wife, who was not a Purdah lady, refrained from visiting the first defendant's wife."[164] The first defendant had placed himself and his wife under obligation to the co-respondent. While he was away from home he had asked the co-respondent to call at his home inspite of the ugly rumours he had heard of an illicit association between his wife and the plaintiff. Justice Wijeyewardene therefore concluded that there was evidence of carelessness and neglect on the part of the husband in not determining the close association of the second defendant with the plaintiff, and consequently, these facts were said to warrant a mitigation of the damages awarded. On appeal to the Privy Council, Lord Radcliffe, delivering the opinion of the Board, declared that the husband "had indeed committed the error of trusting two people too much: but as one of the two was his wife and the other was his own close friend it is perhaps hard that his error should be a matter of reproach to him."[165] Nevertheless he concluded that their Lordships did not feel that they would be justified in interfering with the Supreme Court's order because the assessment of the quantum of damages, as indeed the assessment of what was prudent and of what was careless in social relations, depended essentially upon a familiarity with local conditions which was possessed by the Supreme Court to a much greater extent than it could be by the members of the Board.[166]

In *Dean* v. *Anthonisz*,[167] the Privy Council took into consideration the fact that the wife had supplemented the family income by dressmaking and supplying meals to pupils and teachers at a school in the neighbourhood in which they were living and concluded that the wife was of some financial value to her husband. In this case, too, when assessing the quantum of damages that should be awarded the Privy Council, endorsing the judgment of the District Court, considered the husband's negligence in permitting the close association of the co-respondent with his wife, and his

164. *id.* at p. 232
165. (1950) 51 N.L.R. 416 at p. 426
166. *id.* at p. 426
167. (1953) 54 N.L.R. 538

delay in instituting the action to be mitigating factors. The above criteria were further reiterated by the Privy Council in *Perera* v. *Halwatura*.[168]

A question of considerable importance in this connection is the relevance of the co-respondent's financial status to the assessment of damages. In the English law upto 1830, the pecuniary standing of the co-respondent was relevant in an action for criminal conversation and a claim for damages in a divorce action was tried on the same principles and in the same manner as an action for criminal conversation.[169] However, in *James* v. *Biddington*[170] Alderson B. declared that "the amount of the co-respondent's means is not a question in the cause." Following this, subsequent cases held that the means of the co-respondent was irrelevant to and independent of the question of damages and that, as such, it should not influence the court in assessing damages.[171] Consequently, it has been held that a poor man cannot by the plea of poverty escape from the actual injury he has caused, and a rich man should not, merely because he is a rich man, be compelled to pay more than a proper compensation to the husband.[172] However, it must be pointed out that the means of the co-respondent might be a relevant factor when deciding upon his conduct. For instance, in *Forster* v. *Forster*[173] the court pointed out that if it required the co-respondent's fortune to seduce a wife, it would indicate that she was not lightly to be won and would therefore indicate her greater value to her husband as compared with a wife who yielded to the first suggestion of temptation. While the early South African and Sri Lankan cases, too, held that the means of the co-respondent were material when computing the damages

168. (1957) 59 N.L.R. 233

169. See *James* v. *Biddington* 6 C and P. 589

170. *ibid.*

171. See *Keyse* v. *Keyse and Maxwell* 11 P.D. 100 at p. 102; *Darbishire* v. *Darbishire* 62 L.T. 664; *Bikker* v. *Bikker* (1892) 67 L.T. 721

172. *Butterworth* v. *Butterworth and Englefield* [1920] P.D. at p. 147, *per* Mc Cardie J.

173. 33 L.J.P. 150

to be awarded,[174] the modern South African[175] and Sri Lankan decisions[176] on this point assert that the co-respondent's financial status is irrelevant to the question of damages. The Privy Council in *Alles* v. *Alles*[177] was firmly of the view that the financial straits of the co-respondent had no bearing on the quantum of damages.[178] However, Amerasinghe[179] submits that the wealth of the defendant must be taken into account for "inasmuch as the action is partly penal, the court must, as a matter of commonsense, take the defendant's financial position into consideration. What might prove a light penalty to a man in affluent circumstances might bring about ruin to a man of comparatively modest means. Further, if this factor is entirely disregarded and the same amount is awarded in all cases of equal gravity then the punishment is far more severe in one case than in another."[180]

In conclusion, it is submitted that if the rationale for awarding damages to the innocent spouse contains a punitive element, then, the financial status of the co-respondent assumes importance. It has been pointed out that evidence of extenuating circumstances will have a bearing on the assessment of damages, likewise, the means of the defendant should be a relevant factor. The reprobation of society is adequately manifested only if one admits that the quantum of damages should vary with the degree of impropriety and gravity of misconduct. Consequently, it must be ensured that the quantum of damages the defendant is ordered to pay is substantial enough so as to inflict a penalty on the co-respondent.

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174. For the South African law see *Biccard* v. *Biccard and Fryer* (1892)9 S.C. 473 at 476; *Oliver* v. *Oliver and Peckover* (1891) 1 C.T.R. 51 at p. 53; *Willemse* v. *Willemse and Parker* (1910) C.T.R. 908. For the Sri Lankan law see *Wallbeoff* v. *Mitchell* (1829) Ram. Rep. 135; *Moore* v. *Wolffe* (1880) Ram. Rep. 175; *Alles* v. *Alles* (1945) 46 N.L.R. 217 at p. 232.

175. *Theron* v. *Theron and Toyk* 1937 S.W.A. 65

176. *De Silva* v. *De Silva* (1925) 27 N.L.R. 289 at p. 301; *Alles* v. *Alles* (1950) 51 N.L.R. 416 at p. 426. See also C. F. Amerasinghe *op. cit.* p. 146

177. (1950) 51 N.L.R. 416 at p. 426

178. Although the Privy Council reversed the decision of the Supreme Court on this issue it did not alter the sum awarded as damages.

179. A. R. B. Amerasinghe *Adultery as an Injuria in South African and Ceylon Law* (Colombo 1966)

180. *id.* at pp. 32 - 33

(c) The Effect of Separation on the Claim for Damages

Consortium, or the other spouse's love, affection and company, is an important aspect of the marital relationship, the loss of which is compensated if it is directly attributable to the *dolus* of the third party. If, therefore, the spouses were already living apart from one another at the time of the adultery complained, it has been queried whether the husband has a legitimate claim against the co-respondent who, in these circumstances, cannot be held responsible for the loss of *consortium*. In deciding this question the South African cases have emphasised that the fact of separation *per se* is not conclusive evidence of a cessation of the marital relationship. In other words, the courts have gone further to ascertain if there was any possibility of a reconciliation between the parties at a future date and, if so, whether the adultery of the spouse had wrecked all chances of a reunion. In this way a nexus has been established between the act of adultery and the loss of *consortium* thereby enabling the innocent spouse to proceed against the co-respondent for damages even in situations in which, *prima facie*, he was not responsible for the loss of *consortium*.[181] Likewise, in the English law, too, separation *per se* has been held not to affect the claim for damages. In *Evans* v. *Evans and Platts*[182] it was pointed out that a man is wronged by the seduction of his wife far beyond the loss which he sustains by the breaking up of his home, however important an element of damage this may be. A man whose wife has been seduced by another man may well be subjected to intolerable insult and wrong and the fact that he had already parted from his wife at the time the adultery was committed does not render the blow to his honour less acute nor does it render the position of the children less serious. If the co-respondent had been the real cause of the wife transferring her affection from her husband, then he is just as much liable in damages as if no separation had taken place.[183] This case therefore emphasises the aspect of *contumelia*, or insult, which

181. See *Groundland* v. *Groundland and Alger* 1923 W.L.D. 217; *Bevan* v. *Bevan and Ward* (1908) T.H. 193; *Budd* v. *Budd and Freeman* (1894) 4 C.T.R. 170. See also for a detailed exposition of the law on this topic, C.F. Amerasinghe, *op. cit.* pp. 86 - 94.

182. [1899] P.D. 195

183. See also *Izard* v. *Izard and Leslie* 14 P.D. 45. *per* Butt J.

is not affected, merely because the parties had been previously separated. There is authority for this view in the South African law too[184] and Amerasinghe declares that " Where the spouses are separated, whatever the basis of separation, whether it be deed, decree or a mere matter of fact, if the husband has given up all ideas of being reconciled to his wife, a third party committing adultery with the wife does not inflict *contumelia* on the husband, while if the husband has not given up such idea, such an act of adultery is a *contumelia* by the third party *vis-a-vis* the husband: except that where the separation is by deed and the wife has been seduced by the third party adulterer, even if the husband has given up all ideas of being reconciled with his wife, there is a *contumelia* committed by the third party against the husband."[185] Accordingly "it would be a more rational rule, if the exception were disregarded."[186]

In the Sri Lankan law there is an additional ground for denying an action for damages. The Civil Procedure Code[187] declares that "Whenever in any plaint presented by a husband the alleged adulterer has been made a co-respondent, and the adultery has been established, the court may order the co-defendant to pay the whole or any part of the costs of the proceedings in addition to any damages which may be awarded, where such damages have been claimed. Provided that the co-defendant shall not be ordered to pay the plaintiff's costs, nor shall any damages be awarded:

(i) if the defendant was at the time of the adultery living apart from her husband and leading the life of a prostitute; or

(ii) if the co-defendant had not at the time of the adultery reason to believe the defendant to be a married woman."[187a]

184. *Budd* v. *Budd and Freeman* (1894) 4 C.T.R. 170

185. C. F. Amerasinghe, *op. cit.* p. 94

186. *ibid.*

187. Law No. 20 of 1977, sec. 98

187a. *ibid.*

In this connection it must be pointed out that if subsequent to an act of adultery the spouses resume their marital relationship because the husband had condoned the wife's adultery he may nevertheless bring an action for damages against the co-respondent. "A husband may forgive his wife and condone her misconduct, but he does not thereby necessarily forgive the paramour for the injury inflicted upon himself."[188] Moreover, it has been pointed out that "when a husband condones his wife's adultery there is no loss of *consortium* in the physical sense, but the adulterer is still liable in damages under this head for it is inevitable that the relationship of husband and wife can never be quite the same as before."[189]

Where there is proof of condonation, however, the court will be cautious to guard against the possibility of collusion. The court will have to be satisfied that the husband is not trading on the wife's dishonour.[190] According to Graham J.P. in *Gradwell* v. *Hayward*[191] although damages may be given when adultery has been condoned, the suspicion of collusion must always be borne in mind and the evidence establishing the adultery must be clearly scrutinized.

(*d*) The Right to Claim Damages from a Female Co-Respondent

There is no authority in the Roman-Dutch law for an action against a female co-respondent. According to old Germanic conceptions the wife was a mere instrument to be used by the husband for the satisfaction of his sexual appetite and for the procreation of children.[192] Consequently, in early German law the wife occupied a subordinate place and was treated more like a chattel than a person. Christianity, however, which had a profound influence on this primitive concept of husband and wife, introduced the idea of equality of the spouses. While this period

188. *Viviers* v. *Kilan* 1927 A.D. 449, *per* Soloman J.
189. *Hare* v. *Hare and Fourie* 1949 N.P.D. 93
190. See *Viviers* v. *Kilan* 1929 A.D. 449; *Gradwell* v. *Hayward* 1923 E.D.L. 324
191. 1923 E.D.L. 324
192. T. B. Barlow "A Wife's Claim to Damages Against a Female Co-Respondent" 1940 (57) *S.A.L.J.* 6

did not witness the recognition of parity of status in all respects it recognised an equal sexual morality for both. Consequently adultery was a ground for divorce for both spouses[193] but the wife was refused an action for *injuria* against a third party adulterer.

The law of South Africa, however recognises the wife's right to sue a female co-respondent for damages.[194] Jones J. declared in *Tutt* v. *Tutt*[195] that "to refuse her redress against the party *albeit* a woman, whose acts have brought about a breaking up of her conjugal happiness and home would be to deprive her of the recognition and protection of her lawful right on inequitable and unsound grounds."[196]

Barlow[197] points out that accepting the principle set out in *Tutt* v. *Tutt* can lead to an anomalous situation if the female co-respondent had been seduced by the husband and she was a *virgo intacta* upto the time of intercourse. The woman, according to the Roman-Dutch law, could claim damages from the married man for seduction, while she in turn would be liable for damages in an action brought by the wife. According to Barlow, while the co-respondent was herself the unfortunate victim of the husband she cannot be guilty of harming the wife. He therefore proffered a solution to this problem and suggested that damages should be awarded against a woman "only when it is clear that she had, by her actions, deliberately or negligently led to the committing of the wrongful act, the *onus* of proof lying on the plaintiff."[198] Barlow also made a distinction between primary and secondary culpability and declared that " a woman is guilty of primary culpability where, without any act on the part of the husband, she deliberately sets out to win his passion and brings about an act of intercourse. She can do this by direct suggestion or by constantly seeking him out and subduing him to her will.

193. Grotius 1.5.18; Voet 24.2.5.
194. *Ex parte du Toit* (1909) 19 C.T.R. 233
195. 1929 C.P.D. 51
196. *id.* at p. 53. This was approved of and followed in *Gair* v. *Gair* 1932 C.P.D. 38; *Rosenbaum* v. *Margolis* 1944 W.L.D. 147
197. Barlow, "A Wife's Claim to Damages Against a Female Co-respondent," p.6
198. *id.* at p. 27

She is guilty of secondary culpability where she perceives that the man is drawn towards her and she takes a course of action that will bring his feelings to a head. This can be done by direct suggestion, by frequently accepting or seeking out his company, or by undue bodily exposure."[199] He thus concluded that when the woman's conduct, which gave rise to the act of adultery, had been pursued deliberately or negligently, she was guilty of culpable adultery and liable to damages.

In *Valken* v. *Berger*,[200] substantial damages were awarded against the co-adulteress who, according to the evidence led, had shown a wanton and flagrant disregard for the rights and feelings of the plaintiff. Ramsbottom J. said "It seems to me that the loss by a woman of her husband, of his affections and of his assistance and support may be greater than the comparative loss which may be suffered by a husband if his wife is taken from him."[201] In *Strydon* v. *Saaymann*[202] Lucas A.J. opined that there was no warrant for a distinction between the claim of a husband and that of a wife for damages against a co-respondent. "A wife suffers injury as a result of her husband's adultery in her social standing if not also economically and the impairment of her right must be held to carry with it the right to redress."

As for the Sri Lankan position on this issue, the former Civil Procedure Code provided that it shall be lawful for a husband to include in his plaint a claim for pecuniary damages.[203] In 1959, however, the Commission on Marriage and Divorce criticised this sex based discrimination and "urged that there should be no distinction between the procedure that should be followed in actions by the husband and wife when the ground was the same, and that a wife should be able to obtain damages from a woman who entices her husband away from her."[204] It was also pointed out that in modern Sri Lanka a married woman had full proprietary rights and hence there was no justification for permitting a woman

199. *id.* at p. 28
200. 1948 (3) S.A. 532
201. *id.* at p. 537
202. 1949 (2) S.A. 736
203. No. 48 of 1954, sec. 598
204. Ceylon Sessional Papers 1959 pp. 210, 214

to commit adultery with impunity. The Administration of Justice (Amendment) Law[205] provided that a co-defendant may be ordered to pay the whole or any part of the cost of proceedings but there was no provision for the recovery of damages from a co-defendant. However, the 1977 enactment[206] declared that both a husband and a wife could make a claim for pecuniary damages against a co-defendant, but the co-defendant would not be obliged to pay damages if the defendant was at the time of the adultery living apart from his or her spouse and leading the life of a prostitute, or if the co-defendant had not at the time of the adultery reason to believe the defendant to be a married person.[207]

B. Malicious Desertion

(i) The Elements of Desertion

Desertion has been defined as a "deliberate and unconscientious, definite and final repudiation of the obligations of the marriage state ... and it clearly implies something in the nature of a wicked mind."[208] Quite unlike adultery, therefore, malicious desertion requires not only the *factum* of desertion but also the required *animus* to repudiate the marital relationship.[209] Moreover, desertion is a continuing offence and, as such, may be terminated at any time on proof of a change of *animus* or *factum*.[210]

Malicious desertion may be broadly divided into two, namely, simple and constructive desertion. The distinction between these two types of desertion involves a difference in the *factum* element

205. No. 25 of 1975, sec. 630 (4)

206. No. 2 of 1899 as amended by Law No. 20 of 1977, sec 599. A.

207. Sec. 612 (1) (2)

208. *Silva* v. *Missinona* (1924) 26 N.L.R. 113 at p. 116 *per* Bertram C.J.

209. See *Panalamma* v. *Arumugam* (1928) 12 Leader L.R.73; *Parpathy* v. *Suppramaniar* (1872-76) Ram.Rep. 72; *Attanayake* v. *Attanayake* (1937)16 C.L.Rec. 206; *Goonewardene* v. *Wickremasinghe* (1932) 34 N.L.R. 5; *Ramalingam* v. *Ramalingam* (1933) 35 N.L.R. 174; *Webber* v. *Webber* 1915 A.D. 239 at p. 246; *Williams* v. *Williams* 1944 O.P.D. 290; *Barnard* v. *Barnard* 1950 (3) S.A.28; *Van Vuuren* v. *Van Vuuren* 1959 (3) S.A.765, *Smith* v. *Smith* 1962(2) S.A.257; *Hopes* v. *Hopes* [1948] 2 All E.R. 920 at pp. 924, 926; *Lilley* v. *Lilley* [1958] 3 All E.R. 528 at p. 532; *Wanbon* v. *Wanbon* [1946] 2 All E.R. 366; *Angel* v. *Angel* [1946] 2 All E.R. 635.

210. See sec. (iii) *infra*

of the offence. While in simple desertion, the deserting spouse leaves the matrimonial home, in constructive malicious desertion, the innocent spouse is obliged to leave as a direct consequence of the expulsive acts of the other.[211] Barnes J., succinctly stated in *Sickert* v. *Sickert*[212] that "There is no substantial difference between the case of a husband who intends to put an end to a state of cohabitation and does so by leaving his wife, and that of a husband who with the like intent obliges his wife to separate from him." So long as the essential ingredient of desertion, namely, a cessation of cohabitation accompanied by an intention to terminate the marital relationship is proved it is immaterial to determine who actually left the matrimonial home.[213] "It does not matter, therefore, on which side of the front door, so to speak, the spouses are found when they part."[214]

Simple desertion may be of three types:

(*a*) where the deserting spouse leaves the matrimonial home with the fixed intention of terminating the marriage;

(*b*) where the parties have separated either by volition or compulsion and one spouse is responsible for the onset of a supervening *animus*, not to rejoin the other in the common household; or

(*c*) where one spouse manifests an intention to desert either by the use of expulsive words or deeds coupled with the cessation of cohabitation, but neither of the spouses leaves the matrimonial home due to exigencies beyond their control.[215]

It must be pointed out that the *factum* of desertion has an important bearing on the burden of proof for desertion. To explain

211. *Rayden's Practice and Law of Divorce*, (10th ed., London 1967) 194 at p. 204; H. R. Hahlo, *op. cit.* p. 391

212. [1899] P. 278 at p. 282

213. *ibid.*

214. *Lane* v. *Lane* [1951] P. 284 at p. 286, *per* Lord Merriman P.

215. In this situation, if one spouse was forced to terminate cohabitation because of the conduct of the other, there would be constructive malicious desertion, although both spouses physically remain in the matrimonial home.

this further, when a spouse leaves the matrimonial home there is a *prima facie* inference that that spouse had the required *animus deserendi*.[216] The onus is then on that spouse to rebut this presumption by proof of *justa causa*[217] in the absence of which actual desertion will be established. In the case of constructive malicious desertion, on the other hand, the spouse out of possession must show that the other spouse had acted with the fixed intention of putting an end to the marriage.[218]

It must be pointed out that although malicious desertion consists of the two elements of *factum* and *animus* it is not always possible to see these two elements as distinct and separate components of desertion. In certain instances it is possible to identify and distinguish between these two elements. For instance, in a situation in which the deserting spouse verbally or in a written statement conveys to the other spouse an intention to terminate cohabitation, the *animus* of the deserting spouse would be manifest and the *factum* may be satisfied by the deserting spouse leaving the matrimonial home, as in simple desertion, or by obliging the other to depart, as in constructive desertion. In the Sri Lankan case *Attanayake* v. *Attanayake*[219] the plaintiff had been taken to her mother's house by the defendant subsequent to a quarrel, and left there. At a later date the defendant wrote a letter to the plaintiff's mother in which he accused his wife of adultery and declared: "I do not require your adulterous daughter." According to Poyser J. the defendant had shown a deliberate intention to repudiate the marriage and since the *factum* of desertion too had been established, a divorce was granted.

In *Lane* v. *Lane*[220] the court observed that words of expulsion which are intended to be final, conclusive and effective are the strongest evidence of desertion; provided it is established that the words used, in the circumstances of the particular case, are remarkably capable of bearing an expulsive meaning. The *animus* component of desertion would then be manifest.

216. H. R. Hahlo, *op.cit.* p. 393; *Van Vuuren* v. *Van Vuuren* 1940 N.P.D 170
217. *Williams* v. *Williams* 1940 O.P.D. 290
218. H. R. Hahlo, *op.cit* p. 393
219. (1937) 16 C.L.Rec. 206
220. [1951] P. 284. See also *Buchler* v. *Buchler* [1946] P.25

It is also possible to isolate the physical and mental elements of desertion in a situation where the *animus deserendi* supervenes at a time when the parties are already living apart. It is evident from a perusal of the case law that where one spouse is living away from the matrimonial home it is unimportant, for the purposes of establishing desertion, to ascertain the initial reason for the separation. Consequently, whether they are leading separate lives on account of a mutual agreement or due to force of circumstances, if an intention to put an end to the marriage is manifested, desertion will be established.[221] In *Snoek* v. *Snoek*[222] the parties had agreed to separate to enable the plaintiff to go overseas for purposes of study. Subsequently, the defendant, for no apparent reason, ceased to correspond with the plaintiff, and in a telephone conversation with the plaintiff had informed him that she had no intention of ever receiving the plaintiff when he returned. The court held that the *de facto* desertion had been converted into malicious desertion by the supervening *animus deserendi*. Moreover it was asserted that in such a situation a previous resumption of cohabitation was not a necessary prerequisite.[223]

The legal position involved is no different if the original separation was compulsory. In *Castle* v. *Castle*[224] the plaintiff was away on active service in Europe when he received a letter from his wife saying that she would never live with him again on his return and in *Marais* v. *Marais*[225] the defendant while in a leper institution informed the plaintiff that he would not resume married life with her when his health was restored. In both cases the court held that there was proof of malicious desertion.[226] It is evident, then, that desertion which "is not the withdrawal from a place, but from a state of things"[227] can be established by writing a letter or verbally. So long as an intention to terminate cohabitation is manifested, desertion is constituted notwith-

221. See *Canekeratne* v. *Canekeratne* (1961) 66 N.L.R. 380
222. 1950 (3) S.A. 746
223. See *Pardy* v. *Pardy* [1939] 3 All E.R. 779 at p. 782
224. (1918) N.P.D. 306
225. (1938) G.W.L.D. 21
226. See also *Elgar* v. *Elgar* 1942 E.D.L. 156; *Aldred* v. *Aldred* 1929 A.D. 356; *Odendaal v. Odendaal* 1942 T.P.D. 116
227. *Pulford* v. *Pulford* [1922] P. 18 at p. 21, *per* Sir Henry Duke

standing the fact that the spouses had originally separated due to compulsion or by volition.[228] Moreover, it has also been asserted that there is no material difference in law between a situation in which the compulsory separation of the spouses already existed at the time the alleged desertion occurred and one where the compulsory separaration of the spouses supervened after desertion had been established. [229]

Considerable difficulty however arises in situations where desertion is alleged although the parties continue to remain in the matrimonial home performing some of the obligations of marriage. It then becomes necessary to distinguish between obligations that are fundamental to a proper marital relationship and those which are relatively unimportant to ascertain the existence of an *animus deserendi* as well as the fact of separation.

In an early Sri Lankan case[230] there was proof of the husband's abstention from conjugal intercourse but the parties lived together in the matrimonial home. According to Cayley C.J. whether the denial of conjugal rights is of such a pertinacious character as to amount to desertion must in any particular case depend upon the evidence of all the circumstances of the case. In this case he opined that the relationship between the spouses had in any event reached an unhappy state and consequently "the usual consortium of husband and wife might have been intolerable to the one as to the other"[231] and as such the cessation of conjugal relations *per se* was thought to be insufficient to prove the *factum* and *animus* of desertion.

In *Sinnethamby* v. *Annammah*[232] the wife alleged constructive

228. See *Beeken* v. *Beeken* [1918] P. 302

229. However, a mere *de facto* separation with no further indication of an *animus* to desert will not constitute desertion. In *Parpathy* v. *Suppramaniar* (1872-76) Ram. Rep. 72, the parties had been living apart for six years having cohabitated only for two months after marriage. Nevertheless, Creasy C.J. refused to grant a divorce on the ground of malicious desertion on the reasoning that some positive evidence of an intention to discard the other spouse was not forthcoming.

230. D. C. Colombo No. 80,966 (1881) 4 S.C.C. 107

231. *id.* at p. 108

232. (1951) 55 N.L.R. 349

malicious desertion by the husband on the assertion that he had intentionally ceased to have a conjugal relationship with her. However, she too admitted to not having agreed to sexual intercourse. In the circumstances the court declared that the legal concept of constructive malicious desertion was not involved in a husband's alleged lack of interest in a mutual matrimonial relationship which the wife herself admittedly disdained. If, however, there was evidence of non-consummation of a marriage without just cause desertion would be established.[233]

In *Gunawathie de Silva* v. *Rajapakse*[234] the plaintiff sued his wife for divorce on the ground of malicious desertion but according to the evidence led the defendant had shown no objection to cohabiting with the plaintiff and, in fact, intercourse had taken place upto almost the very day of the alleged final act of desertion. Consequently, the court held that there was no evidence that the defendant intended to bring the marriage to an end. *Rajeswararanee* v. *Sunthararasa*[234a] involved an action for divorce on the ground of malicious desertion. There was evidence that the spouses had lived apart from one another but the reason for this *de facto* separation was their inability to find suitable accommodation, that is a place acceptable to both parties. Although they were anxious to resume their conjugal life, each was unwilling to reside with the other's relatives and, consequently, they had lived apart. In the circumstances the court held that malicious desertion was not proved.

In *Weatherley* v. *Weatherley*[235] the parties were living together in the matrimonial home when the wife for no valid reason refused to have sexual intercourse with her husband. She continued, however, to perform her other wifely duties such as cooking the meals and accompanying her husband to social functions. When the husband alleged malicious desertion, the House of

233. See *Mohitiappu* v. *Kiribanda* (1923) 25 N.L.R. 221; *Wijeratne* v. *Wijeratne* (1946) 47 N.L.R. 324; *Horton* v. *Horton* [1947] 2 All E.R. 871. *cf. Baxter* v. *Baxter* [1947] 2 All E.R. 886; *Sinnattankam* v. *Kantar Vairamuttu* (1901) 2 Bronne's Rep. 138

234. (1963) 68 N.L.R. 477

234a. (1962) 64 N.L.R. 366

235. [1947] 1 All E.R. 563

Lords held that so long as cohabitation was continuing a mere refusal by a spouse to have sexual intercourse could not constitute desertion. In *Wanbon* v. *Wanbon*,[236] however, in addition to a cessation of sexual relations, the wife had also ceased to perform her normal functions as a wife, and the court concluded that there was sufficient evidence of an *animus* to repudiate the married life. Although the parties continued to remain in the matrimonial home, proof that they lived separate lives was held to be sufficient to constitute desertion. Likewise, in *Hattingh* v. *Hattingh*[237] although the parties physically lived under the same roof, the wife had ceased to perform any of her marital obligations and Broome J. concluded that her refusal to be a wife to the plaintiff showed a fixed determination to bring the marriage to an end. It was pointed out that having regard to the age of the parties the repudiation of sexual obligations was not of primary importance as it would be in the case of a younger couple. Nevertheless, the defendant's neglect was held to undermine the whole marital relationship and she was said to be guilty of malicious desertion.

In an overall evaluation of the case law on this point it is clear that the fact that the spouses are residing together in the matrimonial home does not negative the *factum* of desertion. The function of the court, in such a situation, is to determine the relative importance of the acts complained of as items of evidence to support an inference of desertion. As Lord Denning pointed out in *Hopes* v. *Hopes*[238] proof that the wife is residing in the husband's home is not evidence of her residing with the husband. In this case the husband partook of his meals with the rest of the family and he shared the living room with them, although the wife had ceased to have sexual intercourse with him and had ceased to perform her other duties as a wife. The Court of Appeal held that there was sufficient evidence to establish desertion.[239]

236. [1946] 2 All E.R. 233
237. 1948 (4) S.A. 727
238. [1948] 2 All E.R. 920
239. See also *Smith* v. *Smith* [1939] 4 All E.R. 533; *Jackson* v. *Jackson* [1924] P. 19; *Naylor* v. *Naylor* [1961] 2 All E.R. 129; *Ball* v. *Ball* [1953] 2 All E.R. 601; *Angel* v. *Angel* [1946] 2 All E.R. 635; *Everitt* v. *Everitt* [1949] 1 All E.R. 908.

It is manifest therefore that while in some instances a clear distinction between the *factum* and *animus* of desertion is discernible, there are situations in which, although the *factum* component in the sense of a physical separation of the spouses, is not established, desertion may nevertheless be proved if on an evaluation of all the circumstances of the case it is clear that a final repudiation of the marital relationship was intended. Therefore, the *animus* of desertion assumes considerable importance, and is undoubtedly the more important ingredient to be proved when alleging desertion.

(ii) The Animus Descrendi

The vexed question to be decided here is whether a man must be presumed to have intended the consequences of his acts or whether the courts are expected to delve into the mind of the wrongdoer to ascertain his true intention. Indeed, this distinction involves the perennial choice between an objective and subjective criterion when deciding on the required *animus*, and this subject has given rise to much judicial controversy. The factual situation of the case at hand is of primary importance, and hence it is an area which requires the exercise of judicial discretion. It has therefore been asserted that when evaluating the conduct of the parties "every ingredient should be taken into consideration, such as the pecuniary means and social position of the parties, their habits and customs, the primary cause of the defendant's absence, under what circumstances he or she left, to or from what place, to a great distance or close by, to a foreign country or not, to a civilised country or a barbarous or sparsely populated one, the means of communication, the cause of the continued absence, the correspondence or not between the parties, the contribution by the one towards the other's support; also the effort made by either to induce the other to return, or by a husband to induce his wife to follow him or the means adopted, or steps taken by the innocent party to discover the whereabouts of the other, the unexplained absence and the defendant's silence."[240]

240. See Van Zyl's Judicial Practice, (Vol.11) pp. 662-663

In all instances, then, when the facts of a case have to be examined, to determine the intention of the parties, the difficulty of making a choice between the two widely differing criteria will surface. According to Professor Goodhart[241] when there is literal desertion there are no perplexing problems concerning the *animus deserendi* "because although the deserting spouse does not always express his or her intention in precise terms, this is usually self-evident from the act itself. The popular statement that actions speak louder than words has been translated by the law into the words that 'a man is presumed to intend the natural and probable consequences of his acts.' If we did not accept this presumption in ordinary life, we would have difficulty in explaining human conduct on rational grounds."

It is submitted, however, that it is difficult to see the difference between the situation set out above and one where a spouse leaves because of the desertion of the other. In other words, at first sight, in both instances one party is physically out of the matrimonial home. It is only on a further analysis that it is possible to declare that while in the case of constructive malicious desertion the spouse left *justa causa*, in the case of actual desertion there was no such justification. Of course the burden is on the spouse out of the matrimonial home to prove a *justa causa* in order to assert constructive desertion. Of course, it has been said that while "in the case of actual desertion the intention to bring the relationship permanently to an end will be only too apparent, in the constructive desertion situation it will generally be less so."[242]

Proof of *justa causa*, therefore, is the all important ingredient upon which hinges the success of a plea of constructive desertion rebutting the presumption of desertion drawn by the fact of leaving the matrimonial home. For instance, in *Silva* v. *Carlinahamy*[243] the defendant alleged the plaintiff's adultery as the reason for her desertion, but the court was not satisfied as to the validity of this ground because the plaintiff was an old man of 70 and the

241. A.L. Goodhart "Constructive Desertion" 1955(71) *L.Q.R.* p. 32
242. Frank Bates, "*Animus Deserendi* in Constructive Desertion" 1970 (33) *M.L.R.* p. 144
243. (1922) 23 N.L.R. 344

defendant a young woman and the District Judge reasoned that it was doubtful that an old man would fail to find satisfaction with the defendant and misbehave himself with a domestic servant. Consequently, the court held that *justa causa* had not been proved and as such the defendant was guilty of desertion.[244] Likewise, in *De Mel* v. *De Mel*[245] the husband suspected his wife of having committed adultery and ordered her to leave and refused to be reconciled with her unless she gave a written confession of adultery. The court held that the allegation of adultery was unfounded, and, consequently, he was found to be guilty of malicious desertion.

In *Wickremasuriya* v. *Samarasuriya*[246] the wife sought a dissolution of marriage on the allegation of acts of cruelty by the husband. The Privy Council accepted the evidence of cruelty as being sufficient to compel the wife to leave the matrimonial home. *Babunona* v. *Albin Kemps*[247] was an interesting case which involved acts of misconduct by both spouses. According to the evidence, the plaintiff was involved in an adulterous union with a woman who gave birth to his child. The defendant then assaulted the plaintiff and caused him injuries which required him to be hospitalised for some days. Subsequently, the defendant left the matrimonial home. Indeed there was evidence of cruelty on the part of the defendant, but Weerasooriya S.P.J. declared that those acts of cruelty did not render cohabitation with the defendant intolerable "for he (the plaintiff) had already by his own misconduct with Heen Nona rendered cohabitation intolerable for the defendant."[248] On the reasoning, then, that cruelty by one spouse, which was of such a nature as to make cohabitation intolerable for the other, amounted in law to constructive malicious desertion by the offending spouse, the plaintiff was held to have been responsible for the defendant's departure.[249]

In this connection it must be pointed out that the courts are generally faced with the choice of evaluating the conduct of the

244. See also *Glenister* v. *Glenister* [1945] P.30
245. (1951) 54 N.L.R. 91
246. (1965) 68 N.L.R. 155
247. (1962) 67 N.L.R. 183
248. *id.* at p. 185
249. See also *Ariyapala* v. *Ariyapala* (1963) 65 N.L.R. 453

spouse either from a subjective standpoint, in which case notwithstanding the fact that a spouse had departed from the matrimonial home, if it can be proved that he did not in fact intend to bring conjugal life to a permanent end malicious desertion would not be established, alternatively of looking at the facts from the point of view of the reasonable man and concluding that irrespective of his actual state of mind, if a hypothetical reasonable man was deemed to have intended to desert his spouse, the particular defendant was guilty of desertion.

In the English law Lord Denning declared that "There are at present two schools of thought about constructive desertion. One school says that, in constructive desertion, as in actual desertion, a husband is not to be found guilty, however bad his conduct, unless he had in fact an intention to bring the married life to an end. This school admits that there are many cases where he may be presumed to have that intention. For instance, when a husband deliberately makes his spouse's life unbearable, he may be presumed to have intended to drive her out, because he must be presumed to have willed the natural consequences of his acts. But this school says that if in truth the facts negative any intention to bring the married life to an end, the courts should not attribute to him an *animus* to desert. For instance, the conduct of a habitual criminal or a habitual drunkard may be so bad that his wife is forced to leave him; but he may be devoted to her, and the last thing he may intend is that she should leave him. In such a case this school of thought would hold that there is no desertion. The other school of thought does lip service to the necessity for such an intention, but says that, even if the husband had no intention in fact to bring the married life to an end, yet he is conclusively presumed to have intended the natural consequences of his act; and if his conduct is so bad or so unreasonable that his wife is forced to leave him, he must be presumed to have intended to leave, and he is guilty of constructive desertion, however much he may, in fact desire her to remain."[250]

250. *Hosegood* v. *Hosegood* [1950] 66 T.L.R. (Pt.1) 735. See also *Pike* v. *Pike* [1953] 1 All E.R. 232 where the subjective test was applied and *Sickert* v. *Sickert* [1899] P. 278. *Edwards* v. *Edwards* [1948] 1 All E.R. 157; *Simpson* v. *Simpson* [1951] 1 All E.R. 955 where the objective criterion was favoured.

In the leading Privy Council case *Lang* v. *Lang*[251] the husband had grossly ill-treated his wife who then left and resisted all subsequent efforts on the part of the husband to persuade her to return. Lord Porter, delivering the judgment of the Board, declared that *prima facie* a husband who treated his wife with gross brutality must be presumed to have intended the consequences of his acts though the inference may be rebutted; and if the whole of the husband's conduct was such that a reasonable man must have known that it would probably result in the departure of his wife from the matrimonial home, the fact that the husband did not wish this consequence to ensue did not rebut the inference that he intended the probable consequences of his acts and thus intended his wife to leave the house; in the present case, the husband must have known that his conduct would necessitate his wife leaving if she acted as a reasonable being and, therefore, he had constructively deserted her.

On the basis of this judgment it is proposed to discuss the following issues:

(*a*) The definition of intention and its relationship to the concepts of desire and knowledge.

(*b*) The *animus* of the defendant. That is, should the defendant foresee the consequences of his acts in relation to "his" spouse or the "reasonable" spouse?

(*a*) Intention and Knowledge

According to Dias,[252] in law there are three connotations of the word intention:

(i) intention for the act committed;

(ii) intention for the ultimate consequences;

(iii) intention for the particular result of the given action.

251. [1954] 3 All E.R. 571.
252. R.W.M. Dias, *Jurisprudence* (3rd ed., London 1970) p. 287

The third connotation involves the concept of foresight because a person is deemed to intend only the foreseeable consequences of his acts. Foresight may be actual, which as Dias points out is difficult to prove, because even an admission may not be true, or it may be imputed. Imputed foresight in turn involves knowledge, which may be actual or constructive. Constructive knowledge is imputed when it is shown that a person has deliberately abstained from taking steps to inform himself of the relevant circumstances.[253] In relation to the concept of desire it has been generally accepted that it is irrelevant to the imputation of an intention.[254] So long as foresight is established responsibility will attach irrespective of whether the result was desired or not.[255]

It is significant that in the English law the word intention has been used to convey one or more of the different meanings attached to it without distinguishing between the different connotations subsumed in this general concept. This is perhaps best illustrated in the oft relied on proposition that a man is presumed to intend the natural and probable consequences of his act. It is evident that this cannot be accepted without qualification because it is obviously not meant to entail liability in a situation in which the consequences were not foreseen either subjectively or objectively, and where the nature of the acts committed were not grave and compelling. If we then accept the importance of foresight we are in effect treating the presumption as a rebuttable one.[256] Moreover, the nature of the acts assume considerable importance. For instance, if the acts complained of are those of gross brutality and if an intention to commit those acts is established it is more likely than not that the wrongdoer intended to rupture the marital tie. This will be treated as an inevitable consequence of an intended act. However, even this presumption can be rebutted, not necessarily by proof of the absence of a desire for the consequences,[257]

253. *id.* at p. 289

254. See *Gollins* v. *Gollins* [1963] 2 All E.R.pp. 966, 974; *Lang* v. *Lang* [1954) 3 All E.R. 571, *Harriman* v. *Harriman* [1909] P. 123 at p. 148; *Kinnane* v. *Kinnane* [1953] 2 All E.R. 1144.

255. Dias, *op.cit.* p. 289

256. *Simpson* v. *Simpson* [1951] 1 All E.R. at p. 962.

257. See Lord Porter, in *Lang* v. *Lang* [1954] 3 All E.R. 571 at p. 579

but rather by evidence of the lack of knowledge and, therefore, foresight of the natural and probable consequences of the act. This indeed would be an acceptable defence.[258] According to Lord Porter in *Lang* v. *Lang*,[259] "If the husband knows the probable result of his acts and persists in them, in spite of warning that the wife will be compelled to leave the home and, indeed, as in the present case, has expressed an intention of continuing his conduct and never indicated any intention of amendment, that is enough, however passionately he may desire or request that she should remain." It is clear, therefore, that where there is proof of actual knowledge an intention is inferred. Consequently, it would be a defence to plead that the defendant did not in fact know that his wife would leave him.

This leads us then to the next question, namely, whether in these circumstances it is necessary to proceed further and to ascertain whether the defendant should have known or in other words, should have foreseen that the natural and probable consequences of his acts would be the desertion of his wife. Alternatively, we are faced with the objective criterion according to which, once the intention to commit the act is proved, there would be an irrebuttable presumption that a reasonable man would have entertained an intention to bring about the particular consequence, and, as such, the defendant, too, is invested with this intention. Goodhart[260] points out that the reference to intention in this situation is "only a form of window-dressing as his intention is immaterial." Referring to the judgment of Lord Porter in *Lang* v. *Lang* he opined that it was not clear which of the two tests was adopted in that case. According to Lord Porter, "what legal inference is to be drawn when the whole of the husband's conduct is such that a reasonable man would know, that the particular husband must know, that in all human probability it will result in the departure of the wife from the matrimonial home," and Goodhart queries "Does this mean that the husband 'must know'

258. *id.* at p. 580

259. [1954] 3 All E.R. 571

260. "Cruelty, Desertion and Insanity in Matrimonial Law" 1963 (79) *L.Q.R.* 98 at p. 110

or that reasonable foresight is sufficient?"[261] In *Lang* v. *Lang*, Lord Porter declared that, in that case, the appellant must have known that what he was doing would necessitate her withdrawal if she acted as any reasonable creature would, and Goodhart queries whether "it is still open to a husband to prove that he was so obtuse and insensitive that he had failed to recognise the gravity of the effect of his behaviour although a reasonable man in his circumstances would have done so"[262] and he concludes that it is not clear why this compromise between the two conflicting schools has been adopted. It is submitted, however, that the situation envisaged above would not arise if we accept that constructive knowledge, in the sense that if a person deliberately abstains from taking steps to inform himself of the relevant circumstances, he is liable, is adopted. Of course, even then, if it is proved that the defendant's weak and sanguine temperament caused him to entertain the *bone fide* belief that his wife would indulgently put up with his conduct, malicious desertion would not be established. In practical terms, however, it is more likely than not that the wife will voice her intention to leave and thus give her husband sufficient warning. If then, inspite of this he persists in his conduct he cannot plead ignorance or stupidity in not comprehending the consequences of his acts.

It is submitted, however, that this is a necessary outcome of a system that requires the court to apportion fault to one spouse as a prerequisite for the dissolution of marriage and it is not an inherent defect in the tests adopted. Moreover, it must be pointed out that the imputation of constructive knowledge would certainly avert the plea of a defence to the effect that the husband was cruel to his wife because he was a sadist and not because he wished to drive her out of the matrimonial home. It is clear, therefore, that within the framework of a jurisdiction which emphasises the need for blameworthy conduct, a purely objective criterion which would inevitably be a "window dressing" for intention, finds no place.

261. *id.* at p. 113. See also *Bain* v. *Bain* (1923) 33 C.L.R. 317, at p. 325; *Baily* v. *Baily* [1884] 13 Q.B.D. 855

262. "Constructive Desertion" 1955 (71) *L.Q.R.* 32 at p. 36

Indeed, the South African decisions are clearly in favour of the adoption of a subjective evaluation of intention. In *Feldman* v. *Feldman*[263] Watermeyer C.J. declared that care should be taken not to allow an elastic application of the maxim that a man is presumed to intend the natural consequences of his acts to enlarge the meaning of the word desertion until it includes all unlawful conduct which renders cohabitation dangerous or intolerable and thus to blur, or even to obliterate, the distinction between conduct which entitles a spouse to a decree of divorce and behaviour which entitles a spouse to a judicial separation.[264]

In *Froneman* v. *Froneman*,[265] Colman J. declared that he was unable to accept the contention that the test for constructive malicious desertion is an objective one and he went on to say that the *animus* of the defendant may be an *animus directus*, in the sense of a positive intention to put an end to cohabitation, or may be a *dolus eventualis* in the sense of a knowledge by the defendant that the probable or possible effect of his conduct would be a termination of cohabitation coupled with a wilful disregard of that probability or possibility. It is submitted that this definition of *dolus eventualis* is akin to the concept of recklessness which is sufficient to entail liability.[266]

It must be pointed out that although the South African decisions appear to have favoured a subjective criterion of actual knowledge, there is no evidence of the use of the doctrine of constructive knowledge. For instance, in *Belfort* v. *Belfort*[267] the court held that although there was evidence that the appellant had made a bad bargain in husbands, she had failed to discharge the *onus* of proving the required intention on his part since she was unable to ascribe to the respondent knowledge of the consequences of his acts. Likewise in *Froneman* v. *Froneman*[268] the court held

263. 1949 (3) S.A. 493 at p. 504
264. *id.* at p. 504. See also *Belfort* v. *Belfort* 1961 (1) S.A. 257; *Daniels* v. *Daniels* 1958 (1) S.A. 513 at p. 532; *Collins* v. *Collins* 1939 W.L.D.48 at p. 53
265. 1972 (4) S.A. 197
266. R.W.M.Dias, *op.cit* chapter 10
267. 1961 (1) S.A. 257
268. 1972 (4) S.A. 197

that despite the sympathy for the plaintiff who had suffered considerable unhappiness by reason of the defendant's conduct, their married life being ridden with drink, neglect, deceit and broken promises, she was not granted a divorce because there was no evidence that the husband ever visualised her departure. It must be pointed out that this purely subjective requirement of intention has been favoured on the reasoning that "the granting of a divorce is a matter of public policy and that the policy of the courts is to uphold the sanctity of marriage and not lightly to put an end to what is the very foundation of the most important unit of our social life, the family."[269]

According to Hahlo, if a spouse by his conduct deliberately makes his partner's life unbearable, the *prima facie* inference is that he had the intention to end cohabitation. Of course the more heinous the defendant's acts the more difficult it will be for him to prove that he did not intend them. It must be pointed out that in the South African law, matrimonial misconduct is no more the basis of divorce, proof of a breakdown of the relationship being sufficient to obtain a dissolution of the marriage.[270] Consequently the South African position discussed above is only of historical value.

(*b*) The 'Particular Spouse' as Opposed to the 'Reasonable Spouse'

The next issue to be decided is the relevant criterion to be used when ascertaining whether the particular husband foresaw or should have foreseen the desertion of his wife. In other words, can a husband plead in defence that although a reasonable woman would have terminated the marriage in the given circumstances, he did not envisage his wife reacting the way she did. It is submitted that in this situation the husband's foreseeability range should be confined to that of his spouse. In other words, irrespective of what a reasonable person would have done in those circumstances, if the defendant knew that his wife would react in a particular manner then the required *animus* would be satisfied. The

269. *Belfort* v. *Belfort* 1961 (1) S.A. 257 at p. 259, *per* Hoexter J.
270. See Divorce Act No. 70 of 1979

ultimate test then is whether this husband knew that this wife would not tolerate his conduct.[271]

(iii) Termination of Desertion

Unlike adultery, which is a complete offence and which, once committed, is sufficient to terminate a marriage, desertion is by its very nature a continuing offence and as such, the courts have required proof of the permanent quality of the alleged desertion as an essential prerequisite for accepting it as a ground for divorce.[272] Positive evidence of a settled intention to rupture the conjugal relationship is perhaps best illustrated by proof of abortive efforts at reconciliation. But the courts are wary of any unreasonable offer of a resumption of marital life which may have as its sole objective the denial of relief to the innocent spouse. Moreover, if the deserting spouse makes an offer to return which is rejected by the other spouse, the tables will be turned and the other spouse will become the one guilty of desertion. Therefore, it is imperative that the offer to return is a genuine one and as such essential ingredients of the *animus revertandi* are proof that the offer was made *bona fide* and *justa causa*.[273] In *Muthukumarasamy* v. *Parameshwary*,[274] Justice Sharvananda declared that "termination of desertion can take place by a supervening *animus revertandi*, coupled with a *bona fide* approach to the deserted spouse with a view to resumption of life together;"[275] and that a deserted spouse must always, until presentation of his or her plaint, affirm the marriage and be ready to take back the deserting spouse. According

271. See *Buchler* v. *Buchler* [1947] 1 All E.R. 319 at p. 326. *Hall* v. *Hall* [1962] 3 All E.R. 518 at p. 524; *Saunders* v. *Saunders* [1965] 1 All E.R. 838

272. See M.Nathan, *Common Law of South Africa*, (2nd ed. vol.1) 306 *Gibbon* v. *Gibbon* (1822) 2 E.D.C. 280; *Silva* v. *Missinona* (1924) 26 N.L.R. 113

273. *Attanayake* v. *Attanayake* (1937) 16 C.L.Rec. 206; *Silva* v. *Carlinahamy* (1922) 23 N.L.R. 344; *Silva* v. *Missinona* (1924) 26 N.L.R. 113; *Ramalingam* v. *Ramalingam* (1933) 35 N.L.R. 174. *Canekeratne* v. *Canekeratne* (1961) 66 N.L.R 380; *De Mel* v. *De Mel* (1951) 54 N.L.R. 91; *Gunawathie de Silva* v. *Rajapakse* (1963) 68 N.L.R. 477; *Muthukumarasamy* v. *Parameshwary* (1976) 78 N.L.R. 448. For the English law see *Gaskell* v. *Gaskell* [1963] 108 Sol. Jo. 37; *Trevor* v. *Trevor* [1965] 109 Sol Jo. 574; *Ware* v. *Ware* [1942] P. 49; *Wells* v. *Wells* [1954] 3 All E.R. 491; *Pratt* v. *Pratt* [1939] 3 All E.R. 437; *Hutchinson* v. *Hutchinson* [1963] 1 All E.R.1; *Barrett* v. *Barrett* [1948] P. 277; *Fletcher* v. *Fletcher* [1945] 1 All E.R. 582

274. (1976) 78 N.L.R. 488

275. *id.* at p. 493

to the facts of this case there was doubt whether the defendant was in fact guilty of malicious desertion in the first instance. However, there was evidence that the defendant had voluntarily returned to the matrimonial home and as such the court held that by this act she had purged herself of her fault, if any, and since the plaintiff had refused to be reconciled with the defendant, it was the plaintiff and not the defendant who was guilty of malicious desertion.[276] Sansoni J. in *Canekeratne* v. *Canekeratne*[277] defined a genuine offer at reconciliation thus: "It is only genuine if there is a 'fixed and settled intention to offer a resumption of marital life under reasonable conditions,' and it will not be a fixed and settled intention if it is a mere 'fluctuating desire to resume cohabitation'."[278] In *De Mel* v. *De Mel*[279] the husband had ordered his wife to leave the house on an unfounded charge of adultery and he maintained that a reconciliation was possible only if the wife confessed to adultery in writing. The court rightly pointed out that this manifestly unfair condition of a reunion vitiated the genuineness of the offer and hence desertion was established.

It must be pointed out that just as much as desertion requires evidence of a *factum* and *animus* proof of the termination of desertion, too, requires that the parties resume cohabitation with the required intention to restore the *status quo ante*. Hence, it becomes necessary to determine the essential features of a resumption of cohabitation. Since desertion requires a cessation of the common life, an *animus revertandi* must be manifested by " a living together in the matrimonial home."[280] This, however, is very much a question of fact. No comprehensive definition of a termination of desertion is possible, and the courts have decided this issue on an evaluation of circumstantial evidence including the history of the marital relationship, the reasons for the initial cessation

276. For the South African law see *Serfontein* v. *Serfontein* 1974 (1) S.A. 287 For the English law see *Thomas* v. *Thomas* [1946] 1 All E.R. 170; *Joseph* v. *Joseph* [1939] P. 385; *Pratt* v. *Pratt* [1939] 3 All E.R. 437

277. (1961) 66 N.L.R. 380

278. *id.* at p. 382

279. (1951) 54 N.L.R. 91

280. See P.M. Bromley, *op.cit.* p. 210. See also *Abercrombie* v. *Abercrombie* [1943] 2 All E.R. 465; *Lowry* v. *Lowry* [1952] 2 All E.R. 61; *Bartram* v. *Bartram* [1949] 2 All E.R. 270; *Watson* v. *Tuckwell* [1947] 63 T.L.R. 634

and the manifestation of the intention to re-establish the marital tie. Several English and South African cases have had to decide whether proof of sexual intercourse is satisfactory evidence of a termination of desertion. The consensus of judicial opinion on this point has been that while sexual intercourse is an important incident of the marital relationship proof of this *per se* is not sufficient in the absence of other evidence to establish a resumption of cohabitation.[281] What is required is proof of "a bilateral intention on the part of both spouses to set up a matrimonial home together,"[282] and if this *animus* is satisfactorily established by proof of sexual intercourse, then the required *animus revertendi* may be proved.[283] However, the mutual obligations of the spouses go far beyond that of physical cohabitation,[284] and hence this particular item of evidence must be viewed in relation to other factors such as the age of the parties,[285] the place where the parties were residing[286] and the frequency of the physical relationship alleged.[287] Lord Merriman queried,[288] "Does coming together for a single night raise an irrebuttable presumption that the parties have resumed cohabitation even for that short time? ... I think that it would lead to an absurd state of things if one were bound to hold that that is so."

Of course the inevitable consequence of accepting a liberal attitude towards evidence of sexual intercourse is that it may well give rise to a situation in which the husband, who for instance is the deserter, is allowed to treat his wife as a mistress, "an act as shocking to the law as it is to morality and religion,"[289] but it is submitted that this is an unavoidable evil which has to be tolerated in order that justice be done by dissolving a marriage only when desertion is established and refusing a termination of a relationship that signifies some hope of survival. Since desertion

281. *Perry* v. *Perry* [1952] 1 All E.R. 1076
282. *Mummery* v. *Mummery* [1942] 1 All E.R. 553, *per* Lord Asquith
283. See *Ainsbury v. Ainsbury* 1929 A.D. 109; *King* v. *King* 1947 (2) S.A. 517
284. *King* v. *King* 1947 (2) S.A. 517 at p. 522
285. *Perry* v. *Perry* [1952] 1 All E.R. 1076, at p. 1082
286. *Lowry* v. *Lowry* [1952] P. 252 at p. 258
287. *Mummery* v. *Mummery* [1942] 1 All E.R. 553
288. *id.* at p. 555
289. *Burk* v. *Burk* (1883) 21 West Virginia Rep. 445 at p. 453

is a matrimonial fault it is vitiated by the consent of the innocent spouse,[290] or by the commission of a fault by the other spouse,[291] which will then give the deserting spouse a good cause to live apart.

In keeping with the policy of requiring an attempt at reconciliation, prior to the termination of the marriage, the South African law provides the plaintiff with an action for the restitution of conjugal rights as a preliminary to an action for divorce.[292] Failing compliance with this order a decree of divorce is granted.

While the Sri Lankan law does not have an action for restitution of conjugal rights, the same objective is sought to be achieved by the procedure set out in the Civil Procedure Code[293] according to which any action for divorce is in the first instance a decree *nisi* which is not made absolute until after the expiration of not less than three months from the date of entering the decree.[294] The court has the discretion to extend the period and in *Silva* v. *Missinona*[295] Bertram C. J. declared that the period of three months, before it is made absolute, is only a minimum period, "and in cases of malicious desertion this preliminary period should in my opinion, be substantially longer and we should give effect to the principles of the Roman-Dutch law by holding that in cases of malicious desertion the object of this interval is to allow an opportunity for reconciliation, and that the decree should not be made absolute, unless it appeared that the complaining spouse had, in the interval, provided a reasonable opportunity for the resumption of married life and that this had been contumaciously and unreasonably refused by the other party."[296] The power of the court to make a decree *nisi* absolute has been the subject of

290. *Sifton* v. *Sifton* [1939] 1 All E.R. 109
291. *Richards* v. *Richards* [1952] 1 All E.R. 1384
292. H.R. Hahlo, *op.cit.* 407
293. Cap. 101 incorporating amendments upto 1977
294. Sec. 604 See also *Silva* v. *Carlinahamy* (1922) 23 N.L.R. 344
295. (1924) 26 N.L.R. 113
296. *id.* at p. 117. See also D.C. Colombo 55, 353, reported in Vanderstraaten's Rep. (1860-71) 237; *Canekeratne* v. *Canekeratne* (1961) 66 N.L.R. 380; *Wentzel* v. *Wentzel* (1913) A.D. 55; *Mostert* v. *Mostert* 2 Searle 128. In the English law, irretrievable breakdown of the marriage is the only ground for divorce and proof of desertion for at least two years is proof of a breakdown of the marriage. See P.M. Bromley, *op.cit* p. 252

several judicial decisions and the consensus of opinion appears to be that a decree *nisi* can be made absolute not as a matter of course but on an application to court by either party.[297] In other words, there is nothing in the Code which requires the court to act of its own motion in making the decree absolute. "The person who requires the court to move should move the court for that purpose."[298]

(iv) An Action For Damages

The Roman-Dutch law recognises an action for damages against the third party responsible for enticing away his or her spouse.[299] Damages are awarded for loss of *consortium*.[300] "It is the duty of a wife to reside and consort with her husband and any third person who intentionally causes her to violate this duty commits a wrong against the husband for which the latter is entitled to recover damages unless the person acted from lawful motives, *e.g.* to protect her from her husband's ill treatment, real or genuinely supposed. It is obvious that there must be a causative connection between the conduct of the third person and the dereliction by the wife of the duties she owes her husband, and the law as I have endeavoured to state it potentially embraces the conduct of a man who, whatever his immediate objects may be, perseveres in behaving towards another man's wife in a way which he realizes is having the effect of alienating her affections from her husband and which ultimately produces that result and brings about an estrangement."[301]

The difficulty encountered here is the need to establish a causal nexus between the acts of the defendant and the *injuria* inflicted on the plaintiff. Proof of persuasion, inducement, advice given by the third party which led to the act of desertion may be sufficient

297. *Aserappa* v. *Aserappa* (1935) 37 N.L.R. 372. *Hulme-King* v. *de Silva* (1936) 38 N.L.R. 63. *cf.* de *Silva* v. *de Silva* (1926) 29 N.L.R. 378

298. *Sathiyanathan* v. *Sathiyanathan* (1937) 39 N.L.R. 241 at p. 244. *cf.* *Rajaratnam* v. *Chinnokona* (1968) 71 N.L.R. 241

299. See Voet 47. 10. 7; H.R.Hahlo, *op.cit.* p. 419

300. *Pearce* v. *Kevan* 1954 (3) S.A. 910

301. *id.* at p. 912, *per* Selke J.

to give rise to an action for damages.[302] Likewise, any act done by the third party which causes the wife to stay away from her husband would be construed as being wrongful.[303] In South Africa, the courts have gone so far as to award damages even when there is only an alienation of affection although the wife is physically living with her husband and thus a loss of *consortium* cannot be established.[304]

In the law of Sri Lanka there is one reported case where a wife sought to bring an action against a third party who, according to the plaintiff, was the cause of the husband's refusal to consummate the marriage.[305] Jayewardena A.J. opined that there was no evidence of a similar right of action in the Roman-Dutch law probably due to the fact that in the Roman-Dutch law a wife was supposed to be under the tutelage of her husband and the consequent difficulty encountered in her instituting an action when she had no *locus standi in judicio* without her husband. But this case involved the rights of Kandyans and he declared that by virtue of the Kandyan law she was *feme sole* and that there was no reason why she should be held disentitled to maintain an action. The position in regard to a wife governed by the Roman-Dutch law was not discussed in this case but in view of the independent status conferred upon a woman in modern Sri Lanka[306] there appears to be no objection to a similar right being made available to her. Indeed the South African law recognises a married woman's right to sue for loss of *consortium*. "It seems to be clear that at the present day a husband has a right to the *consortium* of his wife and the wife to the *consortium* of her husband and that each has a cause of action against a third party, who without justification, destroys that *consortium*."[307]

302. See C.F. Amerasinghe, *Aspects of the Actio Injuriarum in Roman-Dutch Law* (Colombo 1966) 155-156
303. *id.* at p. 157
304. *id.* at. p. 160
305. *Mohitiappu* v. *Kiribanda* (1923) 25 N.L.R. 221
306. See Married Women's Property Ordinance, No. 18 of 1923.
307. See *Rosenbaum* v. *Margolis* 1944 W.L.D. 147 at p. 151 *per* Blackwell J. See also C.F. Amerasinghe, *op.cit* at pp. 161- 162

C. The Right to Convert a Decree of Separation to One of Divorce

According to the recent amendment of the Civil Procedure Code[307a] "Either spouse may 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, 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 ... enter judgment accordingly."

What must be noted in this connection is that a decree of separation may be granted, according to the Code, "on any ground on which by the law applicable to Ceylon such separation may be granted."[307b] Consequently, the Roman-Dutch common law grounds for separation have been introduced into our legal system. The essential feature of the grounds for separation is proof that further cohabitation with the defendant has become dangerous or intolerable and that this state of affairs was brought about by the unlawful conduct of the defendant.[307c] Hence, matrimonial misconduct sufficient to sustain an action for dissolution will entitle a spouse to ask for the lesser remedy of separation. In addition, proof of cruelty, assaults, sexual offences and other such conduct which makes further cohabitation either dangerous or intolerable will suffice for a decree of separation.[307d] Having obtained a judicial separation all that the spouse has to prove is the expiry of a period of two years to obtain a dissolution of the marriage. It is clear, therefore, that although the concept of matrimonial misconduct is relevant to this provision as well, there is a significant difference in degree between the nature of misconduct involved in adultery and malicious desertion, on the one hand, and the type of conduct which is sufficient for a separation, on the other. Adultery is clearly contrary to and inconsistent with the fundamental obligation of fidelity undertaken on marriage, and proof of desertion requires evidence of a definite

307a. No. 2 of 1889 as amended by No 20 of 1977, sec. 608
307b. *ibid.*
307c. H.R.Hahlo, *op.cit.* p. 330
307d. See further chapter 7 *infra*

intention to terminate the marital union. In order to obtain a decree of separation, however, the inability to tolerate further cohabitation, objectively ascertained, is sufficient.

D. Separation for Seven Years

The Civil Procedure Code declares that "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" either spouse may "apply to the District Court by way of summary procedure for a decree of dissolution of marriage, and the court may, upon the proof of matters stated in an application made under the circumstances referred to in paragraph (b), enter judgment accordingly."[307e]

Although the Code does not require the court to ascertain the reasons for the *de facto* separation it is an irresistible conclusion that the court will determine the circumstances which necessitated the separation. Thus, for instance, where the separation has been brought about by circumstances beyond the control of the spouses, it is unlikely that the court will permit one spouse to plead this as being sufficient for a dissolution of the marriage, particularly in circumstances where the other spouse objects to a termination. On the other hand, if a separation for seven years, under whatever circumstances, is used as the basis for a dissolution of the marriage in circumstances where the spouses mutually agree to terminate their relationship, perhaps the court will not shut out relief. Alternatively the statutory provision may be interpreted so as to permit a dissolution of marriage only on proof of the conditions sufficient to obtain a decree of separation, although a decree had not been obtained, and in addition, on proof of the cessation of cohabitation for seven years. If this latter interpretation is adopted, a divorce by mutual consent would not be permitted.

307e. See. 608 (2)(6)

III. An Action for Nullity

(a) The Statute Law

According to the Civil Procedure Code any husband or wife may present a plaint to the District Court within the local limit, of the jurisdiction of which he or she (as the case may be) resides praying that his or her marriage may be declared null and void. Such decree may be made on any ground which renders the marriage contract between the parties void by the law applicable to Ceylon.[308]

The statute law of Sri Lanka, namely, the Marriage Registration Ordinance sets out various grounds on which a marriage may be declared null and void. "If both the parties to any marriage shall knowingly and wilfully intermarry under the provisions of this Ordinance in any place other than that prescribed by this Ordinance, or under a false name or names, or except in cases of death-bed marriages under section 40, without certificate of notice duly issued, or shall knowingly or wilfully consent to or acquiesce in the solemnisation of the marriage by a person who is not authorised to solemnise the marriage, the marriage of such parties shall be null and void."[309] In addition, the statute renders invalid a marriage between a male below the age of sixteen and a female below the age of twelve, or if a daughter of European or Burgher parents, fourteen years of age.[310] Marriage between parties within the prohibited degrees of relationship, too, is not valid.[311] A marriage when either of the parties has been previously married, and such marriage has not been legally dissolved or declared void is also said to be invalid.[312]

A noteworthy feature of the Sri Lankan law is the absence of any reference to voidable marriages. Indeed, both the Civil

308. No. 2 of 1889 as amended by No. 20 of 1977, (1) (2)
309. Ordinance No. 19 of 1907, Sec. 46
310. Sec. 15
311. Sec. 16
312. Sec. 18

Procedure Code and Marriage Registration Ordinance refer to a marriage that may be rendered null and void and consequently, the common law grounds on which a marriage is treated as voidable would, *prima facie*, appear to have no place in our legal system.

In the common law, minority,[313] duress,[314] and mistake [315] are grounds on which a marriage is liable to be set aside and is therefore, treated as voidable. Nevertheless, these grounds are not a basis for annulment in our law which sets out only the grounds on which a marriage may be rendered void *ab initio*.[316] There are, it must be pointed out, substantial differences between void and voidable marriages. A void marriage, for instance, does not entail any of the legal consequences of marriage. The woman does not acquire her husband's domicile. There are no reciprocal support obligations, the 'spouses' do not succeed each other *ab intestato*, the children are rendered illegitimate, and sexual relations with a third party does not amount to adultery. Moreover, the nullity of a void marriage is absolute and it may be relied on by either of the parties, even after the death of the other, or by any interested third party even after the death of both of them.[317] A voidable marriage, on the other hand, is valid for all purposes unless and until a decree of nullity is obtained.[318] The wife acquires the domicile of her husband, and the children of the marriage are treated as legitimate until a decree of nullity is granted.[319]

In relation to the Sri Lankan law it must be pointed out that on a literal interpretation of the statutory provisions, there appears to be no recognition of voidable marriages in our jurisdiction. However, in *Navaratnam* v. *Navaratnam*[320] the defendant had given birth to a child about three months after marriage, and the plaintiff had been unaware that the defendant was pregnant. The

313. Voet 23.2.11.
314. Voet 23.2.6.
315. Voet 23.2.6.
316. Impotency is a ground for divorce according to our statute law and has been treated by the courts as a basis on which the marriage may be declared void. See p. 337 *supra*.
317. See. H.R.Hahlo, *op.cit* at pp. 478, 488
318. *id.* at p. 490
319. *ibid.*
320. (1945) 46 N.L.R. 361.

plaintiff then sued the defendant for a declaration that the marriage was null and void. Keuneman S.P.J., however, opined that the marriage was voidable and not void and as such the marriage was declared to be good until it was annulled. Therefore, the court held that the wife acquired the domicile of her husband upto the date of the decree. In coming to this conclusion Keuneman S.P.J. relied on English law authority[321] according to which a distinction is made between a suit for nullity on the ground of impotency, on the one hand, and on the ground of informality, illegality such as bigamy, absence of parental consent, or the non-compliance with some requirement in the ceremony, on the other hand. The judgment relied on was that of Bateson J. in *Inverclyde* v. *Inverclyde*[322] according to which "Nullity on the ground of impotence is a suit to avoid a marriage and is in essence a suit to dissolve it. The marriage is voidable and not void, as in other cases of nullity. The marriage remains a marriage until one of the spouses seeks to get rid of the tie."

Indeed, this is entirely consistent with the Roman-Dutch law position[323] where the impotence of either spouse and pre-nuptial *stuprum* of the wife, resulting in pregnancy at the time of the marriage, renders the marriage voidable.[324] The Sri Lankan statute law, however, does not admit of this distinction since reference has been made only to marriages which may be declared null and void.[325]

In *Gunatileke* v. *Mille Nona*[326] the plaintiff sued his wife for a decree of nullity on the ground that at the time of the solemnisation of the marriage the defendant was incapable of entering into the contract of marriage by reason of an incurable impotency which made her incompetent to be a wife, and Akbar J. observed that "Such an action could be brought under sections 596 and 607 of the Civil Procedure Code if the ground alleged would render

321. *Inverclyde* v. *Inverclyde* [1931] P. 29; *Salvesen* v. *Administrator of Austrian Property* [1927] A.C. 641.
322. [1931] P. 29.
323. See H.R.Hahlo, *op.cit* p. 487
324. *ibid.*
325. See Civil Procedure Code (Cap. 101) sec. 607
326. (1936) 38 N.L.R. 291

the marriage void by the law applicable to Ceylon."[327] It is not clear from the reported judgment, however, whether the marriage was treated as void *ab initio* or merely voidable. In *Fernando* v. *Peiris*,[328] however, where, as in the former decision the case involved an action for nullity on the ground of incurable impotency, Gratiaen J. concluding his judgment declared that "I would set aside the judgment of the learned District Judge, and enter a decree declaring the marriage between the plaintiff and the defendant null and void on grounds of the defendant's permanent and incurable impotence."[329]

In the light of the case law, therefore, it is difficult to determine whether the law relating to voidable marriages is a part of our legal system. The better view, it is submitted, is the one that admits of the category of voidable marriages disregarding the literal meaning of the statutory provision. It must also be pointed out that our law has recognised putative marriages, that is, marriages contracted between parties where one or both of the spouses were ignorant of the impediment to their marriage.[330] This is an exception to the rule that a marriage which is null and void *ab initio* has none of the consequences of a valid marriage and as such some of the consequences of a valid marriage attach to a putative marriage.[331]

In relation to incurable impotency as a ground for nullity, it must be pointed out that it may be pleaded by either spouse and, therefore, in *Gunatileke* v. *Mille Nona*[332] where the woman was found to be suffering from *vaginismus*, which is a nervous condition which caused frigidity, the court held that a decree for nullity was available. In *Fernando* v. *Peiris*[333] Gratiaen J. approved of the judgment of Dr. Lushington in *D* v. *A*[334] according

327. *id.* at p. 291
328. (1948) 50 N.L.R. 40
329. *id.* at p. 43. See also *Sivacolunthu* v. *Rasama* (1922) 24 N.L.R. 89, where the marriage was annulled on proof of pregnancy at the time of the marriage, and *Alarmalammal* v. *Nadarajah* (1972) 76 N.L.R. 56, where insanity at the time of the marriage was the basis of a decree for nullity.
330. *Fernando* v. *Fernando* (1968) 70 N.L.R. 534.
331. H.R.Hahlo, *op.cit.* p. 493.
332. (1936) 38 N.L.R. 291
333. (1948) 50 N.L.R. 40
334. 163 Eng.Rep. 1039

to which impotence was established if it was proved that one or other of the spouses was "incapable of a *vera copula* or the natural sort of *coitus*. In such an event if the spouse is not and cannot be made capable of more than an incipient, imperfect and unnatural coitus, the marriage will be pronounced void... No person ought to be reduced to this state of *quasi* unnatural connection." The reasons for impotency are irrelevant. Therefore, whether the incapacity is congenital, caused by accident, illness or self-mutilation is irrelevant. Nor does it matter whether it is due to physical or psychological factors such as an invincible aversion to intercourse.[335] Moreover, the impotence must be permanent.[336] Wilful refusal to have cohabitation is not a ground for annulment although it may amount to malicious desertion.[337] Where the allegation is one of latent impotency, the courts would normally refuse a decree until there was proof of at least three years of cohabitation without consummation.[338] In *Fernando* v. *Peiris*,[339] although there was no evidence against the defendant of any incapacitating malformation, it had been proved that in spite of many attempts at intercourse the wife was still *virgo intacta* after over five years of cohabitation. Consequently, Gratiaen J. held that a presumption of latent impotency was raised against the defendant and the onus was on him to show by clear and satisfactory evidence that the non-consummation of the marriage by him was due to causes other than his impotency. The defendant, however had failed to discharge this onus and in the circumstances the plaintiff was held entitled to a decree of nullity of marriage. Justice Gratiaen however declared that his decision did not involve any finding of general impotency against the defendant and that all that was established in that case was a permanent and incurable incapacity *quoad hanc* and not necessarily as far as all women were concerned.

(*b*) Proprietary and Financial Consequences

In relation to the proprietary consequences of a decree of

335. See H.R.Hahlo, *op.cit.* p. 500
336. *ibid.*
337. *ibid.*
338. *Fernando* v. *Peiris* (1948) 50 N.L.R. 40 at p. 42
339. *ibid.*

nullity the Civil Procedure Code has adopted an inconsistent policy. For instance, as regards the reallocation of property and financial adjustment on divorce the Code does not permit the court to exercise its discretion when a decree of nullity is entered.[340] However, in relation to antenuptial and postnuptial settlements it declares that: "The court, after a decree ... of nullity of marriage, may inquire into the existence of antenuptial or postnuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders, with reference to the application of the whole or a portion of the property settled, whether for the benefit of the husband or the wife, or of the children (if any) of the marriage, or of both children and parents, as to the court thinks fit. Provided that the court shall not make any order for the benefit of the parents or either of them at the expense of the children."[341]

The Code also provides for the payment of alimony *pendente lite*, "Provided that alimony pending the action shall in no case be less than one-fifth of the husband's average net income for the three years next preceding the date of the order, and shall continue, in case of a decree for ... nullity of marriage, until the decree is confirmed ..."[342]

1V. Payment of Costs

Costs include the whole of the expenses incurred by either party on account of the action and in enforcing the decree passed, and all expenses involved in procuring and adducing necessary evidence.[343] When disposing of any application or action the court has the power to give to either party the costs of such application or action or to reserve the consideration of such costs for any future stage of the proceedings.[344] Moreover, the decree or order will direct by whom the costs of each party are to be paid,

340. See Civil Procedure Code (Cap. 101) Sec. 615 (1) which is confined to a decree of divorce and separation.
341. Sec. 618
342. Sec. 614(1)
343. Civil Procedure Code (Cap.101) sec. 208.
344. Sec. 209

and whether in whole or in what part or proportion.[345] The court is also vested with full power to give and apportion costs of every application and action in any manner it thinks fit, and the fact that the court has no jurisdiction to try the case is no bar to the exercise of such power. If, however, the court directs that the costs of any application or action shall not follow the event, the court must state its reasons in writing.[346]

According to Hahlo,[347] the wife is entitled to rely on her husband for a contribution towards her costs on the basis of his duty of support. Consequently, if the wife has sufficient means of her own from which she is able to finance her own action, and the husband's financial status does not permit him to make a contribution towards her costs, the court will not order him to pay towards her costs.[348] In *Joseph* v. *Alexander Elizabeth*[349] the appellant made an application that the plaintiff, her husband, be ordered to deposit a sufficient sum of money for her costs, before she was called upon to file answer, and Schneider J. held that as a general rule, in a divorce action, a husband had to find the means for the wife to maintain the action in her defence, and this principle is founded on the assumption that all the property is in the hands of the husband. The evidence in this case, however, disclosed that the wife was possessed of property in her own right, and that she was in a position to find the means to defend the action brought against her by her husband. Moreover, the plaintiff was not in a position to find the money for his wife's defence. It must be pointed out that if, the husband is possessed of sufficient means, the wife is not obliged to have recourse to her means in order to defend the action.[350] Likewise, if the husband is in a position which warrants the exercise of the wife's reciprocal obligation of support, presumably, she will be ordered to bear her own costs as well as those of her husband's.[351] It must also be noted that

345. Sec.210.

346. *ibid.*

347. H.R. Hahlo, *op.cit.* p. 520

348. *Smallberger* v. *Smallberger* 1948 (2) S.A.309; *Stone* v. *Stone* 1949 (1) S.A. 203: *Levin* v. *Levin* 1962 (3) S.A. 330 See also *Lalla* v. *Lalla* 1973 (2) S.A. 561.

349. (1925) 28 N.L.R. 411

350. *Glazer* v. *Glazer* 1959 (3) S.A. 928

351. *Lyons* v. *Lyons* 1923 T.P.D. 345.

if the wife is in a position that necessitates the exercise of the husband's duty of support, his obligation to pay her costs is independent of and immaterial to the success of the action. In *Silva* v. *Silva*[352] the Supreme Court sent the case back for a proper framing of issues and Pereira J. observed that the plaintiff-husband would be obliged to pay the wife's costs of all proceedings in both courts whatever may be the result of the action. This rule, however, will not apply if it is shown that she has separate property and can afford to meet the costs of litigation out of that property.[353] In arriving at this decision, Pereira J. relied on English law authority which he observed should be favoured. He opined that "The rule is that the husband, besides being generally liable to pay his own costs, is also, as a general rule, whether the wife be successful or not, and whether she be petitioner or respondent, liable to pay his wife's costs, taxed on between party and party, incurred by her up to the time of the case being set down for trial, and to pay them when it is so set down; and he is also liable to pay into court, or give security for, an amount fixed by the Registrar as sufficient in his judgment to cover the wife's costs in connection with the hearing of the case. The reason for this liability, it may be observed, is that under the old law 'marriage gave all the property to the husband, and the wife had no other means of obtaining justice.' "[354]

Exercise of court discretion, in this connection, is dependant not only on the financial status of the parties, but also on the conduct of the spouses. *Appuhamy* v. *Menikhamy*[355] involved an action for divorce filed by the husband on the alleged adultery of his wife. The action, however was dismissed as the husband, himself, was found to have committed adultery. In relation to the question of costs the District Judge had ordered that each party should bear his own costs, and Lascelles C.J., in the Supreme Court, reiterating this view, set out the reasons for the decision. "The conduct of the first defendant has been such as to disentitle her

352. (1905) 8 N.L.R. 280.

353. *id.* at p. 282.

354. *id.* at p. 282. See also *Abeyagoonesekera* v. *Abeyagoonesekera* (1909) 12 N.L.R. 95 which reiterated this view

355. (1911) 15 N.L.R. 100

to any indulgence. She obtained a maintenance order against her husband for the maintenance of the child which (the judge has found, and there is no appeal against his finding) was not the child of her husband, but of the man with whom she afterwards lived. She has also denied the adultery, and put the husband to the costs of proving it. In the circumstances, I think the order of the District Judge that each side should pay their own costs is a fair and equitable one." [356] It must be noted that the relevance of the wife's conduct has a material bearing on her husband's obligation of support. Proof of her misconduct, therefore, disentitles her from enforcing his duty of support. [357] Consequently, the relevance of her conduct to his obligation to contribute towards her costs is self evident.

The Civil Procedure Code also provides for the husband to recover costs from the co-defendant where the adultery of his wife is the basis for a matrimonial action. [358] The Code, however, recognises two exceptions to this principle. Thus, if the defendant was at the time of the adultery living apart from her husband and leading the life of a prostitute or, if the co-defendant had not at the time of the adultery reason to believe the defendant to be a married woman, the co-defendant will not be ordered to pay costs. [359] These principles apply *mutatis mutandis* when a woman is made a co-defendant. [360]

V. Jurisdiction in Matrimonial Actions

(*a*) Actions for Divorce

According to the common law, the only court which has jurisdiction to entertain an action for divorce is the court in whose area the parties are domiciled at the time of the institution of proceedings. [361] Hahlo [362] points out that the basis of the rule vesting

356. *id.* at p. 101
357. See H. R. Hahlo, *op.cit.* p. 144.
358. Sec. 612 (1)
359. Sec. 612 (1) (a) (b).
360. Sec. 612 (2)
361. *Le Mesurier* v. *Le Mesurier* [1895] A. C. 517.
362. *op. cit.* 539.

exclusive jurisdiction in the court of common domicile is the 'status theory', according to which the status of marriage should be ended by divorce through the act of the State most interested in that status at the time; "in the view of most supporters of the theory, the State of the common domicile at the commencement of suit, if there is a suit, otherwise when the divorce took place."[363] It is also consistent with the rule of the unity of domicile of the spouses.[363a] Proof of factors such as that the parties changed their domicile before the trial, or that one or both of the parties are not resident in the court's area at the time of commencement of action, or that the matrimonial offence was committed outside the court's area, or that the offence committed is not a ground for divorce in the place of its commission, or that the marriage was solemnised outside the court's area are all factors that will not affect the jurisdiction of the court to entertain a petition for divorce.

The jurisdiction of the Sri Lankan courts to dissolve a marriage between a British National and a French lady was in issue in *Le Mesurier* v. *Le Mesurier*.[364] The marriage had been solemnised in England and from the date of their marriage until the commencement of the action for divorce the spouses had lived in Ceylon. The action for divorce was founded upon the allegation of adultery. When the appellant instituted the action before the District Court of Matara the defendant pleaded that the District Court had no jurisdiction to entertain the suit. The appellant, an Englishman by birth, contended that though resident in Ceylon, he had retained his English domicile of origin. Nevertheless, the District Judge ruled that he had jurisdiction to proceed in the suit by virtue of the Civil Procedure Code[365] and granted a decree *nisi* to become absolute in four months unless good cause was shown against it. The Supreme Court, however, reversed the decision of the District Judge on the reasoning that the courts of Ceylon had no jurisdiction to dissolve a marriage between a British and a European National resident in the Island. According to Chief Justice Lawrie and Acting Puisne Justice Browne by virtue of the Royal Charter

363. *id.* at pp. 539 - 540.
363a. H.R.Hahlo, *op.cit.* p. 541.
364. (1895) 1 N.L.R. 160.
365. No. 2 of 1889, Sec. 597.

of 1801,[366] British and European residents in the Island were to be governed by the law of England. On appeal to the Privy Council, however, it was pointed out by their Lordships that the Charter of 1801 was revoked and annulled by the Ceylon Charter of Justice of 1833 and since that date there had been no legislation regulating the jurisdiction of the courts of Ceylon in matrimonial causes arising between British and European spouses. They concluded that subsequent to the Charter of 1833 British and European spouses resident in Ceylon were governed by the Roman-Dutch law which was introduced to the Island by the Royal Proclamation of 1799. Consequently, the matrimonial law applicable to British and European residents in Ceylon was the Roman-Dutch law which had prevailed in the Island before its annexation. Their Lordships had to then decide whether the Roman-Dutch law permitted the District Courts to dissolve a marriage contracted in England between British subjects who, though resident within the forum, still retained their English domicile. The argument relied on by counsel for the appellant was that although the parties had a permanent domicile in England they had acquired a matrimonial domicile in Ceylon which was sufficient to vest jurisdiction in the courts of Ceylon. According to counsel for the appellant in addition to jurisdiction arising from the fact of the spouses having their domicile of succession within the territory, which he admitted to be universally acknowledged, he declared that the general law of nations recognised that a concurrent and equally effective jurisdiction to divorce was created by the spouses' residence within the territory of such permanence as to constitute what has been termed a "matrimonial domicile" although not of sufficient permanence to fix their true domicile there. In support of the theory of a matrimonial domicile, as distinguished from the domicile of succession, counsel relied mainly upon certain decisions by the courts of England and Scotland which he represented as conclusive in his favour.[367]

Counsel cited *Brodie* v. *Brodie*[368] where the petitioner, being the husband, was resident in England though he was not domiciled

366. Sec. 53.
367. (1895) 1 N.L.R. 160 at pp. 165, 166.
368. [1917] P. 271

in that country. He had been married to the respondent in Tasmania, and having left her behind in Melbourne he went to Great Britain. His wife never came to England and the acts of adultery charged were committed in the colony. In giving decree *nisi* the court observed "We think that the petitioner was *bona fide* resident here, not casually, or as a traveller, after he became resident here, his wife was carrying on an adulterous intercourse in Australia. He is, therefore, entitled to a decree *nisi* for a dissolution of his marriage."

"Matrimonial domicile" was defined by Lord Justice Clerk[369] thus: "The true inquiry, I apprehend, in every such case is, where is the home or seat of the marriage for the time; where are the spouses actually resident, if they be together; or, if for any cause they are separate, what is the place in which they are under obligation to come and renew, or commence, their cohabitation as man and wife?"

Their Lordships in *Le Mesurier's* case, having cited the above decisions, as well as other English and Scottish judgments, concluded that there could be no satisfactory canon of International law regulating jurisdiction in divorce cases, which was not capable of being enunciated with sufficient precision to ensure practical uniformity in its application. "But every judicial definition of matrimonial domicile which has hitherto been attempted has been singularly wanting in precision, and not in the least calculated to produce a uniform result... *Bona fide* residence is an intelligible expression, if, as their Lordships conceive, it means residence which has not been resorted to for the mere purpose of getting a divorce which was not obtainable in the country of domicile. Residence which is 'not that of a traveller, is not very definite; but nothing can be more vague than the description of residence which, not being that of a traveller, is not to be regarded as 'casual'. So also the plea where it is the duty of the wife to rejoin her husband, if they happen to be living in different countries, is very indefinite. It may be her conjugal duty to return to his society although he is living as a traveller, or casually, in a country

369. *Jack* v. *Jack* 24 Sess. Ca. 2nd Series 467 cited in *Le Mesurier* v. *Le Mesurier* (1895) 1 N.L.R. 160 at p. 169.

where he has no domicile. Neither the English nor Scottish definitions, which are to be found in the decisions already referred to give the least indication of the degree of permanence, if any, required to constitute matrimonial domicile, or afford any test by which that degree of permanence is to be ascertained. The introduction of so loose a rule into the *jus gentium* would, in all probability, lead to an inconvenient variety of practice, and would occasion the very conflict which it is the object of International jurisprudence to prevent." [370]

Their Lordships, therefore, concluded that according to International law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage. They concurred, without reservation, in the view expressed by Lord Penzance in *Wilson* v. *Wilson* [371] where it was said that "It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the Courts of the country in which they were domiciled. Different communities have different views and the laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that differences of married people should be adjusted in accordance with the law of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country, and strangers in another." [372]

In order to remedy the hardship caused by this legal situation the Indian and Colonial Jurisdiction Act of 1926 was passed. This legislation was made applicable to Ceylon by the Ceylon Divorce Jurisdiction Order in Council by virtue of which the Supreme Court of Ceylon was granted original Civil Jurisdiction to

370. *id.* at p. 174.
371. 1 P. and D 442.
372. (1895) 1 N.L.R. 160 at p. 176 See also *Case* v. *Case* 37 T.L.R. 499; *Wright* v. *Wright* (1903) 9 N.L.R. 31.

make decrees for dissolution of marriage when the parties were British subjects domiciled in England or Scotland on grounds for which a dissolution of a marriage may be granted by the High Court in England according to the law for the time being in force. The Supreme Court of Ceylon was vested with the jurisdiction to dissolve a marriage only where it was proved that the petitioner resided in Ceylon at the time of presenting the petition; and that the parties had last resided together in Ceylon and that either the marriage was solemnised in Ceylon, or the adultery or crime complained of was committed in Ceylon.

The alternative requirement that the marriage should have been solemnised in Ceylon was held to have no application to suits on grounds other than "adultery, cruelty or crime."[372a] In *Wooldridge* v. *Wooldridge*[372b] the petitioner, for a dissolution of marriage on the allegation of desertion, proved that he was currently residing in Ceylon and that he and his wife had last resided together in Ceylon, but the marriage had not been solemnised in Ceylon. The Supreme Court had to decide, therefore, whether this fact had the effect of denying the Ceylon courts jurisdiction to hear the case. Keuneman S.P.J. opined that under the Indian and Colonial Divorce Jurisdiction Act of 1926, the petition could not be heard by a Ceylon court. According to this statute [372c] "No such court shall grant any relief under this Act except in cases where the petitioner resides in (Ceylon) at the time of presenting the petition and the place where the parties last resided together was in (Ceylon), or make any decree for dissolution of marriage except where the marriage was solemnised in (Ceylon) or the adultery or crime was committed in Ceylon."[372d]

However, section 1, proviso (c) of the above statute was repealed by the Indian and Colonial Divorce Jurisdiction Act 1940 [372e] and the amendment declares that "No such court shall grant any relief under this Act except in cases where the petitioner resides in (Ceylon) at the time of presenting the petition and the place

372a. *Wooldridge* v. *Wooldridge* (1945) 46 N.L.R. 516.
372b. *ibid.*
372c. (16 and 17 Geo. and V c 40), section 1, proviso (C)
372d. See Rayden, *op.cit.* p. 554.
372e. (3 and 4 Geo. VI. c. 35) section 2.

where the parties to the marriage last resided together was in (Ceylon), or make any decree of dissolution of marriage on the ground of adultery, cruelty or crime except where the marriage was solemnised in (Ceylon) or the *adultery, cruelty or crime complained* of was committed in (Ceylon)."

According to Keuneman S.P.J., under the new proviso there are two conditions necessary *in all suits* for the dissolution of marriage, *viz.*

(i) that the plaintiff must reside in Ceylon at the time of presenting the petition, and,

(ii) that the parties to the marriage must have last resided together in Ceylon.

Thereafter, special provision is made for suits when dissolution is prayed for on the ground of "adultery, cruelty or crime," and in such suits there is the further requirement that the marriage must have been solemnised in Ceylon or that the "adultery, cruelty or crime" must have been committed in Ceylon. Keuneman S.P.J. therefore concluded that "the words of the new section 1, proviso (c) are clear and that the alternative requirement that the marriage should have been solemnised in Ceylon has no application to suits on grounds other than "adultery, cruelty or crime." The new proviso, therefore, seems to go further than the old section in this respect."[372f] Hence in the present case, the court held that there was no statutory bar to the granting of a decree of dissolution of marriage.

In *Morris* v. *Morris*[373] the petitioner was a native of Ceylon and a permanent resident of Ceylon while her husband was an European, domiciled in England, and the Supreme Court of Ceylon was held to have jurisdiction to entertain the petition for divorce.

Annakedde v. *Myappen*[374] was an action for the dissolution

372f. (1945) 46 N.L.R. 516 at p. 518
373. (1938) 40 N.L.R. 246.
374. (1932) 33 N.L.R. 198.

of marriage brought by a wife on the ground of malicious desertion by her husband. The husband, in turn claimed divorce on the ground of the wife's adultery. The initial question to be decided in this case was the jurisdiction of the court to hear the case. The defendant, was an Indian Tamil who had come to Ceylon as a child of six years with his mother. He had remained in Ceylon and had never been to India. He married in Ceylon and claimed that he knew no other home than Ceylon and that as such he had a Ceylon domicile. Garvin S.P.J. held on the above evidence, that the defendant had a Ceylon domicile and that consequently the court had jurisdiction to entertain the petition for divorce.

The position in the modern law of Sri Lanka however, is different as the Ceylon Independence Act of 1947 provided that:

"No court in Ceylon shall by virtue of the Indian and Colonial Jurisdiction Acts 1926 and 1940, have jurisdiction in or in relation to any proceedings for a decree for the dissolution of a marriage, unless those proceedings were instituted before the appointed day, but, save as aforesaid and subject to any provisions to the contrary which may hereafter be made by any Act of the Parliament of the United Kingdom or of Ceylon, all courts in Ceylon shall have the same jurisdiction under the said Acts as they would have had if this Act had not been passed."[374a]

(*b*) Actions for Nullity

The salient feature of a decree for nullity is that it either declares that there never was a marriage or annuls it with retroactive effect.[375] While a marriage that is null and void *ab initio* produces none of the legal consequences of marriage and therefore the woman does not acquire her husband's domicile[376] a voidable marriage is valid for all purposes unless and until a decree of nullity is obtained and as such the wife shares her husband's domicile.[377] It has been pointed out that as a decree of

374a. sec. 3 (1)
375. H.R. Hahlo, *op.cit* p. 484.
376. *id.* at p. 487
377. *id.* at p. 490, 491.

nullity is merely declaratory in effect, the plaintiff should be able to bring an action in any court he or she pleases.[378] Ellison Khan, however, points out[379] that the object of asking for a decree of annulment of a void marriage is to establish by a judgment *in rem*, in which the proper law is applied, that there never was a valid marriage. "This object can best be achieved if jurisdiction is based on some recognised link between the parties (or at least one of them through domicile) and the court seised of the matter. In general a benevolent attitude should be taken in deciding on jurisdictional grounds."[380] Decided cases, provide several alternative bases on which the question of jurisdiction may be determined.[381]

(i) The court of the area of celebration of the "marriage."

(ii) The court of the area of common domicile at the institution of proceedings.

(iii) The court of the area of plaintiff's domicile at the institution of proceedings.

(iv) The court of the area of defendant's domicile at the institution of proceedings.

For an annulment of a voidable marriage the court of the husband's domicile, that is, the common domicile at the institution of proceedings has jurisdiction.[382] In *Navaratnam* v. *Navaratnam*[383] the plaintiff, who was of Ceylon domicile, sued the defendant, who, until her marriage had an Indian domicile, for a declaration that the marriage solemnised between them was null and void on the ground that the defendant gave birth to a child about three months after the marriage and that the plaintiff was unaware that the defendant was pregnant and that the plaintiff

378. G.C.Cheshire, Private International law (Oxford 1947) p. 447
379. H.R.Hahlo, *op.cit.* Appendix by Ellison Khan
380. *id.* at p. 561
381. *ibid.*
382. *id.* at p. 564.
383. (1945) 46 N.L.R. 361.

had no access to the defendant before marriage. The marriage took place in India and the defendant remained in India and never came to Ceylon. The action was instituted in the District Court of Jaffna. Keuneman S.P.J. in the Supreme Court, approved of and followed the decision in *Inverclyde* v. *Inverclyde*[384] where it was held that a decree obtained on the ground of impotency, dealt with a marriage which was voidable only and not void. Consequently, the court of the domicile was said to be the only competent court to grant a decree affecting status. On the basis of this judgment Keuneman S.P.J. concluded: "There can, I think be no doubt that the claim in the present action for a decree of nullity is in its nature akin to the claim for nullity on the ground of impotence, and not to a claim for nullity on the ground of bigamy. In my opinion the marriage must be regarded as good until the decree for nullity is entered, and the domicile of the wife must be regarded as the domicile of the husband upto the date of the decree. The Ceylon court, therefore, had jurisdiction in the action."[385]

It must also be pointed out that the better view is that the retroactive operation of the decree will not apply to the domicile of the parties and therefore the domicile of the man and that of the woman *qua* her dependency on him, hold good, and only after the actual annulment can a new domicile be acquired.[386]

384. [1931] P. 29
385. *id.* at p. 366.
386. Ellison Khan, *op.cit.* p. 564.

CHAPTER 9

BARS TO RELIEF

I. Introduction

According to the Marriage Registration Ordinance[1] proof of matrimonial fault is the basis on which a termination of marriage is permitted.[2] Consistent with this theory of fault, the former Civil Procedure Code[3] enacted that if the court "finds that the plaintiff has, during the marriage, been 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 either of the defendants, then and in any of the said cases the court shall dismiss the plaint." Hence, a finding of connivance, collusion or condonation was an absolute bar to the dissolution of marriage.

In addition, the Code declared that the court should *not be bound* to pronounce a decree of divorce "if it finds that the plaintiff has, during the marriage, been guilty of adultery, or if the plaintiff has, in the opinion of the court, been guilty of unreasonable delay in presenting or prosecuting such plaint, or of cruelty towards 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 or misconduct of or towards the other party or, has conduced to the adultery."[4] Therefore, the matrimonial misconduct of the petitioner, delay in presenting the action, cruelty and desertion or wilful neglect or misconduct conducive to adultery are discretionary bars to an action for divorce.

1. No. 19 of 1907, sec. 19.
2. Incurable impotency is an exception, but this has been treated as a ground for nullity rather than for dissolution.
3. No. 2 of 1889.
4. See proviso to sec. 602.

Indeed a legal system which requires proof of matrimonial fault as a basis for divorce must necessarily require not only proof of the guilt of the defendant but also the corresponding innocence of the petitioner. This is founded on the canon bar rule which requires the plaintiff to come to court with clean hands and is consistent with the Roman-Dutch principles of "*culpa compensatio*" and[5] "*paria enim delicta mutua pensatione dissolvuntur.*"

The absolute and discretionary bars to divorce were an integral feature of the Sri Lankan law upto 1975 when the Administration of Justice (Amendment) Law,[5a] eschewed any reference to these defences. Having thus been tacitly repealed in 1975 they were not reintroduced by the recent amendment to the Civil Procedure Code[5b] which contains the law of matrimonial actions in Sri Lanka. Nevertheless, it is submitted that so long as matrimonial fault is a ground for divorce in our legal system the application of the defences will remain a *sine qua non* of our jurisdiction. Although these defences are not provided for by our statute law, recourse to the Roman-Dutch common law defences is indeed a viable alternative.[5c] Consequently, the bars to relief are not merely of historical interest and warrant a detailed examination.

II. The Absolute Bars

The absolute bars to divorce ensure that a marriage is terminated because of the injury caused to one spouse as a consequence of the matrimonial misconduct of the other. In other words, the matrimonial fault of one spouse *per se* is not sufficient to found an action for divorce; it must be further established that the fault of the erring spouse has caused an injury to the other spouse who is therefore given redress by the availability of a right to ask for a dissolution of the marriage. Consequently, there must be a causal nexus between the wrong committed and the injury suffered in the absence of which a right of action for divorce will not

5. See H.R. Hahlo, *The South African Law of Husband and Wife* (4th ed., Cape Town 1975) p. 370.

5a No. 25 of 1975.

5b No. 20 of 1977.

5c Voet 24. 2. 5.

accrue to the innocent spouse. Indeed, it is fundamental to all remedial actions that an injury or an infringement of a person's rights is established as a prerequisite for an action for redress. However, unlike contractual and criminal acts, in the sphere of matrimonial actions there is a presumption of law that when a spouse commits a matrimonial fault the other is injured. Hence, there is no necessity for proof of injury; nevertheless evidence of full forgiveness of the offence or condonation, active encouragement in the commission of the wrong or connivance, or an agreement to commit or the appearance to commit the offence or collusion would rebut the presumption of an injury inflicted on the innocent spouse.

(*a*) Connivance

A spouse who has given anticipatory consent, which might take the form of active encouragement or tacit approval to the commission of a fault, cannot be heard to complain of the infliction of a wrong on him. The appropriate defence to an allegation of an injury may be couched in the maxim *volenti non fit injuria.*[6]

While connivance is relevant to the offence of adultery it is inapplicable to malicious desertion because if the innocent spouse consents to the other spouse leaving the matrimonial home it will amount to a separation by mutual consent, which is different to, and inconsistent with, the notion of desertion. However, connivance at the adultery of one spouse, for example, the wife, will effectively estop the husband from pleading his wife's matrimonial misconduct as a basis for constructive desertion justifying his departure from the matrimonial home.[7] To plead the defence of connivance it is important to establish a causal nexus between the consent of the spouse and the commission of the offence. Thus in *Godfrey* v. *Godfrey*[8] the husband, while under the influence of liquor, seeing his wife and the co-respondent in each others arms,

6. Homer H. Clarke, *Law of Domestic Relations* (1968) 359; H.R. Hahlo, *op.cit.* p. 376 ; P. M. Bromley, *Family Law* (London 1976) p. 216. See also Voet 24 2. 5.
7. P.M. Bromley, *op.cit.* p. 216
8. [1964] 3 All E.R. 154

said: "If you two want to go to bed together, why the hell don't you?" and this was held to be sufficient proof of his connivance at his wife's adultery which followed. However, in *Gorst* v. *Gorst*[9] the wife reluctantly consented to her husband having sexual intercourse with another woman in the hope that his sexual inhibitions with respect to herself might be cured. According to the evidence led in court the husband had continued to have sexual relations with the other woman and when an action for a dissolution of marriage was filed the connivance of the wife was set up as a defence. The court however held that while the wife had connived at the original act of adultery the taint of connivance did not attach to the subsequent acts. Karminski J. declared that the court would have to decide in the light of all the circumstances whether or not the connivance had spent its force before the subsequent acts of adultery had been committed. The facts in this case disclosed that the connivance had spent itself and consequently the wife was granted a divorce. A break in the chain of causation may be evidenced by a total reconciliation[10] or by the lapse of a sufficient length of time.[11]

A distinction must be made between connivance, on the one hand, which is an absolute bar to divorce,[12] and "wilful neglect or misconduct of or towards the other party as has conduced to the adultery,"[13] on the other hand, which is a discretionary bar to relief. Indeed, the dividing line between the two is tenuous because connivance need not necessarily involve express consent;[14] a mere tacit approval may suffice.[15] In order to plead the absolute bar, proof of knowledge of the actual commission of, or of the likelihood of the commission of adultery is a necessary prerequisite because, knowledge, coupled with a wilful refusal to avert the wrong will amount to connivance based on the rationale that no person can be heard to say that he did not intend the natural

9. [1951] 2 All E.R. 956
10. *Gorst* v. *Gorst* [1951] 2 All E.R. 956
11. *Gallacher* v. *Gallacher* 1934 S.C. 339
12. Sec. 601
13. Proviso to sec. 602
14. Like for instance in *Gorst* v. *Gorst* [1951] 2 All E.R. 956; *Woodbury* v. *Woodbury* [1948] 2 All E.R. 684; *Godfrey* v. *Godfrey* [1964] 3 All E.R. 154
15. See *Bell* v. *Bell* 1909 T.S 500; *Weatherley* v. *Weatherley* (1879) Kotze 66 at p. 94

and probable consequence of his act.[16] Of course something more than mere negligence, inattention, overconfidence, dullness of apprehension or indifference is called for. In *Dissan Appu* v. *Balahamy*[17] the party had entered into an agreement "hereafter to live separately apart from each other, acting according to each of our individual wishes." At the time the agreement was entered into the husband was aware of the wife's illicit association with the second defendant and of the fact that she was eight months pregnant with the defendant's child. Moreover he must have known that since his wife was a poor woman and the adulterer a man of some rank and substance, the wife would probably continue to live in adultery with the second defendant. Notwithstanding this knowledge he had entered into an agreement to live apart. In the circumstances Hutchinson C.J. declared that the plaintiff had connived at the adultery of his wife.[18]

There is reference in both the English and South African cases to the importance of the *animus* of the consenting spouse. A "corrupt intention"[19] is a necessary prerequisite for connivance. This *animus* however may be negated by proof that the innocent spouse consented to the adultery of the other merely in order to obtain proof of adultery.[20]

(*b*) Collusion

A settled meaning of the term collusion is not forthcoming from a perusal of the case law and it is evident that while it has been defined restrictively as being tantamount to fraud, it has also been given a much wider connotation which includes within its scope not only agreements having as their ultimate object the commission of a fraud upon the courts, but also agreements which bring about consequences which are decreed to be inevitable in view of the available evidence.

16. *Buchler* v. *Buchler* [1947] P. 25; Bromley, *op.cit.* p. 218
17. (1907) 1 Leader L.R. 62
18. See also *King* v. *King* [1929] 142 T.L.R. 162
19. *Potgieter* v. *Vorster* 1970 (3) S.A. 289; *Churchman* v. *Churchman* [1945] P. 44. cf. *Gorst* v. *Gorst* [1952] P. 94. According to Homer H. Clarke, *op.cit.* p. 359 the adjective is superfluous.
20. *Douglas* v. *Douglas* [1950] 2 All E.R. 748; *Mudge* v. *Mudge and Honeysett* [1950] P. 173; Hahlo, *op.cit.* p. 378.

According to Rayden,[21] "Collusion means an agreement or bargain between the parties to a suit or their agents whereby the initiation of the suit is procured or its conduct provided for, but not every bargain entered into by the parties to a pending divorce suit is collusive." Justice Mc Cardie[22] distinguished between acts of collusion which entail criminal liability and conduct which does not circumvent the criminal law but nevertheless entails consequences according to the law of divorce. He declared that if a husband and wife agreed that the husband should appear to commit adultery, though in actual fact he did not do so, thereby deceiving the court into granting a decree *nisi*, it would amount to a criminal conspiracy to pervert the course of justice.[23] "So anxious is the law to secure the pure administration of justice that it is an indictable misdemeanour for any person to fabricate evidence with intent to mislead a judicial tribunal, even if the tribunal never sits and the evidence is never used."[24] In similar vein, Denning L.J. in *Teale* v. *Burt*[25] referred to the notion of a bribe when defining collusion and asserted that it was this component of the agreement that gave rise to a perversion of the course of justice. For instance, if the husband promises excessive maintenance in order to persuade the wife to institute divorce proceedings or if he promises her the custody of the children as an inducement to abstaining from defending herself, it would amount to a collusive agreement which would not be tolerated by the law.[26] The same idea is reflected in the judgment of Scarman J. in *Noble* v. *Noble Ellis*[27] where he declared: "If on a fair consideration of the circumstances, the parties intend by their agreement to match institution of suit or any aspect of its conduct with the provision of some benefit to the party instituting or in that aspect conduct-

21. *Divorce*, (10th ed. London 1967) p. 275
22. *Laidler* v. *Laidler* [1920] 36 T.L.R. 510
23. See also Lord Stowell in *Crewe* v. *Crewe* 3 Hagg. 123 at p. 129 where he declared that "Collusion as applied to this subject is an agreement between the parties for one to commit or appear to commit, a fact of adultery, in order that the other may obtain a remedy at law as for a real injury."
24. *Laidler* v. *Laidler* [1920] 36 T.L.R. 510
25. [1951] 2 All E.R. 433.
26. See also Bucknill J. in *Scott* v. *Scott* [1913] P. 32 where he defined collusion as "an improper act done or an improper refraining from doing an act for a dishonest purpose."
27. [1964] 1 All E.R. 577

ing the suit, there is, in my opinion collusion. Unless there is this matching of forensic proceedings against valuable consideration there is no collusion."[28]

Collusion however is capable of a much wider definition as well. Consequently, if the institution of a divorce suit be procured, or its conduct provided for by agreement (especially if abstention from defence be a term) this would constitute collusion; although it does not appear that any specific fact has been falsely dealt with or withheld.[29] However, an important distinction was made in two later English cases, at the time when collusion was made a discretionary as opposed to an absolute bar to divorce in England.[30] These cases stressed that the court had to, in all instances, distinguish between objectionable and non-objectionable collusive agreements. While the former had the effect of disallowing a termination of the marriage, the latter conferred upon the courts a discretion to grant relief notwithstanding the existence of collusion.[31] An essential ingredient of an objectionable collusive agreement was the abandoning of a defence which was believed to be good;[32] or the allegation of an offence which had not been committed.[33] As Wrangham J. declared;[34] "It is sufficient for me in this case to say that it seems to me that in considering whether or not discretion should be exercised in respect of an agreement of this character, the first matter to which I should direct my attention is the question whether or not the result of such an agreement is likely to be that a result is arrived at in the proceedings contrary to the justice of the case. In other words, I must be satisfied that the court will not, as a result of the agreement, be granting relief for a matrimonial offence which has not occurred, or to a party who would not receive relief if the whole of the facts were before the court."

It must be pointed out that although an uncontested divorce case *per se* is not contrary to the objectives of justice, the court

28. *id.* at p. 582
29. *Churchward* v. *Churchward and Holiday* [1895] P. 7
30. Matrimonial Causes Act 1963 and 1965
31. *Nash* v. *Nash* [1965] P. 266 at p. 269
32. *Mulhouse* v. *Mulhouse* [1966] P. 319
33. *Head* v. *Cox* [1964] P. 228
34. *id.* at p. 230

must first ascertain whether the party who contracted away his or her right of defence would, had he or she contested the case, been successful. "For if there is no likelihood that the result of the proceedings will be contrary to the justice of the case, it will be difficult to say that there has been any attempt to pervert the course of justice, which is said in Rayden to be an essential element of a collusive bargain."[35] Hence, the court will view benevolently only an agreement which gives rise to a consequence which would have been the likely outcome of the case if there had been no agreement and the case had been fought out.[36] Of course the judge must satisfy himself that the defence which is proposed to be abandoned is one which would be unlikely to succeed. In other words he does not have to make certain that the defence had no possibility of success whatever.[37]

In the Sri Lankan case, *Bulathsinghala* v. *Matilda Perera*[38] the plaint originally prayed for divorce on the grounds of adultery with each of the three co-defendants and malicious desertion. The defendant, in her answer, denied the allegations of adultery and malicious desertion and pleaded the malicious desertion of the plaintiff as a ground for divorce. Before the answer was filed the court was informed that the plaintiff, in view of a settlement arrived at between the parties in a money case which was proceeding between them had withdrawn all the allegations of adultery. When the case was called for trial the defendant did not appear and the only questions for decision were whether the defendant had maliciously deserted the plaintiff and if so, whether he was entitled to a decree. The District Judge declared that the case failed on the ground of collusion because, on the facts of the case, there was evidence of an agreement whereby the wife had agreed to suppress material facts of defence or recrimination so as to enable the husband to obtain a decree. The agreement referred to was as follows: "The first defendant, while denying the several allegations (*i.e.* of adultery) made in paragraphs 3, 4

35. *Gosling* v. *Gosling* [1968] P. 1 at p. 13, *per* Willmer L.J.
36. *Mulhouse* v. *Mulhouse* [1966] P. 39, *per* Jocelyn Simon P.
37. See *Gosling* v. *Gosling* [1968] P. 1 at p. 17
38. (1944) 39 C.L.W. 44

and 5 of the plaint states that in view of the express withdrawal of the same by the plaintiff on 6th October, 1942, it is unnecesssary specifically to answer the said paragraphs of the plaint." Referring to the District Judge's interpretation of the agreement Moseley J. said, "I fear that I am unable to share that view. The defendant denied the allegations of adultery and I do not know what more 'specific' answers could be expected. The only agreement between the parties in regard to the divorce proceedings was the withdrawal of the allegations of adultery, a circumstance which, so far from tending to facilitate the obtaining of a decree, was more likely to militate against it. No agreement on the part of the wife not to defend the action has been proved, and a feasible explanation has been given of the withdrawal by the plaintiff of the more serious charges in the plaint. In my view there was no collusion."[39]

In *Nelson* v. *Foenander*[40] Soertsz J. stressed the importance of ensuring that a divorce suit is made collusion-proof, and declared that the decree *nisi* could be set aside on proof of collusion that had taken place subsequent to the filing of the divorce action. The Civil Procedure Code declared that "During the progress of the action, any person suspecting that any parties to the action are, or have been, active in collusion for the purpose of obtaining a divorce shall be at liberty, in such manner as the Supreme Court by general or special order from time to time directs, and in the absence of any such order, by petition on summary procedure supported by affidavit of fact or other sufficient evidence, to apply to the District Judge to take such steps in respect of the alleged collusion as may be necessary to enable him to make a decree in accordance with the justice of the case."[41] According to the Supreme Court, in this case, "progress of the action" in the context, clearly covers the period from the institution of the action to the entering of the decree absolute."[42]

39. *id.* at p. 45

40. (1940) 41 N.L.R. 452

41. Sec. 606 of the former Civil Procedure Code No. 2 of 1889. This section has been deleted by Law No. 20 of 1977.

42. (1940) 41 N.L.R. 452

(c) Condonation

"Condonation is the reinstatement of a spouse who has committed a matrimonial offence in his or her former matrimonial position in knowledge of all the material facts of that offence with the intention of remitting it, that is to say, with the intention of not enforcing the rights which accrue to the wrongful spouse in consequence of the offence."[43]

While both the South African and English law authorities concurred in the ingredients of condonation, namely, knowledge of the offence previously committed and forgiveness which was manifested by a restitution of the *status quo ante*,[44] there was a fundamental difference in attitude in relation to the effect of condonation in the two legal systems. In the early English law, condonation was conditional upon the guilty spouse not committing any other matrimonial offence.[45] Moreover, the offence which had the effect of reviving the previously condoned fault need not have been *ejusdem generis* as the original offence.[46] Consequently, it need not have been one which was a ground for divorce so long as it was "sufficiently serious for the court to regard it as a substantial breach of duty,"[47] or as Lord Denning declared "harshness or neglect of a real and substantial kind which is such as to be likely to inflict misery on the innocent party and does indeed lead to a breakdown of the marriage."[48] In these circumstances the previous offence of the guilty spouse was revived. It has been pointed out that while the doctrine of revival may well be a deterrent to future misconduct "the guilty party should not be under so

43. *Inglis* v. *Inglis* [1967] 2 All E.R. 71 at pp. 79-80, *per* Simon P.

44. See *Louw* v. *Louw* 1939 O.P.D. 119 at p. 121 where Van den Heaver J. defined it as "full forgiveness in the light of full knowledge." See also *Bell* v. *Bell* 1909 T.S. 500; *Hearn* v. *Hearn* [1969] 3 All E.R. 417; *Tilley* v. *Tilley* [1948] 2 All E.R. 1113; *Fearn* v. *Fearn* [1948] 1 All E.R. 459 Voet 24. 2. 5

45. *Richardson* v. *Richardson* [1949] 2 All E.R. 330; *Kemp* v. *Kemp* [1953] 2 All E.R. 553; *Cundy* v. *Cundy* [1956] 1 All E.R. 245; *Jelley* v. *Jelley* [1964] 2 All E.R. 866

46. *Dunn* v. *Dunn* [1962] 3 All E.R. 587; *Richardson* v. *Richardson* [1949] 2 All E.R. 330; *Jelley* v. *Jelley* [1964] 2 All E. R. 866

47. *Beard* v. *Beard* [1945] 2 All E.R. 306

48. *Richardson* v. *Richardson* [1949] 2 All E.R. 330

constant a threat of revival of the old offence as to render the relations of the reunion unstable and over-sensitive."[49] The position in the later law however, was materially different in that the Matrimonial Causes Act[50] enacted that adultery once condoned could not be revived.

In the South African law, condonation has the effect of wiping out the offence "as if it had never taken place."[51] The Sri Lankan law, however, has developed on the lines of the early English law, and consequently in our law forgiveness of the offence carried with it an implied undertaking that the guilty spouse would not commit another matrimonial offence.[52]

Condonation involves an *animus remittendi* and the *factum* of reinstatement. This is best established by proof of a resumption of all the marital obligations enjoyed by the defaulting spouse prior to the commission of the offence. In other words, there must be a "restoration of the offending spouse to his or her previous position."[53]

The Sri Lankan law following early English authority held that proof of sexual intercourse, as evidence of condonation had different consequences depending on which spouse was guilty of matrimonial misconduct. For instance, Justice Keuneman in *Dias* v. *Mensaline Hamine*[54] declared that a wife's "submission to the embraces of her husband is not considered by any means such strong proof of condonation as the act of a husband in renewing intercourse with his wife."[55] This difference in attitude is founded on the reasoning that while the wife is the weaker of the two spouses and the one dependant on her husband for board and lodging and thus a victim of her circumstances, the husband

49. R. Else Mitchell, "Revival of Condoned Matrimonial Offences" 1946 (89) M.L.R. 137
50. 1963, sec. 3 which was replaced by sec. 42 (3) of the 1965 Act.
51. H. R. Hahlo, *op. cit.* p. 376
52. See *De Hoedt* v. *De Hoedt* (1910) 4 Leader L. R. 66
53. *Bell* v. *Bell* 1909 T.S. 500 at pp. 508, 509 *per* Innes C. J. *Hockaday* v. *Goodenough* [1945] 2 All E.R. 335; *Benton* v. *Benton* [1958] P. 12; *Baguley* v. *Baguley* [1962] P. 59
54. (1945) 46 N. L. R. 193
55. See also *Appuhamy* v. *Julihamy* (1912) 16 N.L.R. 83

being situated differently is capable of exercising true volition.[56] In 1963, however, the English law obliterated this distinction and enacted that irrespective of the sex of the innocent spouse, proof of intercourse raised a *prima facie* presumption of condonation which could be rebutted by evidence sufficient to negative the necessary *animus*.[57]

The restoration of the *status quo ante* is very much a question of fact. While proof of sexual intercourse is an important item of evidence when deciding whether the parties had resumed marital cohabitation[58] since "a man cannot at the same moment exercise the rights of a husband and disclaim the continuance of the marriage bond,"[59] it is not an essential ingredient of condonation.[60] Indeed, there may be a reconciliation without conjugal cohabitation being re-established due to force of circumstances.[61] Conversely, proof of the spouses living under the same roof is not conclusive evidence of an intention to effect a true reconciliation. In *Baptiste* v. *Selvarajah*[62] there was evidence that the plaintiff lived with the defendant in the matrimonial home notwithstanding the adultery of the defendant, and T. S. Fernando J. declared that this "was the result of the force of circumstances rather than of a true reconciliation."[63] Since reconciliation involves a mutual intention on the part of both spouses to restore what was surrendered, an

56. For English Law authority see *Cramp* v. *Cramp and Freeman* [1920] P. 158; *Turnbull* v. *Turnbull and Coats* [1925] 41 T.L.R. 507; *Maslin* v. *Maslin* [1952] 1 All E.R. 477; *Keats* v. *Keats and Montezuma* (1859) Sw. and Tr. 334

57. Matrimonial Causes Act 1963, sec. 1; and 1965, sec. 42 (1)

58. Voet 24.2.5; *Hare* v. *Hare and Fourie* 1945 N.P.D. 93; *Solomon* v. *Solomon* 1949 (4) S.A. 624; *Tilley* v. *Tilley* [1949] P. 240.

59. *Cramp* v. *Cramp and Freeman* [1902] P. 158 at p. 171, *per* Mc Cardie J. See also H. R. Hahlo, *op.cit* p. 373.

60. "Conjugal cohabitation can be resumed without a renewal of sexual intercourse between the spouses after reconciliation" *Jayasinghe* v. *Jayasinghe* (1954) 55 N.L.R. 410 at p. 417, *per* Gratiaen J.

61. *Bell* v. *Bell* 1909 T.S. 500

62. (1957) 59 N.L.R. 284

63. *id.* at p. 287. See also *Dias* v. *Mensaline Hamine* (1945) 46 N.L.R. 193 where Keuneman J. declared that the fact that the wife resided in the same home with her husband was insufficient evidence of condonation in the absence of additional proof of forgiveness and of the reinstatement of the offending spouse. See also *Neimand* v. *Neimand* (1898) 15 S.C. 217; *Sharneck* v. *Sharneck* 1929 W L. D. 112

invitation by the innocent spouse to have intercourse, which is rejected by the guilty spouse, does not constitute condonation of adultery.[64] Likewise, there can be no condonation if the guilty spouse refuses to be forgiven.[65] In *Pinhamy* v. *Babynona*[66] the parties had entered into an agreement whereby they consented to live separate lives. The terms of the agreement were as follows: "Our deeds, acts, conduct and behaviour can and shall be independent of one another and as each party shall separately will and desire and that both of us shall not hereafter seek any legal remedy against one another according to law." When the husband sued his wife for divorce on the ground of adultery the court held that the agreement was a bar to an action based on an act of misconduct committed prior to the agreement. While this agreement was not an immoral one although it stipulated that the wife might live as she pleased, and that no matter how she lived the husband would not sue her for divorce in respect of such misconduct, the act of adultery alleged in this case was one committed prior to the agreement and of which he was aware at the date of the agreement. Consequently, Hutchinson C.J. implied that the husband had condoned her misconduct which could not be used to sustain an action for divorce.

III. The Discretionary Bars

While both the absolute and discretionary bars to divorce pertain to the allegation of fault on the part of the plaintiff, an important distinction is discernible in relation to the fault of the plaintiff in the two situations. In the former situation, the plaintiff must be free of the taint of guilt in relation to the offence alleged to have been committed by the defendant. In other words, if there is a causal nexus between the guilt of the plaintiff and that of the defendant a divorce will not be granted. In the latter instance, however, the situation is materially different in that the guilt of the plaintiff, which is not only independent of that attached to the defendant but also one which is not necessarily a matrimonial misconduct for which an action for divorce may be available, is

64. *Baptiste* v. *Selvarajah* (1957) 59 N.L.R. 284
65. *Whalley* v. *Whalley* 1967 (4) S.A. 89
66. (1911) 14 N.L.R. 104

sufficient to warrant the exercise of judicial discretion to deny relief to the plaintiff. Consequently, proof of adultery, cruelty, desertion and the wilful separation of the plaintiff may result in the denial of relief to the plaintiff.[67] The statute also provides that proof of "wilful neglect or misconduct of or towards the other party as has conduced to the adultery" serves as a discretionary bar. This clause strongly resembles the absolute bar of connivance but apart from that all the other clauses set out in the statute refer to the independent guilt of the plaintiff. The court also has the discretion to refuse a divorce if the plaintiff has, in the opinion of the court, been guilty of unreasonable delay in presenting or prosecuting the plaint.[67a]

It must be pointed out that although the "clean hands" rule, or the assertion that the parties are *in pari delicto*, is applicable to the absolute bars to divorce, the right to refuse a divorce when the plaintiff, too, is guilty of an offence not causally connected to the defendant's misconduct may be seriously queried. Indeed, the *in pari delicto* rule is effective to deny relief only in situations where the guilt of both parties relates to a common offence.[68] Consequently, just as in criminal law, where it is no defence to a charge of theft, for instance, to allege that the plaintiff too is guilty of a comparable offence, in the realm of divorce the separate misconduct of the plaintiff should bear no relevance to the defendant's fault which is pleaded as a ground for divorce. In relation to the consequences of divorce however, evidence of the matrimonial misconduct of the plaintiff may have some relevance.

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67. Sec. 602. There appears to be no material difference between desertion and wilful separation, although they are treated as alternative offences by the statute.

67a See *Alloe Nona* v. *Manuel Perera* (1920) 2 C.L. Rec. 182 where there was a delay of seven years before an action for divorce was instituted. The explanation offered by the plaintiff however, was that since adultery was committed with the plaintiff's sister, she was reluctant to make the issue a public scandal. Moreover, there was evidence of her financial hardship which discouraged her from filing a divorce action. Consequently, the court held that the delay was not unreasonable. See also in this connection *Abraham* v. *Alwis* (1941) 19 C.L. Rec. 145; *John Perera* v. *Mathupali* (1968) 71 N.L.R. 461.

68. See for instance C. G. Weeramantry *The Law of Contracts* (Colombo 1967) p. 388

In *Appuhamy* v. *Menikhamy*[69] a dissolution of the marriage had been claimed on account of the adultery of the wife. The District Judge however, dismissed the action on finding that the plaintiff, too, had been guilty of adultery. In the Supreme Court, Lascelles C. J. reiterated this view on the reasoning that it was the plaintiff's conduct that had conduced to the misconduct of the defendant. In *Seneviratne* v. *Panishamy*[70] it was urged that a divorce should not be refused to a plaintiff on proof of his adultery unless of course his misconduct had conduced to the adultery of his spouse. Likewise, relief should not be denied to a guilty plaintiff if it is proved that the adultery of his spouse with the co-respondent caused or conduced to the adultery of the plaintiff. However, Garvin J. declared that although there were circumstances in which a court was obviously entitled to condone the adultery of the plaintiff, the court's decision to refuse a divorce should not be limited to the situations set out above. He opined that the court should be guided by English law authority in the exercise of its discretionary powers. The judgment of Mc Cardie J. in *Hine* v. *Hine*,[71] which was cited with approval declared that only exceptional circumstances should lead the court to overlook the matrimonial default of a petitioner. "It is based on the general and cogent requirements of public morality, and the resultant duty of the court to vindicate a high standard of matrimonial obligation. The enforcement of this duty will create a standard which all may know and find it well to follow. If the rule be enfeebled by an unduly sensitive regard to the hardship of particular cases, then the spouse who has been guilty of matrimonial offences would stand upon a footing dangerously akin to that of a petitioner who is free from conjugal stain. It is better that occasional hardship should exist than that the permanent and supreme requirements of matrimonial morality should be relaxed."[72] Justice Garvin thus concluded: "He who seeks to be released from the matrimonial tie must himself be free from matrimonial offence. This rule may only be relaxed in exceptional cases and where the relief prayed

69. (1911) 15 N.L.R. 100
70. (1927) 29 N.L.R. 97
71. [1962] 1 W.L.R. 1124
72. (1927) 29 N.L.R. 97 at p. 99

for may be granted without prejudice to the interests of public morality."[73]

In the later English law there was a gradual change of attitude resulting in a more liberal outlook towards cases where the plaintiff too was guilty of matrimonial misconduct. For instance, in *Wilson* v. *Wilson*,[74] Sir Henry Duke while reiterating the view that judicial discretion was "not to be exercised eagerly or indeed readily, but with some degree of stringency" set out certain guidelines which could help a judge in exercising his discretion. He declared that the following circumstances should be considered:

(1) the position of the children in whose interest it was that they should have a home with the sanctions of decency and, so far as may be, of the law;

(2) the position of the woman with whom the petitioner was living, for it was clearly desirable in her interest that she should be lawfully married;

(3) the case of the respondent, as to whom there was no prospect that refusal of relief would have the effect of reconciling her with the petitioner; and

(4) the case of the petitioner in whose interest it was that he should be able to marry and live respectably.

Since this decision relief was not often refused where the petitioner made a frank disclosure of guilt.[75] In *Apted* v. *Apted and Bliss*[76] the following principles emerged: "In every exercise of discretion the interest of the community at large in maintaining the sanctions of honest matrimony is a governing consideration; a strong affirmative case is necessary before a judge is justified

73. *id.* at p. 100. See also *Appuhamy* v. *Julihamy* (1912) 16 N.L.R. 83; *Swaris* v. *Alwis* (1872 - 76) Ram. Rep. 50; *Fernando* v. *Fernando* (1948) 49 N.L.R. 114

74. [1920] P. 20

75. *Stuart* v. *Stuart and Holden* [1930] P. 77

76. [1930] 46 T.L.R. 456

under the statutes in negativing their conditional prohibitions: it is manifestly contrary to law that a judicial discretion, in favour of a litigant guilty of misconduct in the matters in question, should be exercised where that course will probably encourage immorality."

These sentiments were reiterated and followed by Moseley J. in *Abraham* v. *Alwis*[77] and Sirimane and de Kretser JJ. in *Perera* and *Mathupali*.[78] The latter case involved an action for divorce by the husband against his wife on the ground of malicious desertion. The defendant had committed adultery and continued to live with that man by whom she had a child. It was also disclosed in the course of the trial that the plaintiff had a mistress by whom he had three children. On the facts of the case, Justice Sirimane declared that the marriage had completely broken down and "with due regard to the sanctity of marriage, there is hardly a reason why the marriage tie should continue."[79] In similar vein de Kretser J. opined that "It is an incontrovertible fact that this marriage is at an end, and to convert to Unholy Deadlock what was once and is no longer Holy Wedlock by refusing to exercise a discretion vested in a judge so far from safeguarding the sanctity of marriage appears to me to make a mockery of it and is not in the public interest, for I think one must pay some heed to the change in the attitude of the society we live in in regard to 'the sanctions of honest matrimony'. In the days when the Civil Procedure Code was enacted. . . the man and woman who 'lived in sin' because they could not obtain freedom to marry, because they had matrimonial offences to their discredit were social lepers. Today that is not the case, and that is largely due to the sympathy felt towards those who are unable to regularise such unions whether due to antiquated divorce laws or the too stringent exercise of a discretion vested in a divorce judge. It appears to me that when a court is satisfied that the marriage between the parties is truly at an end it should exercise its discretion with a view to rehabilitate and not to punish. The exercise of discretion in a manner that would tend to regularise unions in

77. (1941) 42 N.L.R. 373
78. (1968) 71 N.L.R. 461
79. *id.* at p. 464

the interests of the parties and the innocent children born to them is in the public interest and, in my opinion, a correct use of the discretion vested in a judge. To so exercise it when one views the matter in its proper perspective does no damage to the sanctity of marriage and in fact enhances respect for the law." [80]

Indeed, this most enlightened judgment appears to reflect the sentiments of modern Sri Lankan law. [81] There is however, an anomalous feature in our statute law, namely, the retention of the fault based grounds for divorce on the one hand, and the abolition of the bars to divorce, on the other. Consequently, there is an urgent need for consistency in this branch of the law.

IV. Conclusion

It is evident from an analysis of the defences that the absolute bars to divorce are an integral feature of a jurisdiction in which divorce is granted on proof of matrimonial misconduct. To explain this further, these defences are the only means by which the court ensures that a divorce is granted because of the fault of one party, which gives a right of action to the innocent spouse. In other words, the plaintiff is required to prove not only that the defendant is guilty of matrimonial misconduct, but also his or her corresponding innocence. If, therefore, there is proof of condonation, for instance, which is full forgiveness in the light of full knowledge, the petitioner cannot be heard to complain of an injury which is a prerequisite for the exercise of a right of action. Likewise, connivance, which is an anticipatory consent to the commission of a matrimonial fault, will estop a claim for relief founded on the maxim *volenti non fit injuria*. The scope of collusion, unlike the other two defences, is significantly wider and while it has been defined as an agreement to perpetuate a fraud upon the courts, it has also been said to include any agreement to institute or conduct a divorce suit not necessarily with a fraudulent intention.

The discretionary bars to relief involved proof of a separate and distinct offence on the part of the petitioner which gave the

80. *id.* at p. 465

81. See the Civil Procedure Code, sec. 608.

court a discretion to refuse a dissolution of the marriage. In addition, proof of conduct conducive to the defendant's misconduct, and the unreasonable delay in filing an action, were capable of being treated as the basis for a dismissal of the petitioner's action.

In 1975, however, the legislature repealed all the absolute and discretionary bars to divorce thereby creating a serious *lacuna* in the law of matrimonial relief in Sri Lanka. [82] It would logically follow then that subsequent to 1975, a divorce can be granted notwithstanding evidence of connivance, condonation or collusion. Indeed, this is a totally unacceptable proposition since no legislature can intend to sanction divorce obtained by connivance, collusion or condonation and at the same time retain the grounds for divorce founded on matrimonial fault. In deleting the absolute bars to divorce the legislature eroded the only safeguards in our law which ensured that a marriage was dissolved only on proof of an injury caused to one spouse on account of the misconduct of the other.

If one were to speculate on the possible rationale for this serious omission it could be asserted that the legislature intended to do away with these defences in order to facilitate the dissolution of a marriage which has 'irretrievably broken down disregarding therefore the need to prove the blameworthy conduct of one spouse as a basis for dissolution. If this was the intention of Parliament it was surely incumbent that a corresponding repeal of the fault-based grounds for divorce in the Marriage Registration Ordinance accompanied the deletion of the bars to divorce from the statute book. Indeed, it appears very much as if the legislature intended to introduce the "breakdown" principle through the back-door as it were, leaving intact the statutory provision requiring proof of matrimonial misconduct, on the reasoning that to abolish that provision would be too radical a step which might well injure the *mores* of Sri Lankan society.

It is submitted however, that the consequences which are brought about by the application of the law as it stands today are

82. Administration of Justice (Amendment) Law No. 25 of 1975.

far more reprehensible than what would have followed if the legislature had made an avowed change in the law thereby incorporating the necessary safeguards that usually accompany liberal divorce laws. For instance in the English law an effective machinery has been set up to ensure that a marriage is not dissolved against the will of one spouse. Moreover, a mere consensual separation is not sufficient for a decree of dissolution unless there is additional proof of separation for a prescribed period of time. In other words, a hasty putting asunder is effectively discouraged.[83] The same however cannot be said for our legal system which does not admit even the need to prove that the marriage has irretrievably broken down as a prerequisite for a decree of divorce. The all important difference between that jurisdiction and ours then is that while in the English law matrimonial misconduct is only a symptom of the unworkability of the marriage, in Sri Lanka, proof of fault *per se* is sufficient to sustain an action for divorce. The inevitable consequence of this would then be that in our legal system the divorce laws are even more liberal than those of a jurisdiction which has completely done away with the fault-based grounds for divorce.

It is submitted that although a reintroduction of the statutory bars to divorce is not being canvassed, it is imperative that legislative intent be unambiguously expressed and consistency in the law achieved.

83. For the South African law see to Divorce Act No. 70 of 1979.

CHAPTER 10

LEGAL CONSEQUENCES OF SEPARATION AND DIVORCE

I. Personal Consequences

The legal consequences of a judicial separation, on the one hand, and divorce, on the other, differ in many respects. While a decree for separation suspends the personal consequences of marriage by temporarily putting an end to the obligation to live together;[1] a dissolution of marriage brings about a total cessation of the personal consequences of the marriage tie.[2] Moreover, subsequent to a decree of separation the spouses are obliged to observe conjugal fidelity and consequently, a second marriage cannot be contracted during the period of separation.[3] On entering a decree of divorce, however, the spouses are free to marry again. In relation to the wife's domicile and name no change is made due to a judicial separation. After a decree of divorce, however, the wife does not retain her husband's domicile and she is free to change her name and to even resume her maiden name, if she so wishes.[4]

II. Financial Consequences

A. Introduction

The concurrent application of dissimilar grounds for divorce is a characteristic feature of the law of Sri Lanka. On the one hand, the Marriage Registration Ordinance[5] stipulates that matrimonial misconduct is the basis for the dissolution of a marriage.

1. Grotius 1. 5. 18; 20; Voet 24. 2. 16.; *Banks* v. *Clement No* 1921 C.P.D. 197 at p. 201
2. H.R.Hahlo, *The South African Law of Husband and Wife* (4th ed. Cape Town 1975) p. 428
3. H.R.Hahlo, *op.cit.* p.335
4. *ibid.*
5. No. 19 of 1907, sec. 19

Co-existing with this statute is the Civil Procedure Code[6] which declares that a decree of separation may be converted to one of divorce after a period of two years; alternatively, notwithstanding that an application for a decree of separation has not been made, if there has been a separation *a mensa et thoro* for a period of seven years a dissolution of the marriage may be obtained. Consequently, the conduct of the parties assumes more importance in certain situations than in others and the court is called upon to adopt different criteria depending on the circumstances of the particular case. This difference of emphasis on matrimonial misconduct has an important bearing on the readjustment of proprietary rights of spouses on separation and divorce. Misconduct which is sufficient to sustain a dissolution of the marriage should be more reprehensible than the notion of fault which is sufficient to obtain a judicial separation. Thus, for instance, desertion with the specific intention to end cohabitation and adultery are grounds for divorce; but continued use of indecent language, persistent nagging, ill-treatment and similar conduct which renders further cohabitation either dangerous or intolerable is sufficient for a decree of separation. When the court is called upon to make a just and equitable settlement of property rights, therefore, a uniform attitude towards matrimonial misconduct cannot be adopted.

A further distinction between the support obligation consequent to a judicial separation, on the one hand, and divorce, on the other, is discernible. A decree of separation does not have the effect of terminating the obligations of marriage and as such an order for support on separation is expected to be commensurate with the spouse's reciprocal obligation of support. Hence there is evidence in the law of South Africa that the courts have been more generous when making an order for maintenance on separation, than on divorce.[7] According to justice Watermeyer in *Stone* v. *Stone*[8] in the case of separated spouses the award of maintenance is "the court's translation into terms of money what the spouse, whose duty it is to support, would, in the case of continued cohabitation ordinarily have provided to the other, in

6. No. 2 of 1899, as amended by Law No 20 of 1977, sec. 608
7. See H.R.Hahlo, *op.cit.* p. 341
8. 1966 (4) S.A. 98 at p. 103.

money and in kind." This criterion however, is not relevant to an assessment of maintenance subsequent to a termination of the marital relationship.

It must be pointed out that while the unfettered discretion vested in the courts to make an order "if it thinks fit" is to be commended,[9] the absence of any guidelines which will aid the court in the use of its discretionary powers is regretted. In a jurisdiction such as that of Sri Lanka, where the grounds for divorce are varied and, where in addition, a distinction is made between the requirements to be proved for a decree of separation and divorce, an adequate appreciation of the facts of each case assumes considerable importance in order to guard against the equal treatment of unequals which may well result in substantial injustice to individuals.

B. Maintenance

(i) Alimony Pendente Lite

It is a well established principle of law that while the action for divorce is *sub judice* either spouse has the right to enforce the other's obligation of support.[10] This derives from the fact that until such time as the marriage tie is dissolved the consequences of marriage attach to the spouse. The right to demand support is therefore, dependant on the merits of the case, and the availability of the action has as its primary objective support pending the action in order to enable the needy spouse to live without hardship during this period and to go through with the action before court.[11] All that the applicant must prove is financial need and the other party's ability to provide the required support. In the common law, the applicant is required to establish that she has a reasonable chance of success in the main action. Although this need not be proved on a balance of probabilities in her favour, it must at least be shown that if her allegations are true, judgment will be entered in her favour.[12] This is founded on the rationale that

9. Civil Procedure Code No. 2 of 1899 as amended by Law No. 20 of 1977, sec. 615
10. Civil Procedure Code No. 2 of 1899 as amended by Law No. 20 of 1977, sec. 614
11. *Aslin Nona* v. *Peter Perera* (1945) 46 N.L.R. 109
12. H.R.Hahlo, *op.cit.* p. 518

the support obligation consequent upon marriage is vitiated on proof of misconduct. [13] This requirement will be wholly consistent with the action for divorce if dissolution of the marriage is based solely on proof of matrimonial misconduct since the "innocence" of the applicant will be a requisite both for success in the matrimonial action and in the claim for interim support. Subsequent to the introduction of the new grounds for divorce, in our legal system, however, the courts are faced with a situation in which fault may or may not be relevant to the action for divorce [14] while it continues to wield a significant influence on the obligation of support *pendente lite*, which may be wiped out if there is obvious proof of matrimonial fault. Legislative reform to achieve consistency in the law, therefore, is an urgent necessity. [15]

When quantifying alimony *pendente lite* the Sri Lankan law, following early English law practice, ensures that the alimony awarded is in no case "less than one-fifth of the husband's average net income for the three years next preceding the date of the order."[16] Moreover, it has been judicially established that the applicant must make the claim in the divorce proceedings. [17] In *Busse Acharige Justina Hamy* v. *Alutwala Acharige Don Elias de Silva* [18] the court refused to allow the plaintiff to file a separate action for alimony *pendente lite*. The reason given by the court was that it was essential to give the defendant notice of the claim for alimony "because the existence of such a claim might influence the respondent in deciding whether or not to defend the suit." [19] An attempt to flout an order of the court is an abuse of the process

13. See Voet 24.2.18; *Bing and Lauer* v. *Van der Heever* 1922 T.P.D. 279; *Excell* v. *Douglas* 1924 C.P.D. 472 at pp. 477, 481. *Peck* v. *Peck* (1889) 9 Natal L.R. 195; *Cook* v. *Cook* 1911 C.P.D. 810

14. Civil Procedure Code No. 2 of 1899 as amended by Law No. 20 of 1977 sec. 608

15. An analogous situation prevails in modern South African law. See June Sinclair in "The Divorce Act and the Duty of Support" 1981 (98) *S.A.L.J.* 89

16. Civil Procedure Code No. 2 of 1899 as amended by Law No. 20 of 1977. sec. 614. This rule has been abolished in the English law. See P.M. Bromley, *Family Law* (5th ed, London 1976) p. 529, note 1.

17. *Busse Acharige Justina Hamy* v. *Alutwala Acharige Don Elias de Sliva* (1884) 6 S.C.C. 136.

18. (1884) 6 S.C.C. 136

19. See Rayden *op.cit.* p. 481

of the court. In *Aslin Nona* v. *Peter Perera*[20] Justice Keuneman declared that it is "a contempt to try to starve the wife into surrender, or to reduce her to such a state of destitution that she cannot efficiently carry on the litigation." The court therefore relied on the statutory provision which enacts that "Nothing in this Ordinance shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court,"[21] and ordered a stay of the proceedings until the alimony due was paid.[22] The court, however, will not go so far as to strike out the defence and to place the defendant in the position he would have been had he not appeared.[23] It has been pointed out that while "an order staying the hearing of the action effectively prevents the abuse of the process of the court because the husband is thereby compelled to comply with the alimony order if he desires his action to be tried, there is no question of any denial of justice for the plaintiff because he can secure that trial is held merely by making the payment which is within his power to make. But to strike out the defence is to expel the defendant from the action; it is to punish rather than to prevent abuses, for it does not operate to enforce or secure compliance with the flouted order."[24] It has also been doubted whether an order to conduct an *ex parte* trial can be made by virtue of inherent, as opposed to express, powers.

In relation to the duration of the order the Civil Procedure Code enacts that it "shall continue in case of a decree for dissolution of marriage or of nullity of marriage until the decree is made absolute or is confirmed, as the case may be."[25] Decree absolute

20. (1945) 46 N.L.R. 109.

21. Civil Procedure Code No. 2 of 1889, sec. 839

22. Default of Payment of costs too may justify the application of sec. 839. See *Abeyagoonesekera v. Abeyagoonesekera* (1909) 12 N.L.R. 95; *Silva* v. *Silva* (1905) 8 N.L.R 280. For the English law see *Leavis* v. *Leavis* [1921] P. 299; *P.v. P and T.* 26 Times L.R. 607; *Chappel* v. *Chappel* [1938] 4 All E.R. 814. For the South African Law see *Berry* v. *Berry* 1924 (45) Natal L.R. 161.

23. *Sinnathamby* v. *Yokammah* (1958) 61 N.L.R. 183.

24. *Sinnathamby* v. *Yokammah* (1958) 61 N.L.R. 183 *per* H.N.G. Fernando C.J.

25. Sec. 614 (1). In the event of a claim for a decree of judicial separation the order will cease on the decree being granted. See Raydon *op.cit.* p. 497; P.M.Bromley, *op.cit.* 529

is made on the expiration of three months from the entering of the decree *nisi* "or such longer period as the court may prescribe in the said decree."[26] In *Aserappa* v. *Aserappa*[27] the court had to consider whether a decree *nisi* became absolute as a matter of course after the lapse of the prescribed period or whether the court had to be moved by either party to make the decree absolute. The District Judge held that although in that case the decree was made absolute nine months after the entering of decree *nisi*, the decree related back to the end of the three months on the reasoning that it became absolute as a matter of course. Dalton S.P.J. in the Supreme Court, however, reversed this decision and held that that view was not supported by the Code. He rightly pointed out that the object sought to be achieved by requiring a period of time to lapse before decree absolute, was to give the parties an opportunity to effect a reconciliation and this rationale may well be defeated if one adopts the view that no matter what the circumstances are, on the termination of the three month period the decree will become absolute. The better view then is that which compels the party who desires to make the decree absolute to move the court to do so provided of course the minimum three month period had lapsed.

(ii) **Permanent Alimony**

Wide discretionary powers have been conferred on the court which "may, if it thinks fit," upon pronouncing a decree of divorce or separation, order for the benefit of either spouse that the other shall do any one or more of the following:

(*a*) make such conveyance or settlement as the court thinks reasonable of such property or any part thereof as he may be entitled to;

(*b*) pay a gross sum of money;

(*c*) pay annually or monthly such sums of money as the court thinks reasonable;

26. Sec. 604.

27. (1935) 37 N.L.R. 372.

(*d*) secure the payment of such sums of money as may be ordered under paragraph (*b*) or paragraph (*c*) by the hypothecation of immovable property or by the execution of a bond with or without sureties, or by the purchase of a policy of annuity in an insurance company or other institution approved by court.

The court may at any stage discharge, modify, temporarily suspend and revive or enhance an order made under subsection (1)."[28]

The absence of any legislative directive on the manner in which judicial discretion should be exercised is indeed unfortunate.[29] For instance, the matrimonial misconduct of the parties will have a bearing on the obligation of support during the post dissolution period, but the extent of its relevance and the nature of misconduct that will affect an order for support, has not been set out by the legislature. Some guidance may be obtained, however, from the early case law on this subject. In *Karunanayake* v. *Karunanayake*[30] Maartensz J. opined that permanent alimony should as a rule be larger than alimony pending the action. This appears to be founded on the rationale that when the claim is made, since the matrimonial innocence of the applicant has been decided upon, the court is constrained to give recognition to this fact, and to enhance the interim award, which was made at a time before the merits of the case were decided upon. Similarly, in *Mathew* v. *Mathew*[31] Basnayake C.J. observed that the discretion of the judge in awarding permanent alimony was not fettered by the quantum awarded as alimony *pendente lite*, once again suggesting, by inference, that different considerations influence the court after the allocation of fault. However, in *Wijeratne* v. *Wijeratne*[32] the Supreme Court was firmly of the view that the financial status of the defendant was the sole criterion upon which alimony should be quantified.

28. Civil Procedure Code No. 2 of 1899 as amended by Law No. 20 of 1977 Sec. 615
29. See for instance the Matrimonial Causes Act 1973 of England which seeks to guide the court in the exercise of its discretionary powers.
30. (1937) 39 N.L.R. 275
31. (1956) 57 N.L.R. 511
32. (1967) 73 N.L.R. 546

Consequently, the plaintiff's claim for a sum in excess of that awarded as alimony *pendente lite* was refused on the reasoning that there was no evidence of a change in the defendant's financial position to justify a corresponding increase being granted to the plaintiff.

Indeed it must be pointed out that prior to the enactment of the new grounds for divorce [33] the criterion for evaluating support *stante matrimonio* matched the criterion used to evaluate entitlement during the post divorce era. Consequently, there was uniformity in the law in that the obligation of support, which is a fundamental incident of marriage, was vitiated on proof of a breach of either the obligation to live together or that of fidelity. Hence, in all the situations in which this right could be enforced, that is, when the common household was in existence, when an application for alimony *pendente lite* was made, and when the spousal obligation was enforced subsequent to a dissolution of the marriage, the yardstick of evaluation for entitlement was proof of the applicant's financial need, the ability of the defendant to fulfil his obligation of support and the absence of matrimonial misconduct.

The modern Sri Lankan law, however, reflects an anomaly, first introduced by the recent amendment to the Civil Procedure Code [34] according to which a spouse may convert a decree of separation to one of dissolution after the lapse of two years, and, proof of separation for seven years is sufficient for a dissolution of the marriage. While introducing these additional grounds for divorce, the provisions of the Marriage Registration Ordinance,[35] according to which proof of adultery, malicious desertion and incurable impotency are grounds for divorce, were left intact. The inevitable outcome of the applicability of these fault and non-fault based grounds for divorce in our legal system is the adoption of different criteria when deciding upon entitlement to proprietary rights *stante matrimonio* and subsequent to a dissolution of the marriage, on the one hand, and the application of different rules when awarding support on divorce depending on

33. Civil Procedure Code No. 20 of 1977
34. *ibid.*
35. No. 19 of 1907 sec. 19(2)

whether the action was instituted by virtue of one of the grounds set out in the Marriage Registration Ordinance or the newly amended Civil Procedure Code, on the other.

In relation to the conduct of the parties there is a significant difference in the nature and gravity of the acts complained of. For instance, conduct of a more reprehensible nature sustains an action for divorce, while conduct sufficient to warrant a judicial separation is less blameworthy[36] and therefore this difference, though one of degree, must influence the court in the exercise of its discretionary powers. This distinction, however, tends to get blurred by the rule which permits a decree of separation to be converted to one of divorce only after the lapse of two years.[37]

Moreover, according to the earlier law only an "innocent" wife was entitled to alimony both on separation and on divorce.[38] In *Ebert* v. *Ebert*[39] Justice Keuneman declared that although he favoured a more humane principle such as the one applicable in the English law, which allowed alimony even to an indigent "guilty" wife, he was powerless to depart from the existing statutory provision. According to the amended Code, however, the court is required to make an order "if it thinks fit" for the benefit of either spouse. *Prima facie* our law appears to be identical to the modern English law which also vests in the court a considerable degree of discretion to make an order having 'regard to all the circumstances of the case."[40] The notable distinction between our law and that of England, however, is the introduction of the doctrine of irretrievable breakdown of the marriage as the sole ground for divorce in that legal system, while the Sri Lankan law continues to retain the fault based grounds for divorce entrenched in the Marriage Registration Ordinance. Consequently, a spouse, who, according to the Sri Lankan law is solely responsible for wrecking the marriage on account of his adultery or malicious desertion, will nevertheless be entitled to support, whereas in the English law the court is not called upon to apportion "guilt" to one party,

36. See chapter 8 *supra*
37. No. 2 of 1899 as amended by Law No. 20 of 1977, sec. 608
38. Civil Procedure Code No. 2 of 1889
39. (1939) 40 N.L.R. 388.
40. Matrimonial Causes Act 1973, sec. 25(1).

the blameworthy conduct of both parties having resulted in an irretrievable breakdown of the marriage. Notwithstanding this, the English law continues to ascertain the conduct of the parties. It has been said that an examination of conduct is important because "if a wife's conduct is found to a given extent to be worse than her husband's she would be placed in a financial position, compared with the hypothetical position, to that extent lower than his position, similarly compared."[41] Cretney, therefore, points out that this would involve a thorough investigation of the parties' conduct with a view to fixing responsibility for the breakdown on one spouse.[41a] The Court of Appeal in *Wachtel* v. *Wachtel*,[41b] however, pointed out that irretrievable breakdown of a marriage which presupposes the blameworthy conduct of both parties is irreconcilable with "a post-mortem to find out what killed the marriage."[41c] Moreover, the Court of Appeal did not subscribe to the view that an evaluation of the degree of culpability necessitates a reduction of the financial award made. The relevance of matrimonial misconduct is limited to situations where "the conduct of one of the parties is in the judge's words... 'both obvious and gross', so much so that to order one party to support another whose conduct falls into this category is repugnant to anyone's sense of justice."[41d] In this circumscribed situation it was felt that either a total denial of financial relief or a reduction of what might have been awarded is justifiable and entirely consistent with a jurisdiction which does not require proof of misconduct for a dissolution of marriage. However, it has been pointed out, that in order to label the conduct of the parties as "gross and obvious" the court is compelled to embark on an exhaustive search for the truth and this very process is incompatible with the theory that both are to blame for the breakdown. "To that extent, then, irretrievable breakdown has not yet vanquished fault for it still hovers in the wings - not always wanted,

41. *Harnett* v. *Harnett* [1973] Fam. 156, at pp. 161-162 *per* Bagnall J.

41a S.M.Cretney, *Principles of Family Law* (2nd ed., London 1976) 203

41b [1973]Fam. 72

41c *id.* at p. 90.

41d *id.* at p. 90 *per* Lord Denning M.R.

but ready to rush in, either in person, or in the shape of its *alter ego*, breach of obligation, as soon as anyone is prepared to let it."[41e]

In effect then the English law is characterised by two widely differing criteria upon which financial relief is awarded. They are situations in which:

(*a*) there is proof of an irretrievable breakdown of the marriage due to the fault of both parties, the relative degree of fault being unimportant;

(*b*) the responsibility for the breakdown is fairly and squarely apportioned on one party because of his "gross and obvious" misconduct.

The distinction between the two alternatives involves a difference of emphasis. While in (*a*) the court is concerned with the end result of the blameworthy conduct, in situation (*b*) the degree of culpability attributed to the conduct assumes importance. Consistent with this distinction, financial relief is awarded in (*a*) but denied in (*b*).

C. The Statute Law of England

The Matrimonial Causes Act of 1973 declares that it is the duty of the court, when deciding whether to exercise its powers of ordering financial provision to a party to the marriage "to have regard to all the circumstance of the case" including the following seven specified matters.[42]

(i) "The income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future."

It is usual for the court to consider both the actual and potential resources of the parties.[43] If, however, the ex-wife is a

41e H.A.Finlay, "The Retreat of Matrimonial Fault" 1975 (38) M.L.R 153 at p. 170

42. Sec.25

43. *Mc. Ewan* v. *Mc Ewan* [1972] 1 W. L.R. 1217; *Griffiths* v. *Griffiths* [1974] 1 W.L.R. 1350; *Jones* v. *Jones* [1975] 2 All E.R. 12; *Buttle* v. *Buttle* [1953] 2 All E.R. 646; *Williams* v. *Williams* [1974] 3 All E.R. 377; *Klucinski* v. *Klucinski* [1953] 1 All E.R. 683.

mother of young children who is compelled to stay at home, her potential income is not computed.[44] In any event, different considerations apply to a woman, who more often than not is faced with a diminished opportunity of employment, as a consequence of having sacrificed her career in the interests of her family and who is forced to re-enter the job market because of the disruption of her home.[45] The availability of supplementary benefits from the State, and the tax liabilities of the spouse ordered to pay alimony are also looked into. While the court will guard against a spouse attempting to throw his obligation of support on the State it will not make an order which will reduce his income to below subsistence level.[46]

(ii) "The financial needs and responsibilities which each of the parties to the marriage have or is likely to have in the foreseeable future."

This entails an evaluation of the legal and moral obligations of the spouses to maintain dependants such as children of the marriage, legitimate and illegitimate children of a former union, and former spouses.[47]

(iii) "The standard of living enjoyed by the family before the breakdown of the marriage."

An inevitable lowering of the standard of living of both spouses is to be expected since now two homes will have to be run instead of one.[48] Nevertheless, the court will seek to ensure that the reduction is evenly distributed so that although the applicant is not assured of a life style enjoyed prior to the divorce, it is seen to that there is no great disparity between the living standards of both parties.[49]

(iv) "The age of each party to the marriage and the duration of the marriage."

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44. Rose v. Rose [1950] 2 All E.R. 311; *Le Roy-Lewis* v. *Le Roy-Lewis* [1954] 3 All E.R. 57.
45. *Graves* v. *Graves* [1973] 117 S.J. 679.
46. *Clark* v. *Clark* [1979] 9 Fam. Law 15.
47. *Roberts* v. *Roberts* [1970] P 1; *S* v. *S* [1976] Fam. 1; *Jones* v. *Jones* [1976] Fam 8.
48. S.M.Cretney, *Principles of Family Law* (2nd ed., London 1976) p. 183
49. *ibid.*

The age of the applicant has a bearing on the award because this determines the opportunity for employment and is also relevant to the question of need. A woman of advanced years, for instance, will be less able to secure suitable employment and will also be placed in a situation which warrants enhanced financial support to enable her to offset the expenses incurred in obtaining assistance of one sort or another.[50]

The duration of the marriage is important in order to evaluate the contribution made by each spouse to the marriage. If, for instance, the marriage had lasted a very short time, the court will proceed to ascertain whether one party had made a substantial contribution to the marriage by way of giving up a lucrative job or by sharing in the expenses incurred in setting up the common household. In these circumstances, financial relief will be given by way of compensation for the loss incurred.[51] If, on the other hand there had been only a "shell of a marriage," cohabitation having lasted for a very short period, and there is no evidence of a contribution made by either spouse, a financial award will not be made.[52]

(v) "Any physical or mental disability of either of the parties to the marriage."

(vi) "The contribution made by each of the parties to the marriage to the welfare of the family, including any contribution made by looking after the home or caring for the family."

This last provision is of singular importance since it contains the innovated idea that not only monetary contributions made towards the acquisition of assets but also that the indirect contributions usually made by the woman performing her functions as a homemaker, are relevant to the assessment of a financial award. "Parliament recognised that the wife who looks after the home and family contributes as much to the family assets as the wife who goes out to work. The one contributes in kind, the other in money or money's worth. If the court comes to the conclusion that the home has been acquired and maintained by the joint efforts of

50. *ibid.*

51. *Cumbers* v. *Cumbers* [1974] 1 W.L.R. 927.

52. *Krystman* v. *Krystman* [1973] 1 W.L.R. 927; *Taylor* v. *Taylor* [1974] 119 S. J. 30

both, then, when the marriage breaks down, it should be regarded as the joint property of both of them, no matter in whose name it stands. Just as the wife who makes substantial money contributions usually gets a share, so should the wife who looks after the home and cares for the family for twenty years or more."[53]

The above argument is most appropriate to the subject of redistribution of "matrimonial property" or "family assets" and will be discussed in relation to the reallocation of property on divorce.

(vii) "The value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring."

This refers to benefits such as the husband's pension or proceeds of the sale of a family business. In other words, benefits which the wife would have enjoyed had the marriage not broken down.[54]

The Matrimonial Causes Act then declares that the court is to exercise its powers "as to place the parties, so far as it is practicable and having regard to their conduct, first to do so in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other."[55]

It is submitted that this concluding provision is perhaps the most controversial because it compels the court to compare two wholly unlike situations, namely, a united family, on the one hand, with two individuals living separately, with or without children, on the other.[56] Moreover, while all the preceding criteria set out may well be equally applicable to the exercise of judicial discretion in Sri Lanka, this last provision marks the point of departure between the English and Sri Lankan law on the subject.

53. *Wachtel* v. *Wachtel* [1973] Fam. 72, at pp. 93-94, *per* Lord Denning M.R.
54. See *Trippas* v. *Trippas* [1973] 2 All E.R. 1; *O'Donnel* v. *O'Donnel* [1975] 2 All E.R. 993.
55. Sec 25(1).
56. *Wachtel* v. *Wachtel* [1973] Fam. 72 at p. 88.

D. The Standard of Support

In the English law, divorce is based on the irretrievable breakdown of the marriage and is meant to be "not a reward for marital virtue on the one side and a penalty for marital delinquency on the other; not a victory for one spouse and a reverse for the other; but a defeat for both, a failure of the marital 'two-in-oneship' in which both its members, however unequal their responsibility, are inevitably involved together."[57] The law, therefore, has sought to minimise the miseries of divorce and has attempted to enable the 'empty legal shell' to be destroyed with maximum-fairness, and, with minimum bitterness, distress and humiliation. Consequently the English law statute prescribes a minimum standard of support, namely, support so as to place the parties in the financial position in which they would have been if the marriage had not foundered. In effect then although the marriage is dissolved and the obligations of marriage cease to be operative, the duty of support, which is an incident of marriage, appears to influence the obligation of an ex-spouse to pay alimony on divorce. Indeed, the English law obligation of maintenance during the post-divorce era savours of the "support approach" because it requires a degree of support commensurate with the standard enjoyed during marriage.[58] In other words, according to this view, on marriage the spouses take on a responsibility for life, irrespective of the existence of the marriage, dependant solely on need. Of course, matrimonial conduct continues to be relevant in the English legal system and notwithstanding financial need, proof of grave misconduct will disentitle the guilty spouse from claiming maintenance. The punitive rationale of a bygone era, therefore, continues to survive in that legal system. This limitation, it must be pointed out, is essential in view of the statutory provision which requires an ex-spouse to be maintained at a level enjoyed prior to the dissolution of the marriage. Indeed, a rule such as this presupposes that the applicant is less guilty than the defendant or is at least of equal culpability, and

57. "Putting Asunder" - A Divorce Law for Contemporary Society. The Report of a group appointed by the Archbishop of Canterbury in January 1964. (London 1966) 21.

58. See Kevin Gray, *Reallocation of Property on Divorce* (Oxford 1977) pp. 307-308; Stephen Cretney, "The Maintenance Quagmire" 1970 (33) *M.L.R.* 662

is inconsistent with a finding of the greater blameworthy conduct of the applicant. While the theory that the award of financial relief is not governed by the need to impose a sanction on the erring spouse is fast losing ground, there is no warrant for the premise that a spouse, though guilty of wrecking the marriage, is entitled to the privileges enjoyed previously. Apart from being inequitable this may well impose a crushing financial burden on the "innocent" spouse vested with the obligation of support.

In any event, one may query the object of a statute which enjoins the court to place the parties, as far as possible, in the same financial position they would have enjoyed had the marriage been successful. Kevin Gray points out that such a target may well lead to ludicrous results. If, for instance, a woman marries a wealthy man whom she leaves after a short period of cohabitation, the court cannot be expected to order the husband to maintain her in the life style she had enjoyed during her marriage. Likewise, a woman who was in indigent circumstances during her marriage, would be placed in a better financial position whatever payment is made. Thus Gray concludes that "The task given to the courts should, if anything, be that of reinstating, not the position which would have resulted if the marriage had continued, but the position which would have occurred if the marriage had never taken place at all."[59] Indeed, the rationale sustaining the obligation of support on dissolution of the marriage should be materially different from that which gives rise to the obligation of support *stante matrimonio*. In *Doyle* v. *Doyle*[60] Hofstadter J. queried " Why should ex-wives and separated women seek a preferred status in which they shall toil not, neither shall they spin?.. Alimony ... was never intended to assure a perpetual state of secured indolence. It should not be suffered to convert a host of physically and mentally competent women into an army of alimony drones. Ironically, inflated alimony awards are frequently not only financially disastrous to the man but also psychologically deleterious to the woman. She remains hopelessly entangled in the web of the past, never establishing a new and independent life but "wandering between two worlds one already dead, the other powerless to be born." There

59. Kevin Gray *op.cit* p. 320.

60. (1957) 158 New York Supplement 2d. 909, 912.

can be little justification then for a mandate to keep one's ex-spouse in perpetuity; and no compelling reason why one should be privileged to enjoy a "bread ticket for life."[61]

The basis for the award of alimony which has gained support in recent times is the idea that it is essential in order to enable ex-spouses to "adjust equitably the economic advantages and disadvantages arising from the marriage, in so far as this adjustment is not made by other branches of the law."[62] Kevin Gray who supports the rehabilitative approach to alimony declares that "any financial obligations which continue after dissolution should be rooted, not in an economic dependency created by the mere fact of marriage, but in the need to *eliminate* the economic disadvantage which may have been induced by marriage. In other words, the objective of post-decretal support should be rehabilitative, in the sense that such support should be limited in amount and duration to that which is necessary to obviate 'marriage-conditioned' needs and to enable a former dependant spouse to acquire financial independence for the future. The rehabilitative focus concentrates primarily on the desirability of encouraging the divorced wife to resume or retain for the occupational activity which she gave up by reason of marriage. By providing this incentive towards self-support, the law aims to effect a *restitutio in integrum* by returning the formerly dependant spouse to the position of economic independence, which she would have enjoyed had she not married."[63]

There is, it is submitted, much to commend this view and it is applicable in a jurisdiction like that of Sri Lanka where the statute does not prescribe a target of support. The unfettered discretion conferred on our courts may will be directed towards achieving the ends of rehabilitation rather than continued dependance on an ex-spouse with all the attendant disadvantages which that theory entails. It is clear then that while the English law statutory provisions setting out the criteria by which the financial position of the parties may be ascertained, are of considerable

61. *Brady* v. *Brady* [1973] 3 Fam. Law 78.

62. Memorandum No. 22 (vol. 2): Family law, Aliment and Financial Provision (31 March 1976) para 3.7. cited by Kevin J. Gray *op.cit* p. 288

63. Kevin Gray, *op.cit* p. 293.

value to us, the absence of a minimum standard of support in our statute, compels the Sri Lankan courts to develop on lines significantly different to that of the English law. Perhaps the vital merit of our statutory provision is that it is entirely consistent with and facilitates the adoption of the innovated rehabilitation approach as the *ultimo ratio* upon which the award of alimony may be founded. Moreover, this rationale is consistent with the social and economic status of women in modern Sri Lanka. This "adjustment" oriented alimony has gained considerable support in the Continental jurisdictions[64] and has as its vital merit support for the "transitional period" only, thereby enabling ex-spouses to recover from the trauma of divorce to leave behind what is dead and to look forward to a life freed from that ghost from the past.

E. Reallocation of Property

(i) Scope and Objectives

The matrimonial property regime of Sri Lanka has undergone several changes which have warranted the application of widely differing principles throughout its history. Prior to 1876 when the Roman-Dutch common law governed the proprietary rights of spouses, community of property was a consequence of marriage; as such all movable and immovable property of the spouses was owned in common by both, and on a termination of the marriage the common estate was divided equally between them.[65] The separate property of the spouses, however, that is, property which had been excluded from the community by virtue of an antenuptial contract, was governed by the terms of the agreement.[66] In addition, the common law principle of forfeiture of benefits was a part of our law. The effect of this rule was to forfeit from the guilty spouse any benefits derived from the marriage. In other words, the law averted the enrichment of one spouse at the expense of a marriage which he had wrecked.[67] In *Philips* v. *Philips*[68]

64. Kevin Gray, *op.cit* p. 22.
65. H.R. Hahlo, *The South African Law of Husband and Wife* (4th ed. Cape Town 1975) p. 435; *Philips* v. *Philips* (1882) 5 S.C.C. 36.
66. H.R. Hahlo, *op.cit.* p. 259
67. H.R. Hahlo, *op.cit* p. 430
68. (1882) 5 S.C.C. 36.

the common estate consisted of the wife's property only, and the husband had no proprietary rights at all. When the wife brought a successful action for divorce based on the husband's adultery, Justice Dias declared that to hold that an adulterous husband had an unqualified right to a moiety of the common estate would be contrary to the principles and policy of the Dutch law. The wife was therefore permitted to recover all that she had brought into the marriage. Likewise, in *Dondris* v. *Kudatchi*[69] the court held that a wife divorced from her husband on the ground of her adultery, forfeits for the benefit of the innocent spouse everything which, according to the common law or by antenuptial contract or otherwise, would have been acquired by her out of his property. What must be noted in this connection is that the offending spouse forfeited not his or her own property but only the benefits derived from the marriage either under the common law or by antenuptial contract.[70] Consequently, an identification of property rights with a clear view to distinguishing between the separate property of the spouses and benefits derived by either spouse was of primary importance.

Several early decisions discussed a spouse's right to recover the *dos* or *donatio propter nuptias* given at the time of the marriage. Indeed, the application of the rule of forfeiture, in relation to dowry property, depended entirely on whether title passed to the other spouse on marriage, or whether it remained the separate property of the donating spouse. A substantial difference is apparent between the Roman and Roman-Dutch law position. In the Roman law the husband had *dominium civile* and the wife the *dominium naturale* of the dotal property given by the wife, and on a dissolution of the marriage due to the misconduct of the wife, the husband took the property absolutely if there were no children, and if there were children he had a life interest over the property.[71] The same principles applied *mutatis mutandis* in relation to the *donatis propter nuptias*.[72] The essential feature of the Roman law

69. (1902) 7 N.L.R. 107.

70. *De Silva* v. *De Silva* (1925) 27 N.L.R. 289 at p. 304.

71. Just., Inst., 2.7.3.

72. C. 5. 3. 20 pr., 5. 12. 29

principle then was that the dotal property of the respective spouses was forfeited by the donor in the event of a dissolution of the marriage on account of the matrimonial misconduct of the donor.

By contrast, in the Roman-Dutch law, it was usual for the spouses to enter into a dotal agreement at the time of the marriage excluding the common law consequence of community of property from properties received as a contribution towards the expenses to be incurred in bearing the burden of marriage.[73] The "dos" and the equivalent contribution made by the husband, therefore, remained the separate property of the spouses and, as such, the principle of forfeiture of benefits did not operate so as to deprive a spouse of his right to reclaim the dotal property on a dissolution of marriage. To explain this further, the rule of forfeiture sought to prevent a spouse from enjoying a benefit derived as a consequence of the marriage, on the rationale that he must not be enriched at the expense of a union he had put asunder. Accordingly, an essential prerequisite for the application of this rule was proof of a benefit having accrued to the spouse against whom this rule was applied. Indeed, there would be such a gain if the wife, for instance, had made an absolute transfer of her property to her husband. Then, in the event of the matrimonial misconduct of the husband he would be bound to restore the property to his wife, who would otherwise not have been entitled to it having already transferred her rights to him. On the other hand, if the wife had retained separate ownership over her dotal property, then even if she was held responsible for the destruction of the marriage she would not lose her rights over her property since it would not constitute a benefit she derived from the marriage.[74]

In *Fernando* v. *Fernando*,[75] two months prior to the marriage, the plaintiff's brother donated certain properties to the plaintiff and defendant in equal shares "as a token of mental pleasure

73. Voet 24. 3. 2; Wille *Principles of South African Law* (7th ed., South Africa 1977) p. 130; H.R. Hahlo, *op.cit.* p. 421.

74. Savitri Goonesekera, "Recovery of Dowry and Other Property on a Dissolution of Marriage", *The Colombo Law Review* (vol. 3, Colombo 1972) p. 1 at pp. 6, 7.

75. (1961) 63 N.L.R. 416.

and for their future prosperity." When the marriage was subsequently dissolved on account of the desertion of the plaintiff the court held that while the defendant was entitled to retain the share which had been donated to him, he was not entitled to the plaintiff's share. In other words despite the guilt of the plaintiff she did not forfeit her right to a half share of the property because it was not a benefit she derived from the marriage. It was a part of her separate property and as such it was outside the scope of the rule of forfeiture.

In *Karunanayake* v. *Karunanayake*[76] the court had to decide whether the plaintiff was entitled to the restitution of Rs. 5,000/- which had been given by her father to the defendant on her behalf as a *dos*. Maartensz J. delivering the judgment of the Supreme Court, denied the plaintiff's right to the *dos* on the reasoning that the cash contribution was not her separate property as a consequence of the operation of the Matrimonial Rights and Inheritance Ordinance[77] which vested all movable property in the husband absolutely. It was held therefore that in the absence of an agreement stipulating that the statutory provision was not to apply, so as to vest the movable property in the husband, the restitution of the dowry property was not permissible.[78]

The 1923 Married Women's Property Ordinance[79] brought about far reaching changes in relation to the proprietary rights of spouses. This statute removed the remaining disabilities attendant on a married woman, conferring upon her proprietary rights equal to those of her husband. Of concurrent application, at this period, was the Civil Procedure Code[80] which was modelled on the lines of the English statutes.[81] The Code provided that

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76. (1937) 39 N.L.R. 275

77. No. 15 of 1876, sec. 19.

78. See also *Wijesundera* v. *Bartholomeusz* (1884) 6 S.C.C. 141 where the Supreme Court denied the plaintiff's right to recover her dowry property consisting of cash and furniture but permitted the restitution of her jewellery which was said to be her paraphernalia.

79. No. 18 of 1923

80. No. 2 of 1889

81. See *De Silva* v. *De Silva* (1925) 27 N.L.R. 289, *per* Schneider J.

" Whenever the court pronounces a decree of dissolution of marriage for adultery of the wife, if it is made to appear to the court that the wife is entitled to any property the court may, if it thinks fit, order such settlement as it thinks reasonable to be made of such property or any part thereof, for the benefit of the husband, or of the children of the marriage, or of both." [82]

This provision operated to penalise the guilty spouse by depriving her of her separate property as opposed to a benefit derived from the marriage. Moreover, sanction was imposed only on an adulterous woman. This section, therefore, bore no resemblance to the common law rule of forfeiture of benefits.

In addition, the court was given wide discretionary powers to inquire into the existence of antenuptial and postnuptial settlements made on the parties and to make appropriate orders for the benefit of the husband, wife or children as the court thinks fit. [83]

This, then, was the inception of an anomaly which is evident even today. On a Roman-Dutch law infrastructure the legislature superimposed an essentially English law statute thereby introducing an innovation which was not capable of assimilation into our legal system. Decided cases have discussed the effect of the statutory provision, on the common law principle of forfeiture of benefits. In *De Silva* v. *De Silva* [84] Schneider J. opined that the Civil Procedure Code might be regarded either, as repealing the common law on the subject dealt within them, or of introducing new provisions which were to stand side by side with the provisions of the common law not being opposed to one another, but only alternative each to the other. In other words, the court had the discretion to act under one set of provisions or the other. Of course, he was not prepared to go so far as to say that the common law was repealed by the Civil Procedure Code but he was firmly of the view that if the court elected to exercise its powers under the Code, there was no room for also declaring a forfeiture of benefits under the common law.

82. Sec. 617 (1).
83. Sec. 618.
84. (1925) 27 N.L.R. 289.

In similar vein, Tambiah J. in a more recent decision, *Fernando* v. *Fernando*[85] declared that the common law remedy was not abrogated as a result of the enactment of the Civil Procedure Code "but rather the remedies envisaged by these sections are complementary to the action available under the common law."[86] Justice Tambiah also reiterated the view that the parties cannot have the benefit of both remedies but should elect to claim either the remedy under the common law or that available under the Civil Procedure Code. In this case the parties had not claimed any proprietary relief under the Code but they opted to reserve their rights to bring separate actions under the common law. Nevertheless on an analysis of the facts it was revealed that the property vested in the plaintiff, in this case, was not a benefit she derived as a consequence of the marriage, but rather her separate property which was not affected by the common law rule of forfeiture of benefits.

The amended Civil Procedure Code[87] differs from the previous statute in an important respect in that it eschews any reference to the guilt of the parties and merely empowers the court to order a settlement of the property "as the court thinks fit."[88] The court also has the power to vary any antenuptial or postnuptial settlements made on the parties.[89]

An interesting case, in this connection, is the recent unreported decision of the Court of Appeal in *Abeyratne* v. *Wickremaratne*[89a] which involved the right to recover dowry property on the dissolution of a marriage. The facts of this case assume considerable importance. On the occasion of the plaintiff's engagement to the defendant, she received a dowry consisting of Rs. 15,000/- in cash and a car valued at Rs. 7,000/-. According to the plaintiff, on the day of the engagement, her father brought the cash and the switch key of the car on a brass tray and these were given to the defendant to take charge of as "barakaraya" (custodian).

85. (1961) 63 N.L.R. 416.

86. *id.* at p. 418.

87. No. 2 of 1899 as amended by Law No 20 of 1977, sec. 615

88. *ibid.*

89. Sec. 618

89a C.A. (SC) 131/73 (F)

The defendant handed the tray to his father who, in turn, handed it to the plaintiff's mother. At a later date, the defendant had requested the plaintiff to give the money to him so that he might invest it. He also wanted the car transferred to him so that he could better attend to the repairs in the event of an accident. The plaintiff had agreed to this suggestion and the cash as well as the car were duly transferred to the defendant.

When the parties obtained a dissolution of their marriage some years later the plaintiff reclaimed her dowry property. The defendant however pleaded that he was under no obligation to return it since it had been transferred to *him*. The District Judge, however, rejecting the defendant's argument held that the property in question, namely, the car and the cash were gifts made by the parents of the plaintiff to the plaintiff and that when it was subsequently transferred to the defendant he was expected to hold it in trust for the plaintiff.

Reiterating this view, Justice Wimalaratna, in the Court of Appeal declared that "it would indeed be a retrograde step if we were, in the last quarter of the 20th century, to give the same meaning to dowry as the Romans did, by ruling that dowry is a gift given by the parents of the wife to the husband 'in order that he may bear the burdens of marriage.' Unless a gift to the husband is established by clear and cogent evidence, dowry given on the occasion of the marriage remains, in my opinion, the wife's separate property." He cited with approval the judgment of Samarawickreme J. in an earlier case[89b] where the defendant asserted a claim to the sum of Rs. 25,000/- given as dowry on the reasoning that it was his separate property. Justice Samarawickreme observed that "even if what is loosely called a gift of dowry may be a gift to the husband, that is excluded in this case, and the Rs. 25,000/- handed to the defendant was a gift by the plaintiff's father to the plaintiff."

Justice Wimalaratne pointed out that subsequent to the Married Women's Property Ordinance, "a married woman has the same civil remedies against all persons including her husband for the protection and security of her separate property. The

89b *M.W.S. Cooray* v. *K.S.Lili de Silva* (S.C.80) 73 (F) - D.C. Panadura No.12356/M - (S.C.Minutes of 15.8.78).

concept of 'trust' had been introduced into Ceylon by that date, and one of the civil remedies available to her would be an action for breach of trust." That was the remedy which the plaintiff chose to pursue in this case. She pleaded a trust, but not an express trust. She stated that she handed over the cash and the car to the defendant "in trust for her" and that he had "the exclusive use and possession of the cash and the car which were the property of the plaintiff." In his judgment, Justice Wimalaratne pointed out that this averment amounted to saying that she did not part with her beneficial interest in the property. "No doubt, the plaint has not been drafted with that degree of care required when pleading a trust, but the meaning appears to me to be clear." He cited section 83 of the Trusts Ordinance[89c] which states that where the owner of property transfers it and it cannot reasonably be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein, the transferee must hold the property for the benefit of the owner or his legal representative; and declared that the trust pleaded in this case was not inconsistent with a resulting trust arising under section 83.

When English law was developing the concept of trust, equity was faced with the position that the donor might make an ostensibly complete conveyance, but in such circumstances that the consistency of equitable principle would demand that his intention must be read as an intention to retain the beneficial interest for himself. Hence, the doctrine of resulting trusts was introduced.[89d]

"When a resulting trust is pleaded the function of the court is to ascertain the settler's true intention, and this intention is discovered by considering the attendant circumstances. It may be, however, that if property is bestowed directly to another, a presumption of advancement will arise if there is a near relationship and a duty on the part of the grantor to provide for the grantee, this presumption replacing that of the resulting trust. That is why illustration (*c*) to section 83 states that where a husband

89c No. 9 of 1917.

89d *Abeyratne* v. *Wickremaratne* C.A. (SC) 131 / 73 (F), *per* Justice Wimalaratne.

makes a gift of land to his wife she takes the beneficial interest free from any trust in favour of the husband, it being reasonable to infer from the circumstances that the gift was for the wife's benefit. Although the presumption of advancement exists in favour of a wife, the converse does not appear to be so, since neither law nor equity imposes an obligation on the wife to provide for the husband. In *Re Curtis, Hawes* v. *Curtis*[89e] Kay J. said 'I think it is perfectly well settled, I believe the law is undoubted, that the mere transfer to the name of the husband of property which is undoubtedly the separate estate of the wife, is not *per se* sufficient evidence of a gift to the husband for his own use. That does not destroy the separate estate of the wife. The husband is taken to be, nevertheless, a trustee of that property for the wife.' It was also held that the burden of proving that the transfer is a gift to the husband was upon the representative of the husband; proof of the mere transfer to him being not enough. In *Mercier* v. *Mercier*,[89f] where a property was purchased in the name of the husband, which was paid for out of the joint account, composed almost entirely out of the wife's income, it was held that the wife had not made a gift of the purchase money to the husband, and that the land belonged to her.

"The findings of the learned District Judge that the cash was given by the plaintiff to the defendant to be held in trust for her; and that when the car was transferred to the defendant's name he was to hold it in trust for the plaintiff, are consistent with the attendant circumstances."[89g]

The interesting feature of this recent decision is the remedy availed of to obtain a restitution of dowry property on the dissolution of marriage. The parties did not rely on the provisions of the Civil Procedure Code, nor was recourse had to the common law principle of forfeiture. Instead, the plaintiff successfully established the creation of a trust *stante matrimonio* thereby enabling her to enjoy the beneficial interest in the property, subsequent to a dissolution of the marriage. Indeed, there is authority in

89e [1885] 52 L.T. 244

89f [1903] 2 Ch. 98

89g *Abeyratne* v. *Wickremeratne* C.A. (SC) 131/73(F) *per* Justice Wimalaratne.

the English law for the establishment of a trust in relation to matrimonial property acquired during the tenure of the marriage. In instances where, although property is purchased in the name of one spouse, it is manifest that the beneficial interest was to be enjoyed by the other spouse the court has declared the establishment of a trust.[89h] There is every justification, therefore, for recourse to a like remedy when asserting a right to the beneficial interest in dowry property. At any rate, the Civil Procedure Code[89i] provides that the court may order for the benefit of either spouse a settlement of the property. The word "settlement" is of English law origin and connotes *inter alia* the establishment of a trust.[89j] It is therefore submitted that the creation of a trust is provided for by the Civil Procedure Code and the above decision illustrates an instance where the statutory provision may be availed of by the court, in order to preserve for the benefit of the wife dowry property received by her from her parents on the occasion of her marriage.

A salient distinguishing feature between the statutory provision and the common law, in relation to the re-allocation of property on divorce, is manifest. According to the Roman-Dutch common law only financial benefits will be forfeit on proof of matrimonial guilt,[90] but the statute permits a re-allocation of property which may be ordered irrespective of a finding of guilt. Notwithstanding this distinction, the rationale sustaining both rules appear to be the need to avert the unjust enrichment of one spouse to the detriment of the other in the context of matrimonial property. In other words, the law seeks to ensure that neither property nor benefits conferred upon one spouse, for the use of both within the bonds of matrimony is appropriated for the use of one spouse when the circumstances upon which the enjoyment of the right was founded is no more.[91] It is evident then that not all forms of property, however acquired, can be the subject of a judicial

89h. See chapter 6 *supra* sec. B.

89i. No. 2 of 1899, as amended by No. 20 of 1977 ,sec. 615 (1)

89j. See text at note 122 *infra.*

90. H.R. Hahlo, *op.cit* p. 435.

91. Rayden on Divorce (10th ed., London 1967) p. 870; H.R. Hahlo,*op.cit.* p. 430.

settlement. The court can exercise its discretionary powers only in relation to what has been commonly termed "matrimonial property" or "family assets."[92]

According to Kevin Gray[93] "family assets" are "those property rights which constitute the economic product of the constructive collaboration of husband and wife. 'Partnership property', in this sense, comprises all assets whose acquisition or retention is attributable to the economic interaction of the marriage partners. Property which does not originate in the joint efforts of the spouses is not 'partnership property' and lies completely outside the scope of the formula of reallocation on divorce."[94] Hence, a typical example of matrimonial property is that which is the product of the collaborative efforts of both spouses. In other words, there must be a causal nexus between the spouse and the property in question, in the context of the marital relationship. Proprietary rights which cannot be so connected lie outside the scope of judicial settlements. Consequently, the emphasis in modern Sri Lanka should be not on separate property as opposed to community property, but rather on "family assets" as contra-distinguished from "private assets."

From the foregoing discussion it is clear that one criterion by which a "family asset" may be identified is by ascertaining whether the property was "intended to be a continuing provision for the (spouses) during their joint lives ... acquired by their joint efforts during the marriage ..."[95] The English law has extended this category to include property acquired in contemplation of marriage.[96] "Here the acquisition is regarded as having an implicit

92. *Wachtel* v. *Wachtel* [1973] Fam. 72. Of course it must be pointed out that the statute empowers the court to make such conveyance or settlement of such property as he may be entitled to. As such, the court may adopt the view that *all* property irrespective of how it was acquired can be the subject of a reallocation.

93. Kevin Gray, Reallocation of Property on Divorce (Oxford, 1977) p. 117

94. *ibid.*

95. *Fribance* v. *Fribance* [1957] 1 W.L.R. 384 *per* Lord Denning. See also *Hine* v. *Hine* [1962] 1 W.L.R. 1124; *Ulrich* v. *Ulrich and Felton* [1968] 1 W.L.R. 180; *Gissing* v. *Gissing* [1969] 1 All E.R. 1043.

96. *Ulrich* v. *Ulrich and Felton* [1968] 1 W.L.R. 180. See also *Pettitt* v. *Pettitt* [1970] A.C. 777 at p. 819.

partnership character in view of the fact that it was made in clear anticipation of the celebration of marriage."[97] Of course property acquired by either spouse by virtue of a gift or inheritance is *prima facie* outside the scope of matrimonial property. "This property has been acquired by way of lucrative (as distinct from onerous) title, and a sharing of it on divorce would not normally be justifiable since it represents not the product of partnership effort expended by husband and wife, but rather the largesse of a stranger to the matrimonial relationship."[98] It must be pointed out, however, that although such property is indubitably the property of the individual spouse as time goes on it is possible that the other spouse will acquire an interest in the property by virtue of having made either a direct or indirect contribution towards its retention, or improvement.[99]

Translating these general ideas to an evaluation of matrimonial property in Sri Lanka, it becomes necessary to determine the nature of dowry property, which is an important feature of our legal system. In the context of our social framework it is usual for a woman to be dowered by her family at the time of marriage. "A dowry is almost always the consideration or part of the consideration for the man taking the woman as his wife."[100] When deciding upon the ownership and rights to dowry property, on dissolution of marriage, much depends on whether the ex-spouses invoke an application of the Civil Procedure Code or whether they resort to the common law principles regulating the proprietary rights of parties subsequent to a divorce. If, for instance the parties proceed under the common law, the rule of forfeiture of benefits will be applicable, and consequently, if dowry property had been transferred by, for example, the wife to the husband, then on proof of his matrimonial misconduct he will lose his rights to the property since it would be a benefit he gained as a consequence of the marriage.[101] The essential feature of the application of the rule of forfeiture to dowry property, is the donating spouse's right

97. Kevin Gray, *op.cit.* p. 133.
98. *id.* at p. 137.
99. See *Haldane* v. *Haldane* [1976] 3 W.L.R. 760 at p. 777.
100. *Jayasekera* v. *Wanigaratna* (1909) 12 N.L.R. 364 at p. 365, *per* Hutchinson C.J.
101. See text at note 74

to the property, irrespective of his or her guilt and dependent solely on the question of legal title. In other words, except in a situation where the property is transferred absolutely to the other spouse, who will retain title to it unless he or she is responsible for wrecking the marriage, in all other instances because dowry property remains the separate property of the donating spouse, and on the reasoning that the rule of forfeiture does not operate so as to divest a spouse of his or her title to property, which is not a benefit derived from the marriage, dowry property will remain in the hands of the donating spouse. It must also be pointed out that although the rule of forfeiture of benefits requires, as a necessary prerequisite, the allocation of guilt to one spouse, and notwithstanding that since the 1977 amendment to the Civil Procedure Code a divorce may be obtained without proof of fault, the rule of forfeiture can continue to apply. In the modern law of South Africa, for instance, the irretrievable breakdown of the marriage has replaced the former grounds for divorce, which were founded on proof of matrimonial misconduct.[102] Nevertheless the common law rule of forfeiture of benefits has been incorporated into the statute. Accordingly, in the law of South Africa, "when a decree of divorce is granted on the ground of the irretrievable breakdown of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, one party will in relation to the other be unduly benefited. In the case of a decree of divorce granted on the ground of the mental illness or continuous unconsciousness of the defendant, no order for the forfeiture of any patrimonial benefits of the marriage shall be made against the defendant."[103]

It is clear, therefore, that although the conduct of the parties may not be important for success in an action for divorce, it can continue to have an important bearing on the ancillary question

102. Divorce Act No. 70 of 1979, sec. 4.

103. *id.*, sec. 9 (1) (2).

of maintenance during the post-divorce era. Hence it may be asserted that in Sri Lanka, too, the introduction of a non-fault based ground for divorce[103a] does not necessarily result in the erosion of fault in relation to matters arising as a consequence of divorce.

If, on the other hand, the ex-spouses choose to seek a redistribution of proprietary rights under the Civil Procedure Code, the effect of the exercise of judicial discretion on dowry property, will be uncertain. On the basis that dowry property is initially given by way of a gift to one party, it may *prima facie* appear to be excluded from the category of "family assets" and thus outside the scope of judicial discretion. However, the fact that the gift is made in contemplation of marriage, in other words, with the specific intention of enabling the spouses to bear the financial burdens of marriage, the quality of the gift will undergo a material change. The very fact of marriage, which is the enduring association of man and woman marked by a sharing of fortune and adversity, by love and constructive co-operation, by commitment, compromise and reciprocation[104] necessarily means that proprietary rights cease to be divisible into "his" and "hers" and acquires, instead, the characteristic of being "ours". Indeed, the intrinsic nature of the concept of partnership, involved in a marital union, makes it exceedingly difficult to prevent the proprietary rights of the spouses, however acquired, from being assimilated into the "hotch potch" of matrimonial property and thereby becoming the subject of the financial dealings of the family as a whole. It thus becomes impossible to disentangle the original property from the web of family involvement. Consequently, if dowry property is in cash, for instance, the husband's role in making wise investments, using it for the purchase of immovable property, which property is used for the benefit of the entire family, or using it as capital to start a business would result in his making a substantial contribution towards this property, a share of which he must thus become entitled to. Likewise, if the property in issue is an estate or other

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103a Civil Procedure Code No. 2 of 1899 as amended by Law No. 20 of 1977, sec. 608 (1) (2)

104. Kevin Gray *op.cit.* p. 23

immovable property the husband's contribution towards the maintenance and improvement of the property must entitle him to a share of the property when a re-allocation is made subsequent to a divorce.

Indeed, an argument founded on the rationale that the indirect contribution of a husband towards the dotal property of the wife entitles him to a share of the property will prove to be unpalatable to a society which attributes a pre-eminent position to dowry property which often consists of ancestral land. The dissemination of this property to persons outside the immediate family is bound to result in much displeasure. Consequently, parties may prefer to proceed under the common law and to ask for a forfeiture of benefits which will leave intact property brought into the marriage by way of dowry. But recourse to the common law will also involve a division of assets, founded on the "solid tug of money."[105] Monetary contribution towards the acquisition of property, will constitute the criterion on which a division is made. While this may appear to be unobjectionable, it will ignore the indirect contribution made by the non-earning spouse towards the acquisition of assets by the other. For instance, it has been said that "men can only earn their income and accumulate capital by virtue of the division of labour between themselves and their wives. The wife spends her youth and early middle age in bearing and rearing children and in tending the home; the husband is thus freed for his economic activities. Unless the wife plays her part the husband cannot play his. The cock bird can feather his nest precisely because he is not required to spend most of his time sitting on it."[106] Moreover, even if the wife herself is a wage earner, in a situation where she spends her income on expenses involved in the running of the home, and he, on investments and acquisition of property, he alone will benefit from the assets acquired if they were purchased in his name. Indeed, the unsuitability of such a mode of division is self evident. Therefore, while recourse to the Civil Procedure Code will enable the courts to exercise its discretionary powers so as to do maximum justice to both parties, it will obscure the special features of dowry property which may ultimately be divided between the two spouses.

105. *Hofman* v. *Hofman* [1965] N.Z.L.R. 795 *per* Woodhouse J.
106. Cited by Kevin Gray, *op.cit.* p. 34

(ii) The Relevance of Matrimonial Misconduct

A common feature of both the South African and the English law on this question of reallocation of property on divorce is the relevance of the conduct of the parties to the redistribution of proprietary rights, although the primary question of divorce eschews any reference to misconduct; the irretrievable breakdown of the marriage being recognised as the sole ground for divorce in both jurisdictions. It has been said of the English law statute that an evaluation of the conduct of the parties will inevitably give rise to much bitterness and humiliation, the very objective that the "good divorce law" founded on irretrievable breakdown sought to do away with.[107] According to Omrod J. in *Wachtel* v. *Wachtel*[108] "the forensic process is reasonably well adapted to determining in broad terms the share of responsibility of each party for an accident on the road or at work because the issues are relatively confined in scope, but it is much too clumsy a tool for dissecting the complex inter-actions which go on all the time in a family. Shares in responsibility for breakdown cannot be properly assessed without a meticulous examination and understanding of the character and personalities of the spouses concerned, and the more thorough the investigation the more the shares will, in most cases, approach equality..."[109] Although the court has attempted to restrict the relevance of conduct to situations where it is "obvious and gross"[110] this does not effectively do away with "all the acrimonious accusations which the spouses care to direct at each other in court."[111] Moreover, as Kevin Gray points out "the indeterminate scope of 'obvious and gross' misconduct is intensified by the wholly pragmatic way in which the courts identify such behaviour. It is still unclear whether relevant conduct may include conduct arising before marriage or after separation or even after divorce. Nor is there any indication how the courts will evaluate the effect of relevant misconduct. The "moral outrage provoked in the judge by the conduct in issue" appears to be the only criterion of such

107. Kevin Gray, *op.cit.* p. 210; *Cretney*, *op.cit.* p. 203; *Courtney* v. *Courtney* [1968] P. 523.
108. [1973] Fam. 72.
109. *id.* at p. 79
110. *Wachtel* v. *Wachtel* [1973] Fam. 72.
111. Kevin Gray, *op.cit.* p. 215.

grave conduct.[112] For instance in *W.* v. *W.*[113] Sir George Baker P. was of the opinion that conduct "of the kind that would cause the ordinary mortal to throw up his hands and say 'surely that woman is not going to be given any money' or 'is not going to get a full award' " should be relevant when deciding upon a redistribution of assets. More recently in *J.(H.D.)* v. *J.(A.M.)*[114] Sheldon J. reiterated the test applied by Sir George Baker P. in *Katz* v. *Katz*[115] according to which "a party's conduct would be of sufficient gravity to affect the issue if the facts are such that, after making all allowances for his disabilities and for the temperaments of both parties, the character and gravity of his behaviour was of such a nature that it would be repugnant to anyone's sense of justice to ignore it in deciding the provision to be made by one for the other or what should be their appropriate shares in the family assets."

However, Kevin Gray submits that "A very serious doubt may be raised as to the propriety of allowing matters of misconduct to be decided on a level which positively encourages instinctive and perhaps idiosyncratic reactions in a highly emotive area of human relations."[116] He therefore suggests that only conduct which directly or indirectly affects the economic aspects of the family should be taken into account. In other words, conduct which reduced the other party's means, income or ability to earn.[117] "The only forms of misconduct which ought to be taken into account are those which touch upon the contributions in fact made by the spouses... Just as all contributory activity is relevant, so it can be argued, any deficiency of contributory effort must be similarly relevant. The social justification for the participation of husband and wife in the matrimonial assets is frustrated, in whole or in part, where one of the spouses by his or her misconduct has inhibited or impaired economic collaboration within the marriage partnership. The application of this criterion of 'economic causality' thus renders matrimonial fault relevant if, and only if, such fault has injured the property relations of the spouses and is thereby causally connected with the accumulation of their assets."[118]

112. *id.* at p. 217.
113. [1975] 3 All E.R. 970 at 972.
114. [1980] 1 All E.R. 158.
115. [1972] 3 All E.R. 219.
116. Kevin Gray, *op.cit.* p. 217.
117. See also *W. v. W.* [1975] 3 All E.R. 970 at p. 972.
118. Kevin Gray, *op.cit.* p. 235.

The problem in accepting a theory founded on the reasoning that only matrimonial misconduct which generates an economic causality is relevant is to recognise offences such as desertion, wanton disregard for the financial wellbeing of the family, and the wrongful diminution of matrimonial assets[119] which are some of the more obvious acts of misconduct which have a definite bearing on the economics of a family, while ignoring a whole range of conduct which might well have the same impact on the finances of the family but where the causal nexus is not so clear. For instance, a dutiful wife may cause her husband mental anxiety by, for instance, her unreasonable fears or accusations which may result in a diminution of his work potential. On the other hand, a wife may not be in a position to contribute towards her husband's finances because of his ill-treatment of her. In both situations there is a causal nexus between the wife's conduct and the family finances, which is not so obvious. In such a situation an equitable division of assets will not be achieved by taking into consideration only the facts as they appear to be, ignoring the more obscure facts which nevertheless have a material bearing.

The Civil Procedure Code of Sri Lanka, however, does not provide the courts with any guidance for the exercise of their discretionary powers. Consequently, our courts are free to make an order totally independent of the conduct of the parties. Particularly in situations where a divorce is granted on proof of mere *de facto* separation, the direct and indirect contributions made by the spouses either by way of money or service may be the only criterion upon which a settlement is made. In this connection it is important to point out that the word "settlement" in the Civil Procedure Code[120] is taken from an English law statute[121] and it is submitted that it should be interpreted to convey the same meaning it has in the English law. The essential feature of a "settlement" in the English law is that it constitutes "some modification of the proprietary right whereby the settled property is held otherwise than on the ordinary footing of legal ownership."[122] A settlement, therefore

119. *id.* at pp. 235 - 244
120. No. 2 of 1889, sec. 617 and 618. See the amended Code of 1977 sec. 615, 618.
121. Matrimonial Causes Act 1857, sec. 45.
122. Davidson's Conveyancing (3rd ed. vol. 3 part 1) p. 1.

"is a legal act designed to regulate during a specified period the enjoyment of property, and to provide during the same period for the same custody and prudent management of the subject-matter of that property."[123] Settlements thus involve some modification of absolute proprietary rights over property and they usually, though not necessarily, create successive estates or interests therein.[124]

The phrase "antenuptial settlement" implies "an instrument effected before a marriage and wholly or partly in consideration of it for the purpose of regulating the devolution of property whether capital or income on one or both of the parties to the marriage."[125] A postnuptial settlement is one made "upon the husband in the character of husband, or upon the wife in the character of wife, or upon both in the character of husband and wife... The particular form of it does not matter. It may be a settlement in the strictest sense of the term; it may be a covenant to pay by one spouse to the other, or by a third person to a spouse. What does matter is that it should provide for the financial benefit of one or other or both of the spouses, as spouses, and with reference to their married state."[126]

In *De Silva* v. *De Silva*[127] a house had been gifted to the wife by her father and the husband had a right of succession to the rents of the house in the event of the wife predeceasing him leaving no children. Certain other properties were transferred absolutely to the wife who alone was to enjoy the income. Schneider J. declared that when a Colonial legislature passes an Act in the same terms as an Imperial Statute, and the latter has been authoritatively construed by a Court of Appeal in England, such construction should be adopted by the court of the Colony. He went on to declare that he was inclined to regard the deeds by which the first defendant's father conveyed property to her not so much as marriage settlements, but as conveyances of property. "Even if the conveyance of the house be regarded as a settlement

123. Bythe Wood and Jarman's Conveyancing (4th ed. vol. 6) p. 127.
124. *ibid.*
125. Tolstoy, *op.cit.* p. 158
126. *Prinsep* v. *Prinsep* [1929] P. 225 at p. 232.
127. (1925) 27 N.L.R. 289.

of the kind contemplated in sec.618, because it contains provisions for the benefit of both parties to the marriage, the conveyance of the estate cannot be regarded as such a settlement. It is clearly not a settlement 'made on the parties' to use the words employed in the section to describe the settlements which a court may vary under the provisions of that section. But although the property donated to the first defendant by her father may not come under section 618, all her property which she acquired by donation or by purchase, can be dealt with by the court under section 617. I would therefore regard the settlement ordered by the court in this case as a settlement made under section 617."[128]

Dalton J., in a separate judgment, opined that "It is admitted that gifts of immovable property by parents on marriage, as we have here, are common in Ceylon, and may be deemed to be the common local form of a settlement. If it be necessary for the purpose of this case to decide whether or not these deeds constitute a settlement on marriage, I would hold that they are in fact a settlement on the marriage of plaintiff and the first defendant. It is true that they are for her separate use and without power of anticipation, but the court has power to vary settlements even with those limitations under section 618."[129] He thus concluded that "Even if there has been no settlement, and I do not think it can be contended that there is anything in the nature of a settlement attaching to the two estates... the court can make such an order in respect of a property the wife is entitled to for the benefit of the husband as appears reasonable."[130]

III. Conclusion

There is, it is submitted, an urgent need for legislative reform in this area of the law in order to achieve consistency in relation to the ingredients required to be proved for dissolution of marriage and its proprietary consequences, on the one hand, and in relation to the outcome of divorce and separation on the other hand. Matrimonial misconduct continues to be a basis for divorce in Sri Lanka and as such it should be relevant to an evaluation of the proprietary rights of the spouses subsequent to a

128. *id.* at p. 307.
129. *id.* p. 315.
130. *id.* p. 316.

dissolution of marriage. Problems however arise when deciding on the nature of misconduct that will influence the court when reallocating the property rights of former spouses. In other words, will proof of misconduct such as adultery and malicious desertion *per se*, which is sufficient for a finding of "guilty" and "innocent", influence the court to award greater rights to the "innocent" spouse as opposed to the one "guilty" of wrecking the marriage. Alternatively, will the court be influenced only by proof of extenuating conduct. Indeed, the English law statute refers to "obvious and gross" conduct thereby shutting out evidence of fault which, though sufficient to obtain a divorce, provided there is an irretrievable breakdown of the marriage, is not sufficiently grave to deny the spouse a share of the property subsequent to the divorce.

While the Sri Lankan law continues to apportion blame on one party thereby holding one spouse entirely responsible for the dissolution of the marriage, the statute also recognises a divorce on proof of separation *a mensa et thoro* for seven years. In the light of these fault and non-fault based grounds for divorce it is difficult to determine the extent to which the conduct of the parties should influence our courts in the ancillary question of property rights subsequent to a divorce. For instance, if a divorce is obtained under the Marriage Registration Ordinance will the court invariably deny or reduce the "guilty" spouse's right to a beneficial interest or title to property? While there is evidence of this policy in the early Sri Lankan law it is submitted that a rule such as this loses sight of the fact that a final repudiation of the marital tie is most often the culmination of a slow process of deterioration of a relationship brought about by the blameworthy conduct of both parties. In other words, husband and wife together share, though sometimes unequally, the responsibility for a breakdown of the marriage. In circumstances such as this, to impose a sanction on one spouse, who is ostensibly "guilty" of blameworthy conduct, is indeed unfair and ought to be discouraged. However, the exception accepted in the English law, of taking into consideration conduct which is so reprehensible that "to order one party to support another whose conduct falls into this category is repugnant to anyone's sense of justice"[131] may be usefully adopted by our courts.

131. *Wachtel* v. *Wachtel* [1973] 1 All E.R. 829, *per* Denning M.R.

The Sri Lankan law poses a further difficulty in this subject of reallocation of property rights by virtue of the introduction of a system of redistribution of assets with no reference to the existing common law principles regulating this issue. The consensus of judicial opinion appears to favour the view that notwithstanding the express statutory provision the common law principle of forfeiture of benefits continues to apply. It would appear then that in our legal system the spouses have a choice of two widely divergent and mutually exclusive remedies when seeking a redistribution of assets on divorce. While the application of the common law rule of forfeiture of benefits requires an allocation of fault, the statutory provision may be applied irrespective of the guilt of the parties. The salient merit of the rule of forfeiture is that it leaves undisturbed property rights in the hands of the spouses and affects only benefits obtained by a spouse during the tenure of the marriage. In other words, legal title to property determines the question of ownership and if a spouse had transferred property to the other and if the donee spouse was responsible for terminating the marriage, the property transferred would revert to the transferor because, according to the rule of forfeiture of benefits, a spouse is not allowed to enjoy a benefit derived as a consequence of a marriage which he is responsible for wrecking. Consequently, dowry property, which assumes considerable importance in our legal system, remains the property of the donor spouse thereby averting the possibility of such property being made the subject of a redistribution of assets, which will be the inevitable outcome of an application of the statutory provision. However, conceding this demerit of the rule set out in the Civil Procedure Code, it must be pointed out that the statute, which gives the courts wide discretionary powers to adjust the proprietary rights of spouses, will probably do more justice to both the spouses because the criterion of entitlement will not necessarily be legal ownership, but will include every form of contribution made towards the acquisition and retention of matrimonial assets.

ABBREVIATIONS

A. C.	...	Appeal Cases (House of Lords and Judicial Committee of Privy Council), 1875-91.
A. C. R.	...	Appeal Court Reports, Ceylon, 1903-10.
A. D.	...	Appellate Division of the Supreme Court of South Africa, 1910 onwards.
A. I. R.	...	All India Reports.
A. J. C. L.	...	American Journal of Comparative Law.
A. J. I. L.	...	American Journal of International Law.
All E. R.	...	All England Reports.
Bal. Rep.	...	Balasingham, K., Reports of Cases, Ceylon, 1904-10.
Bal. N. of C.	...	Balasingham, K., Notes of Cases decided by Supreme Court of Ceylon, 1911-16.
Beav.	...	Beavan's Reports (1838-1866—48-55 E.R.).
Bing.	...	Bingham's Reports (1822-1934—130-131 E.R.).
Browne's Rep.	...	Browne, K. G. Dodwell, Reports of Cases decided in the Supreme Court of Ceylon, 1900-1903.
Buch.	...	Buchanan, James and E. J. Cases decided in the Supreme and other Courts, Ceylon, 1900-03.
Buch. A. C.	...	Buchanan, James and E. J. and D. M. Cases decided in the Court of Appeal of the Cape of Good Hope, 1880-1910.
C. A. C.	...	Court of Appeal Cases (Ceylon).
C. L. J.	...	Ceylon Law Journal, 1936 onwards.
C. L. Rec.	...	Ceylon Law Recorder, 1919 onwards.
C. L. Rep.	...	Ceylon Law Reports, 1889-97.
C. L. Rev.	...	Ceylon Law Review.
C. L. W.	...	Ceylon Law Weekly, 1937 onwards.
Col. L. R.	...	Columbia Law Review.
C and P.	...	Carrington and Payne (1823-1841—171-173 E.R.)
C. P. D.	...	Cases decided in the Cape Provincial Division of the Supreme Court of South Africa, 1910.
C. T. R.	...	Cape Times Reports, 1891-1901.
Cey. T. L. R.	...	Times of Ceylon Law Reports 1922-42.
C. W. R.	...	Ceylon Weekly Reporter, 1915-20.
Cape L. J.	...	Cape Law Journal, 1884-1900.
Ch.	...	Law Reports, Chancery Division (1891 onwards).
Ch. App.	...	Law Reports, Chancery Appeal Cases (1865-1875).
Ch. D.	...	Law Reports, Chancery Division (1875-1890).
Cox.	...	Cox's Equity (1783-1796—29-30 E.R.).
Cr. App. Rep.	...	Criminal Appeal Reports — India.
Cr. Law Journal	...	Criminal Law Journal — India.
Curr. L. R.	...	Current Law Reports, Ceylon 1909-1910.
E. D. C.	...	Cases decided in the Eastern Districts Court of the Cape of Good Hope (1880-1909).

E. D. L.	...	Cases decided in the Eastern Districts Local Division of the Supreme Court of South Africa, 1910 onwards.
E. R.	...	English Reports (1220-1865).
Ex.	...	Law Reports, Exchequer Cases (1865-1875).
Ex. D.	...	Law Reports, Exchequer Division (1875-1880).
Ex. R.	...	Exchequer Reports, (Welsby, Hurlstone and Gordon) 1847-1856—154-156 (E. R.).
Fam. Law	...	Family Division Reports (England).
Foord	...	Foord, A. J. Cases decided in the Supreme Court, of the Cape of Good Hope, 1880.
G. W. L.	...	South Africa Law Reports, Griqualand West.
Grenier	...	Grenier S., Appeal Reports of the Supreme Court of Ceylon, 1872-4.
H. C. G.	...	Reports of the High Court of Griqualand West, 1882-1910.
Hagg. Con.	...	Haggard (Consistory) Ecc.—1789-1821.
Hagg. Ecc.	...	Haggard (Ecclesiastical)—1827-33.
I. A.	...	Indian Appeals.
I. C.	...	Indian Cases.
I. L. R.	...	Indian Law Reports.
Ind. Ap.	...	Indian Appeals.
Ind. Dec.	...	Indian Decisions.
Jur.	...	Jurist Reports (1837 - 1854)
K. B.	...	Law Reports, King's Bench (1891 onwards).
K. and J.	...	Kay and Johnson (1854 - 1858).
Koch.	...	Koch, G., Supreme Court Decisions, Ceylon, 1899.
Kotze.	...	Kotze, J.G., Cases decided in the High Court at the Transvaal, 1877 - 81.
L. J. P. C.	...	Law Journal Reports, Privy Council.
L. J. P. and M.	...	Law Journal Reports, Probate and Matrimonial.
L. Q. R.	...	Law Quarterly Review.
L. R. C. P.	...	Law Reports, Common Pleas, England (1865-75).
L. R. Eq.	...	Law Reports, Equity Cases (1866-75).
L. R. H. L.	...	Law Reports, House of Lords, English and Irish Appeals (1865-75)
L. R. P. C.	...	Law Reports, Privy Council Appeals (1865-75).
L. R. P. and D.	...	Law Reports, Probate and Divorce Cases (1865-75).
L. R. Q. B.	...	Law Reports, Queen's Bench (1891 onwards).
L. T.	...	Law Times.
Leader L. R.	...	Leader Law Reports, Ceylon 1907-12.
Lem. and Asir.	...	Leembruggen and Asirwatham's Reports (Ceylon).
Lor.	...	Lorenz, C. A., Appeal Reports of Ceylon (1856-59)
Marsh.	...	Marshall's Reports.
Matara	...	Decisions of the Supreme Court of Ceylon on Appeal from the District Court of Matara, 1892-1914.
Menzies or M.	...	Menzies, Hon. W., Cases decided in the Supreme Court of the Cape of Good Hope, 1820 - 50.

M. L. R.	...	Modern Law Review.
Mod.	...	Modern Reports of Select Cases decided in the Courts of King's Bench, Common Pleas, Chancery and Exchequer, England, 1669 - 1732.
Morg. Dig.	...	Morgan's Digest (Ceylon).
Morg.	...	Morgan's Reports.
N. L. R.	...	New Law Reports, Ceylon, 1895 onwards.
N. P. D.	...	Cases decided in the Natal Provincial Division of the Supreme Court of South Africa, 1910 onwards.
Natal L. R.	...	Natal Law Reports, Supreme Court, Old and New Series, 1873 - 1910.
N. S. W. L. R.	...	New South Wales Law Reports.
Nell	...	Nell's Reports of decisions of the Supreme Court of Ceylon on Review and Appeal from the Court of Requests, 1845 - 1855.
N. Z. L. R.	...	New Zealand Law Reports.
O. P. D.	...	Reports of the Orange Free State Provincial Division, 1910 onwards.
P. P. D.	...	Reports of the Probate, Admiralty and Divorce Division of the High Court of England.
P. C.	...	Privy Council.
P. H.	...	Prentice-Hall, Weekly Legal Service, S. Africa, 1923 onwards.
P. Wms.	...	Peere Williams' Reports, Chancery and King's Bench, England, 1695 - 1735.
Q. B.	...	Law Reports, Queen's Bench, (1865-1875).
Q. B. D.	...	Law Reports, Queen's Bench Division (1875 - 1890).
Ram. Rep.	...	Ramanathan, Sir P. Judgements of the Supreme Court and High Court of Appeal of Ceylon, 1820-23; 1843-55; 1860-62; 1863-68; 1872-75-76; and 1877.
S. A.	...	Decisions of the Supreme Court of South Africa and of the High Courts of Southern Rhodesia and South West Africa, 1947 onwards.
S. A. R.	...	Cases decided in the Supreme Court of the South African Republic.
S. A. L. J.	...	South African Law Journal.
S. C.	...	Supreme Court Reports, Cape of Good Hope, 1880-1910.
S. C. C.	...	Supreme Court Circular, Ceylon, 1878 - 91.
S. C. D.	...	Supreme Court Decisions in Appeal, Ceylon, 1908-12. (Also known as Weerakoon's Reports).
S. C. Rep.	...	Supreme Court Reports, Ceylon, 1892-94.
S. W.	...	South Western Reporter (U.S.).
S. W. A.	...	Reports of the High Court of South West Africa, 1920-1946.
Sc. Ap.	...	Scottish Appeals.
Searle	...	Searle, M.W. Cases decided in the Supreme Court of the Cape of Good Hope, 1850-67.
Sol. J.	...	Solicitor's Journal (1857 onwards).
T. H.	...	Cases decided in the Witwatersrand High Court.

T. L. R.	...	Times Law Reports, England, 1885 onwards.
T. P. D.	...	Cases decided in the Transvaal Provincial Division of the Supreme Court of Africa, 1910 onwards.
T. R.	...	Term Reports (Dunford and East) (1785-1800-99-100 E.R.)
T. S.	...	Cases decided in the Transvaal Supreme Court.
Tamb.	...	Tambyah, Isaac. Reports of Cases decided by the Supreme Court of Ceylon, 1886-1911.
Trans. H. C.	...	Witwartersrand High Court (Transvaal) (1902-1910).
Vand.	...	Vanderstraaten, J. W. Decisions of the Supreme Court of Ceylon, 1869-71.
W. A. R.	...	Western Australia Reports.
Weer. Rep.	...	Weerakoon Reports.
W. L. D.	...	Witwatersrand Local Division (1910 onwards).
W. L. R.	...	Weekly Law Reports.
Wendt Rep.	...	Wendt, H. L. Reports of Cases in the Supreme Court of Ceylon, 1882 - 3.

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EXCERPTS OF REVIEWS

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