1951 *Present:* **Nagalingam J. and Basnayake J.**

KARUNATILLEKE, Appellant, and KARUNATILLEKE *et al.*, Respondents

S. C. 131—D. C. Colombo, 2,094/D

Divorce action—Defendant husband's counter-claim for divorce—Allegation of acts of adultery with several men—Condonation of all except one—Need all the adulterers be made parties?—Civil Procedure Code, ss. 75, 77, 598, 603.

In an action for dissolution of marriage brought by a wife the husband filed answer denying the plaintiff's allegations and accusing the plaintiff of misconduct with three persons A, B and C. He claimed a divorce on the ground that the plaintiff was living in adultery with D. He averred that he was all along willing to condone her acts of adultery with A, B and C.

Held, that the defendant was under no obligation to make A, B and C parties to the action or to apply for an excuse from the court, under section 598 of the Civil Procedure Code, for not making them parties.

[1] *(1950) 51 N. L. R. 322.*
[2] *(1946) 47 N. L. R. 38.*
[3] *(1902) 6 N. L. R. 243.*
[4] *(1930) 7 T. L. R. at p. 92.*

APPEAL from a judgment of the District Court, Colombo.

E. B. Wikramanayake, K.C., with *J. Fernandopulle*, for the 1st defendant appellant.

E. G. Wickramanayake, K.C., with *C. E. Jayewardene*, for the plaintiff respondent.

Izzadeen Mohamed, for the 2nd defendant respondent.

Cur. adv. vult.

February 16, 1951. BASNAYAKE J.—

This is an appeal from a judgment in an action for divorce, rejecting the answer of the defendant husband on the ground that he had without obtaining an excuse under section 598 of the Civil Procedure Code (hereinafter referred to as the Code) failed to bring in as parties to the action certain adulterers whom he discloses in the answer.

It is urged by learned counsel for the respondent that the provisions of section 598 of the Code are imperative and that the defendant is not entitled to ask for a divorce on the ground of his wife's adultery without complying with the requirements of that section. He relies on the cases of *Ziegan v. Ziegan et al.*[1] and *Jasline Nona v. Samaranayake* [2].

Learned counsel contends that the defendant's claim for divorce is a claim in reconvention and that that part of his answer should be treated as a plaint. On that footing he seeks to bring the defendant's claim within the ambit of section 598.

In my opinion that argument is untenable. The principle of reconventional claims is well known to Roman-Dutch Law and is discussed by Voet [3] at length, and has no application to a case where a defendant husband to an action for dissolution of marriage asks for a decree for divorce in his favour. Such a claim can be made by a defendant husband only by virtue of section 603 of the Code.

It is not contended that the defendant's answer violates the provisions of section 75 of the Code which prescribes the requisites of an answer. Its rejection was not therefore warranted by the provisions of section 77 which empowers the court to reject an answer which is substantially defective in any of the particulars defined in section 75 or is argumentative or prolix or contains matter irrelevant to the action.

The objection to the answer arises in this way. The defendant while denying the plaintiff's allegations accused the plaintiff of misconduct with three persons named Peter Keus, Freddy Hurst, and Lewis, between

[1] *(1891) 1 S. C. R. 3.* [2] *(1948) 49 N. L. R. 381.*
[3] *Voet, Book V, Title I. Sections 78–79. Sampson's translation*

the years 1942 and 1945. He claims a divorce on the ground that the plaintiff is living in adultery with his brother Harry Beauclerk Karunatilleke. He avers that he was all along willing to condone her acts of adultery with the others.

The question for decision then is whether those others against whom judgment is not asked for should be made parties to this action. In proceedings instituted for dissolution of marriage, if the defendant opposes the relief sought on any ground which would have enabled him to sue as a plaintiff for such dissolution, the court may in such proceedings give to the defendant on his application the same relief to which he would have been entitled in case he had presented a plaint seeking such relief [1]. In the instant case if the defendant had presented a plaint containing the allegations in his answer, should he have either made the others whom he accused of adultery with his wife co-defendants or obtained an excuse under section 598 of the Code ? The answer to that question must be sought in section 598, which 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 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 [2]. 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.

Learned counsel for the respondent in the course of his argument invited our attention to certain decisions [3] of the English Courts in support of his submission. He also sought the aid of the statutory provisions relating to the procedure in matrimonial causes in England for the purpose of interpreting section 598 of our Code. In my opinion it is wrong to construe our Code in that way. The best guide to the intention of legislation is afforded by what the legislature has itself said. In construing our Code the proper course is, in the first instance, to examine the language of the statute, and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law or from similar legislation in other countries even though such legislation be anterior to our Code. The construction of a statute by

[1] *Section 603 of Civil Procedure Code.*
[2] *Voet, Book XXIV, Title II, Section 5.*
[3] *Jones v. Jones, (1896) L. R. P. D. 165.*
Kenworthy v. Kenworthy (1919) L. R. Prob. 65.
Carryer v. Carryer & Watson (1865) 4 Sw. & Tr. 94.

instituting a textual comparison of its provisions with those of similar statutes elsewhere and the drawing of inferences from the variations between the local and the foreign enactments have been aptly described by the Privy Council as a perilous course to adopt [1].

For the foregoing reasons I am of opinion that the judgment of the learned District Judge should be set aside. I accordingly allow the appeal with costs, both here and below.

NAGALINGAM J.—I agree.

Appeal allowed.