1926.

Present: Dalton J. and Jayewardene A.J.

CORNELIS APPUHAMY *v.* APPUHAMY *et al.*

190—D. C. (Inty.) Kalutara.

Administration—Deed of separation between husband and wife—Husband's right to administer wife's estate—Civil Procedure Code, s. 523.

A husband is entitled to have issued to him letters of administration to his deceased wife's estate, even though they had been living apart, in terms of a deed of separation entered into between them.

APPEAL from an order of the District Judge of Kalutara. This was a testamentary action in which the appellant applied for letters of administration to the estate of his deceased wife. The parties had been married in 1911 but in 1913 they entered into a deed of separation. The learned District Judge held that in view of the terms of the deed the petitioner had no interest in his wife's estate and that he had no right to administer it.

H. V. Perera, for appellant.—Under section 523 of the Civil Procedure Code the surviving spouse has a preferential right to administer. It is not necessary when a surviving spouse makes an application under this section to go into the question whether the petitioner was the deceased's heir or not. The agreement of separation entered into between husband and wife does not divest the husband of his rights of inheritance. The agreement does not dissolve the marriage, and it ceases to have any effect when one of the spouses dies. In *Appuhamy v. Menika* [1] a claim by a *binna* husband who is not an heir to his wife to administer his deceased wife's estate was upheld.

Soertsz (with him *D. E. Wijeywardene*), for respondents. The preferential right to administer given under section 523 may be renounced and that has been done by clause 4 of the deed of separation. Even if there is no renunciation, still the Court may use its own discretion and issue letters of administration to some other person than the husband.

March 17, 1926. DALTON J.—

This is a testamentary action in which the appellant applied for letters of administration to the estate of his deceased wife named Dona Emalishamy. The parties had been married in 1911, but

[1] *(1916) 19 N. L. R. 149.*

in January, 1913, for certain reasons set out in the deed they entered into a deed of separation. That deed is in evidence (R1), and it was a notarial agreement. The learned District Judge, on the application coming before him, came to the conclusion that in view of the terms of the deed R1, the property of the intestate must devolve as if she had died unmarried, and in the circumstances the petitioner had no interest in her estate, and as there was no child of the issue of the marriage to inherit it he had no claim to administer the estate. The petition was dismissed with costs. From that dismissal he appeals to this Court, and two grounds have been urged in support of the appeal: first of all, that the rights of inheritance of the petitioner, the husband, are not lost under the agreement and, secondly, that under the provisions of section 523 of the Civil Procedure Code the claim of the widower, in any case of a conflict of claims to grant of letters of administration, shall be preferred to all others. Dealing with the second ground of appeal, there is no doubt as to the clear and explicit terms of section 523. That section has been commented on in the case of *Appuhamy v. Menika* (*supra*). As Wood Renton C.J. points out the claim of the widow or widower should be preferred to all others, and it is set out in this section in peremptory language, language, he adds, to which it is impossible not to attach great significance. That case also is in authority for the proposition that although the husband may have no beneficial interest in his wife's estate after her death, yet he may be still entitled to be her administrator. That decision centred round the question of Kandyan law with regard to the rights of a *binna* husband, but the principle there applied would appear to be applicable in this case for our disposal. It has been argued, however, for the respondent that here in deed R1 the husband has explicity renounced his rights to administer his wife's estate. That argument has been strenuously urged on behalf of the respondent by Counsel, but I am entirely unable to agree with him that there is either under section 4 or section 5 of the deed any renunciation by the husband of his right to administer the estate of his wife on her death. The language, in my opinion, is not capable of such an interpretation being put upon the section, and I would hold that there is, in fact, no renunciation of this right in the deed. With reference to the further question with regard to the alleged rights of inheritance of the husband, it seems to me it was not necessary for the learned Judge to decide that point in the matter that came before him on this petition as far as it related to the claim of the husband, the appellant, for letters of administration. It was in no way relevant to appellant's claim. He has however dealt with it, and it is necessary for this Court in the circumstances to make an order in respect of that conclusion. The order of the Court, in my opinion, should follow the order made

1926.

DALTON J.

Cornelis Appuhamy v. Appuhamy

in a case where the circumstances were similar. It is reported as a footnote to the case of *Appuhamy v. Menika* (*supra*), to which I have already referred, at page 151.

The order, therefore, that I will make in this appeal is an order quashing the proceedings before the learned trial Judge and directing that letters of administration be issued to the appellant as applied for, leaving it open to the respondents at the proper time to raise the question of the appellant's right to share in the distribution of the estate. In view of the learned Judge's suggestion that there might be waste on the part of the appellant should letters of administration be granted to him it would be the duty of the Court on issuing a grant of letters to see that adequate security is given by him.

There will be no order as to costs in the lower Court, but the appellant will be entitled to the costs of the appeal.

JAYEWARDENE J.—I agree.

Appeal allowed.