1938 *Present :* **Poyser S.P.J. and Maartensz J.**

WEERAPPERUMA *et al. v.* WEERAPPERUMA.

160—D. C. Colombo, 7,550.

Marriage—Invalid by reason of legal impediment—Cohabitation in habit and repute—No presumption of marriage.

Where a marriage registered between parties is invalid owing to a legal impediment a presumption of marriage by cohabitation in hablt and repute cannot arise.

THE petitioner claimed letters of administration to the estate of his deceased brother Dangedera Gamage Edwin Weerapperuma. The eighth respondent, Stella Weerapperuma, opposed the grant on the ground that she was the lawful widow of the deceased and had consequently a preferential claim to the letters of administration.

The eighth respondent was first married to Sathianathan who filed a divorce action against her. The decree nisi was entered on October 15, 1921. The decree was never made absolute.

On May 6, 1922, a marriage was registered between the deceased, Weerapperuma, and the eighth respondent, and they lived together up to the deceased's death which occurred on March 18, 1936. Sathianathan died on September 9, 1935.

The learned District Judge held that she was the lawful wife of the deceased and granted her letters. From this order the petitioner appealed.

N. E. Weerasooria (with him *E. G. Wickramanayake*), for petitioner, appellant.—At the time of the marriage of the eighth respondent with the deceased, her marriage with Sathianathan was subsisting and not legally dissolved. After the death of the deceased an attempt was made to obtain a decree absolute in the divorce case, but the application was refused. In the course of that proceeding, the eighth respondent contended that the decree nisi should have been made absolute by the Court *ex mero motu,* and that the marriage was valid. The authorities are against that. (*Sathiyanathan v. Sathiyanathan*[1]; see also *Aserappa v. Aserappa*[2]; *Hulme-King v. De Silva*[3].)

It was admitted that there were no customary ceremonies at the second marriage.

[MAARTENSZ J.—How does that arise as the marriage had never been dissolved ?]

One cannot presume a lawful marriage when there was an impediment to the marriage although the parties lived as husband and wife.

H. V. Perera, K.C. (with him *D. W. Fernando* and *K. Subramaniam*), for the eighth respondent.—The learned District Judge held that the registration of the second marriage in 1922 constituted a good marriage but that view cannot be supported. The learned Judge is right on the ground of a marriage by habit and repute. The parties entered under

[1] *(1937) 9 C. L. W. 135.* [2] *(1935) 37 N. L. R. 372.* [3] *(1936) 38 N. L. R. 63.*

a form of marriage and lived as husband and wife. Though there was an impediment to the marriage, it can be presumed that there was a legal marriage when the impediment was removed.

[MAARTENSZ J.—Did the parties realize that there was an impediment ?]

No. It is not necessary.

[POYSER S.P.J.—Can there be a presumption when there is definite evidence against it ?]

Yes. It can be presumed. Where there is no impediment, there must be some ceremony and must not be clandestine. It is merely a civil contract. The leading case is *The Bredalbane Peerage claim* [1]. In *De Thoren v. Attorney-General* [2], the parties went through a form of marriage though there was an unknown impediment. Everyone believed that the marriage was good. It is improbable that the parties would go through another form of marriage once the impediment was removed, and the House of Lords held that it was not necessary.

[MAARTENSZ J.—The Court shall presume that two people apparently living together were legally married.]

It is a presumption of law and cannot be rebutted by a presumption of fact. It can be rebutted only in a particular way. (*Dinohamy v. Balahamy* [3]; *Wilkinson v. Payney* [4].) In *Gunaratna v. Punchihamy* [5], one of the parties to the alleged marriage said that there was no registration or marriage and that was sufficient to rebut the presumption. The decision in *Punchi Nona v. Charles Appuhamy* [6] is against this contention. The Roman-Dutch law favours marriage wherever it is possible.

[MAARTENSZ J.—What about your reliance on the marriage of 1922 in the petition ? Is not that against you ?]

No. That is precisely the point in the *De Thoren case* (*supra*).

The law is that if a person introduces another as his wife, that is a declaration, even though the cohabitation arises out of an illegal contract. Hence the presumption arises.

There was no pretence of marriage in *Sastry Velaider Aronegary v. Sembecutty Vaigalie* [7].

E. G. Wickramanayake, in reply.—The facts are against a presumption of marriage by habit and repute. Under the Scotch law mere consent is sufficient, but not so under our law which requires that the consent should have been open and attended by some ceremony. Where it is not able to have direct positive evidence that a ceremony did take place, the Court presumes that the ceremonies did not take place. (*Gunaratne v. Punchihamy* [8].)

This was approved and followed in *Punchi Nona v. Charles Appuhamy* (*supra*).

H. V. Perera, K.C., referred to *In re Shephard, George v. Thyer* [9].

Cur. adv. vult.

February 17, 1938. POYSER S.P.J.—

The petitioner claimed letters of administration to the estate of his deceased brother Dangedera Gamage Edwin Weerapperuma. The eighth respondent, Stella Weerapperuma, opposed such grant on the

[1] (1872) *L. R. 2 H. L. Sc. 269.*
[2] (1876) *1 A. C. 686.*
[3] (1927) *29 N. L. R. 114.*
[4] (1791) *4 Term 468.*
[5] (1912) *15 N. L. R. 501.*
[6] (1931) *33 N. L. R. 227.*
[7] (1881) *6 A. C. 364; 2 N. L. R. 322.*
[8] (1912) *15 N. L. R. 501 at 504.*
[9] (1904) *1 Ch. 456.*

ground that she was the lawful widow of the deceased and had consequently a preferential claim to such letters.

The facts are as follows: The eighth respondent was first married to one Sathianathan who obtained a divorce from her on October 15, 1921. The decree, however, was never made absolute.

On May 6, 1922, she married the deceased, the marriage was duly registered (8DI), and they lived together up to the deceased's death which occurred on March 18, 1936.

Sathianathan did not die till September 9, 1935, and it was contended on behalf of the petitioner that the eighth respondent did not contract a valid marriage with the deceased as the decree nisi granting Sathianathan a divorce was never made absolute.

The District Judge rejected this argument and held that although decree absolute was not actually entered of record, the decree nisi became absolute "in effect" after the lapse of three months as no cause had been shown against it being made absolute.

The District Judge also stated that "it has always been the practice of this Court to make decree nisi in a divorce action absolute without any application on the part of the parties".

However that may be, there is a decision of this Court to the effect that such practice is not justified by any provision of the Civil Procedure Code.

In *Aserappa v. Aserappa*[1], the following passage occurs in the judgment of Dalton S.P.J.:—

> "According to the practice of that Court, he (*i.e.*, the District Judge, Colombo) states that decrees absolute, in matrimonial cases I presume, are entered as a matter of course after the lapse of the prescribed period without the Court being moved thereto by either party. The practice I understand, is based upon what are stated to be the explicit provisions in section 605 of the Code. If that practice had been followed therefore in this case, the Court would have made the decree absolute immediately after the expiration of three months from the date of the decree nisi. It is clear that the practice is not uniform, because it was not followed in this case. Even in August when the plaintiff's application was dealt with, the failure to act in accordance with this practice was not mentioned.
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> "If there is any such practice in force, and my brother Maartensz informs me that it was in force when he was District Judge, Colombo, I am not satisfied that it is justified by any provision of the Code. It seems to me that the person who requires the Court to move, should move the Court, and not that the Court should act of its own motion in making the decree absolute."

I think however it is unnecessary for us to decide whether this practice is justified by the Code or not. The fact remains that in this case the decree nisi was not made absolute and I cannot agree with the District Judge that the decree automatically became absolute when three months had expired, and therefore, the eighth respondent was, in my opinion, unable to contract a valid marriage at the time she married the deceased.

[1] *(1935) 37 N. L. R. 372 at p. 374.*

Mr. Perera conceded that he would not support the judgment on these grounds, but argued that as the deceased and the eighth respondent lived together for fourteen years as husband and wife and were regarded as such by their friends and relations, that the law would presume a legal marriage. The case he principally relied on in support of this argument was *De Thoren v. Attorney-General* [1].

That case has been considered in various local decisions and the law in regard to the presumption of marriages now appears to be well settled.

On this point I would refer to *Dinohamy v. Balahamy* [2], a Privy Council decision. In that case the following passage occurs in the judgment of *Lord Shaw* [3]:—

> "It is not disputed that according to the Roman-Dutch Law there is a presumption in favour of marriage rather than of concubinage; that according to the law of Ceylon, where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage. A judgment substantially in these words (*Sastry Velaider Aronegary v. Sembecutty Vaigalie* [4]), was pronounced by this Board through Sir Barnes Peacock. Sir Barnes discusses the law with some fullness, quoting among other cases the opinion of Lord Cairns in *De. Thoren v. Attorney-General* (*supra*) and making reference to the Scotch leading case, the *Bredalbane Case* [5]."

In this case it is clearly proved beyond all doubt that the marriage between the eighth respondent and the deceased was invalid. How under these circumstances there can be any presumption in favour of a valid marriage I fail to see.

I need only add that the eighth respondent recently sought to have her marriage with the deceased legalized by having the decree nisi made absolute "*nunc pro tunc*". (*Sathiyanathan v. Sathiyanathan* [6].) it was held however by this Court: (i.) that a party to a marriage, in respect of which a decree nisi for dissolution of marriage has been entered, is not entitled to contract another marriage until decree absolute is entered; (ii.) that if a party to a divorce action contracts another marriage after decree nisi, but before decree absolute, and during the lifetime of the other party, (*a*) the second marriage is invalid; (*b*) on the death intestate of either of the contracting parties to the second marriage, the survivor is not entitled to any share of the estate of the deceased.

That case however was argued on the basis that the District Judge should "*ex mero motu*" have entered decree absolute and so it might be argued that this decision does not necessarily decide this appeal.

However that may be, the eighth respondent did not contract a valid marriage with the deceased, nor can, for the reasons previously set out, it be presumed that they were married.

[1] (*1876*) *1 A. C. 686.*
[2] (*1927*) *29 N. L. R. 114.*
[3] (*1927*) *29 N. L. R. at p. 116.*
[4] (*1881*) *6 A. C. 364; 2 N. L. R. 322.*
[5] (*1872*) *L. R. 2 H. L. Sc. 269.*
[6] (*1937*) *9 Cey. Law Weekly 135.*

I would allow the appeal and direct that the appellant be granted letters of administration to the estate of the deceased Dangedera Gamage Edwin Weerapperuma.

In regard to costs I think an inquiry as to the eighth respondent's status was unavoidable and therefore consider that the costs in the lower Court and of this appeal should come out of the estate.

MAARTENSZ J.—I agree.

Appeal allowed.