

1881.
February 3
and 4.

PRIVY COUNCIL, February 3 and 4, 1881.

SASTRY VALAIDER ARONEGARY and his Wife v.
SEMPECUTTY VAIGALIE *et al.*

On appeal from the Supreme Court of Ceylon.

Present :—Sir B. PEACOCK, MONTAGUE E. SMITH, Sir K.
COLLIER, Sir RICHARD COUCH.

Law of Ceylon—Presumption of marriage—Onus probandi.

According to the Roman-Dutch Law of Ceylon there is a presumption in favour of marriage rather than of concubinage.

According to the law of Ceylon, as in England, 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.

Where it is proved that they had gone through a form of marriage and thereby shown an intention to be married, *held*, that those who claimed by virtue of the marriage were not bound to prove that all necessary ceremonies had been performed.

APPEAL from two judgments of the Supreme Court (February 12 and July 26, 1878), reversing a decision of the District Court of Batticaloa, D. C. No. 18,350 (August 5, 1876).

The facts are stated in the judgment of their Lordships. The issue was whether the appellants had sufficiently proved a valid marriage alleged by them.

Mr. Gorst, Q. C., and E. W. Stock, for appellants, contended that the Supreme Court had wrongly entertained a presumption contrary to marriage, and had wrongly thrown on the appellants the burden of proving what were the necessary ceremonies, and that they had been duly performed. The appellants had proved consent, intention to contract marriage, subsequent belief that they had done so. It rested with the respondents to prove distinctly and conclusively that they had not at any time been performed. Reference was made to *De Thoren v. Attorney-General* (1 *App. Cas.* 686); *Piers v. Piers* (2 *H. L. C.* 331); *Lyle v. Ellwood* (3 *L. R.* 19 *Eq.* 98).

Dr. Phillimore and Mr. Dunham, for the respondents, contended that the rule as to *onus probandi* asserted on the other side was established by Scotch authorities, and was not found in Roman-Dutch Law. They referred to *Van Leeuwen* (ed. 1820), p. 7; *Grotius' Introd. to Dutch Law*, p. 24, section 16; *Voet*, bk. XXIII., tit. 2 of *Pandects*; *Thomson's Laws of Ceylon*, vol. II., pp. 564–5

The counsel for the appellants was not called on for reply.

The judgment of their Lordships was delivered by Sir BARNES
PEACOCK :—

1881.
February 3
and 4.

This appeal arises out of a suit brought by the plaintiffs, who are husband and wife, in which it was alleged that the second plaintiff was at the time of her marriage with the co-plaintiff the widow of one Pattanier. The suit was brought against the defendants to recover a share of the property of Pattanier, to which it was alleged that the second plaintiff, as his widow, was entitled. The plaintiff also claimed a share, which it was alleged had descended to her from a deceased child of Pattanier by her. The question is whether she was lawfully married to Pattanier, and the child legitimate.

The first defendant is a brother of Pattanier, and was an executor under his will. The second defendant was a son of Paramakuddi Kassenater, an uncle of the second plaintiff; and the third defendant was the wife of the second defendant, and a daughter of Pattanier by a deceased wife. The learned Judge of the first Court found that there was a valid marriage. He said: "First, it is indisputable that the second plaintiff lived in the house" [that is, the house of Pattanier] "subsequent to the death of the testators" [that is, Pattanier's second wife, the mother of third defendant and her minor sister and brother]. "Second, it is also indisputable that the second plaintiff gave birth to a child in testator's house, which child survived the testator though by a few months only. Thirdly, the evidence is in favour of second plaintiff's being the wife vastly preponderated over that supporting the contrary view, not only in quantity, but in quality. If this be accepted, the legitimacy of the child from whom second plaintiff claims $\frac{1}{2}$ share is also indisputable. In a case of this kind, if there were really any room for doubt, the evidence on either side should be pretty evenly balanced. And yet quite the contrary is the case, defendants' being by far the weaker."

Upon appeal to the Supreme Court of Ceylon that judgment was reversed by the learned Chief Justice. It appears to their Lordships that the Chief Justice threw the *onus* of proof on the wrong parties, inasmuch as he held in substance that it was necessary for those who claimed by virtue of the marriage to prove what were the customs of the Tamils with regard to marriage, and that this ceremony was legally performed.

Their Lordships have no doubt upon the evidence that Pattanier and the second plaintiff lived together as man and wife. It was proved that she visited with him, and that she presented betel to their friends, which their Lordships apprehend a concubine would

1881.
February 3
and 4.

not do. They not only lived together as man and wife, but there is strong evidence to show that there was a legal marriage. Pattanier and the second plaintiff were Tamils, and the first defendant who was called as a witness proved what the custom was. He said: "She was married according to the customs of the country, but she is not the lawfully registered wife." It is true that the marriage was not registered, but it was not necessary to have it registered, inasmuch as the act which rendered the registration of marriages compulsory was not passed till after the marriage was celebrated. The witness proceeded: "The ceremony we usually perform is for four or five or six persons to be invited according to the wishes of both parties, and rice ceremony to be performed at the house of the bride or bridegroom. If the rice ceremony is performed it is marriage."

The second plaintiff herself was examined. She said that she was twenty-two or twenty-three years of age. "I lost my parents when I was five or six years old. After their death I was in charge of my sister Valliamma and her husband. I was there up till a year after I reached puberty. I do not know the year. I then went to my uncle Kassenater's house, my aunt, his sister, coming and calling me. I remained there eight, nine, or ten days. After that my uncle, his wife, his son, (second defendant)" [that is important] "his son-in-law and daughter, my brother, and aunt took me to Pattanier's house to marry me there."

It appears, according to her evidence and to other evidence in the cause, that she was taken to the house for the purpose of being married. It also appears that her brother-in-law was anxious that she should be married to a brother of his, and not to Pattanier. She says, "We went to the house. Rice was ready to be served. They spoke of serving rice to the persons who accompanied me. Then there was a row. The row was commenced by my brother-in-law and a brother who stood at the gate." [There were two brothers, one who stood at the gate and asserted in making the row, and another, who after executed a deed of dowry which will be presently alluded to.] "I was at this time inside the house; when I heard the row, I asked what it was, and they told me that my brother and brother-in-law were at the gate making a row. Then my uncle and his son got out." In her cross-examination by the second defendant's advocate she said: "During the row and before it ceased rice was served to us, and the people went away. The rice was served before the row commenced. Pattanier gave me a kurrie cloth. The tali was tied next morning; not tali, but he gave his jewels to my uncle's wife to put them on me, and she did so. There

1881.

February 3
and 4.

“ are now present as witnesses who were then present, Kanawatee Pavanatee Katuramen and my uncle’s wife. I do not know whether Sivakami is present here as a witness or not. On account of this row other ceremonies could not have been performed. Other ceremonies were necessary for marriage, but were not performed on account of the row. My relatives left at the commencement of the row.”

Strong reliance was placed by the defendants upon the statement that other ceremonies were necessary for marriage, but were not performed on account of the row.” It is to be observed that this statement was obtained upon cross-examination, and was probably in answer to a leading question. The witness was in all probability better acquainted with what ceremonies were usually performed than what were actually essential to the validity of a marriage.

Their Lordships do not attach much importance to the answer. There is evidence from which it may be inferred that the serving of rice was the essential ceremony, and it was proved that rice was served. But the evidence of marriage does not rest here. It is confirmed on the strongest manner by some dowry deeds. On the 21st October, 1866 (the marriage having taken place on the 20th), Paramakuddi Kassenater, who was the uncle of the second plaintiff and the father of the second defendant, and was also a notary, and therefore more likely than a young woman, the second plaintiff, to know what ceremonies were essential to the validity of a marriage, executed a deed, by which he conveyed to Pattanier and the second plaintiff a garden by way of dowry. It says: “ On the 21st day of October in the year 1866, I, Paramakuddi Kassenater, notary of Kattankudyirippu in Batticaloa, do hereby acknowledge to have granted in dower to Sampakoddi Sinnapulle, my niece, (that is second plaintiff) and Sinnepulle’s husband Sambekoddiyar Pattanier of the same place, to the following effect.” Then, after describing the boundaries of the garden it says: “ and the said garden with all the produce thereof is to be possessed and enjoyed by the aforesaid Sinnapulle and her husband Pattanier according to their pleasure for ever.”

That deed was attested by four witnesses, and it is stated to have been duly read over and explained to the parties, including Pattanier, and to the witnesses. And it is also proved by one of the witnesses that the deed was executed in triplicate, and that one of the parts was handed over to Pattanier, who retained it. It appears also from the evidence that Pattanier and the second plaintiff took possession of the garden; that they used it; and

1881.
February 3
and 4.

the second plaintiff, after the death of Pattanier, executed a lease of the cocoanut trees growing on it to a tenant who was called as a witness, and who proved that under the lease he had possession of and gathered the cocoanuts.

There seems to be therefore no doubt that Pattanier and the second plaintiff acted upon the deed in which Pattanier was described as the husband of the second plaintiff.

On the same day the brother of the second plaintiff acknowledged to have granted, in dower to his sister, money, jewellery, and other property, and that she and her husband were to possess and enjoy the same. That deed was also read over and explained by a notary public : it was attested by four witnesses, and it was handed over, like the other deed, to Pattanier and the other second plaintiff, and it appears that the wife took possession of the property. In addition, the deeds appear to have been registered in the office of the Registrar of Lands, so that it was made public that the property had been given over to Pattanier and the second plaintiff, as husband and wife, upon their marriage. The second and third defendants claim the property through the husband, who by retaining the deeds and taking the property under them, must be taken to have acknowledged that there was a lawful marriage.

A document was put in evidence marked E, which was signed by the second defendant as registrar, and which was a register of the death of the child of Pattanier and the second plaintiff, in which it was named Pattanier, which would not have been the case if it had merely been the child of a concubine.

It was proved that the second defendant was one of the persons who went with the uncle and the second plaintiff to the house of Pattanier in order that she might be married, and he appears to have been present when the ceremony was performed. He therefore was capable of judging whether the marriage was a valid one or not, and whether the child was legitimate or illegitimate ; and as a Registrar of Deaths he registered it as the child of Pattanier. Then, again, when the plaintiffs were married in 1873, he signed the register of their marriage, in which the first plaintiff was described as a widower and the second plaintiff as a widow, which she would not have been if she had merely been a concubine of Pattanier. Therefore, there is evidence, under the hand of the second defendant, in which it is in effect admitted that there was a marriage ; that the lady when she married the present plaintiff was the widow of Pattanier ; and that the child which she bore was a legitimate child.

Again, there was a petition put in by the second plaintiff on 21st March, 1870. The second defendant at that time had not married

1881.
February 3
and 4.

the daughter of Pattanier, and was not interested therefore in setting up that the marriage was not a lawful one. The petition contained the following passage : " The petitioner begs to inform " the Court that she is the third wife of the late Sembucutti Kannaku Pattanier of Turepatte, a principal rich man in this place." The petitioner further says that the said Sembucutti Kannaku Pattanier (her husband) also gifted her clothes, and she used and enjoyed, " and lived with him until his death as husband and " wife. The said petitioner further says that the said Sembucutti " Kannaku Pattanier married her and lived with her amicably, and " also received dowry from her in writing, and she brought forth " two children, who are dead. The petitioner further says that " after the death of her husband his brother Sembucutti Vaigelie " has taken all her jewels and ornaments, the clothes, and he delays " to return them, and therefore she prays that she may be relieved." That document appears according to the evidence to have been prepared at the instance of the second defendant and with his knowledge. Therefore there is not only the fact that Pattanier and the second plaintiff lived together as reputed husband and wife, that she visited his friends as his wife, and that he held her out to the world as his wife, but that the second defendant had in documents under his hand acknowledged, at a time when he was not interested in disputing the marriage, that she was lawfully married. Notwithstanding all that evidence, and after the finding of the first Court, the Chief Justice in his judgment says : " A great " deal of evidence was gone into on both sides, and the *onus* was " on the plaintiff to prove (1) what are the ceremonies necessary to " constitute a valid marriage in the Tamil caste to which the parties " belong ; (2) that these ceremonies were duly performed in the " marriage in question. On the first point the evidence is so " conflicting that it is impossible to gather an intelligible account " of what are the ceremonies necessary to constitute a valid marriage " amongst Tamil natives of the Batticaloa District." He did not say that it had been proved to his satisfaction that the marriage was not according to the custom, but merely that the evidence was so conflicting that it was impossible to gather an intelligible account of what were the necessary ceremonies, and he threw the *onus* of proving what were the necessary ceremonies on the plaintiffs, and found that they had failed in making out that all the necessary ceremonies had been performed.

He proceeded : " So far as the evidence can be followed, the " ceremonies seem to vary according to circumstances, such " as the position and wealth of the bride and bridegroom,

1881.
February 3
and 4.

“ and whether a man or woman is married for the first time. The
 “ witnesses also differ as to what are essential ceremonies; and on a
 “ review of the whole of the evidence it appears clear that either
 “ there is not a well-recognized ceremonial to be observed on
 “ occasions of marriage, or that the witnesses were wholly ignorant
 “ of what they were called to prove. It is admitted that all the
 “ necessary ceremonies were not performed at the marriage in
 “ question, but it is alleged that they could not have been on
 “ account of the disturbance which took place when the marriage
 “ was going on. We think this excuse, even if true, is insufficient
 “ in law, as a marriage cannot be taken to have been duly
 “ celebrated if any of the essential ceremonies were not duly
 “ observed, even though such omission was unavoidable.”

It was contended by Dr. Phillimore that the presumption of marriage arising from cohabitation with habit and repute did not apply to the case of the Tamils and to Ceylon, but it appears from the authorities which he cited that, according to the Roman-Dutch Law, there was a presumption in favour of marriage rather than of concubinage. It does not therefore appear to their Lordships that the law of Ceylon is different from that which prevails in this country, namely, that where a man and a 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.

Dr. Phillimore did contend that in a district where concubinage was not considered as immoral, the same presumption would not arise; but their Lordships cannot agree with him in that respect. It is evident in the district in which Pattanier lived, wives are treated differently from concubines, and it is not because a number of persons live in a state of concubinage to be presumed that a man and woman who are living together as reputed husband and wife are not lawfully married. It is evident from the parties going through the form of marriage that they intended to be married; and if they were not married according to the strict custom, it was not in consequence of their wish that it should be so. It appears clearly that they did consider that a valid marriage had taken place.

In the case of *Piers v. Piers* (2 H. L. C. 331) it was laid down by the House of Lords that the presumption of marriage arising from cohabitation with habit and repute can only be rebutted by the clearest and most satisfactory evidence. The Lord Chancellor said: “ I have not found that the rule of law is anywhere laid

1881.
February 3
and 4.

“ down more to my satisfaction than it is by Lord Lyndhurst in the
“ case of *Morris v. Davis* (5 C. L. & F. 163) as determined in this
“ house. It is not precisely the same presumption as exists in the
“ present case, but the presumption is strictly applicable to the
“ principle which we are considering. He says :—‘ The presumption
“ ‘ of law is not lightly to be repelled. It is not to be broken in
“ ‘ upon or shaken by a mere balance of probability. The evidence
“ ‘ for the purpose of repelling it must be strong, distinct, satis-
“ ‘ factory, and conclusive.’ No doubt every case must vary as to
“ how far the evidence may be considered as satisfactory and
“ conclusive ; but he lays down this rule that the presumption
“ must prevail, unless it is most satisfactorily repelled by the
“ evidence in the cause appearing conclusive to those who have to
“ decide upon that question.”

In *De Thoren v. Attorney-General* (1 App. Cas. 686) Lord Cairns, then Lord Chancellor, stated that the presumption of marriage is much stronger than the presumption raised with regard to other facts, and he referred to the Breadalbane case (*Law Rep. 2 H. L. 269*), in which it was held that the presumption was one which not only might, but ought to, be drawn from cohabitation with habit and repute, although the cohabitation commenced with a ceremony which was not only invalid by reason of the real husband of the woman being alive at the time, but was known by both parties to be invalid.

Their Lordships having come to the conclusion that Pattanier and the second plaintiff lived together as man and wife, and that Pattanier held her out as his wife, the presumption of their marriage is not lightly to be rebutted. The Chief Justice did not find that the presumption was rebutted, but he threw the *onus* of proving a legal marriage according to the customs of the Tamils upon the other side. Their Lordships think that the learned Chief Justice was in error in over-ruling the decision of the Judge of the first Court, who had come to the conclusion that there was a legal and valid marriage.

Their Lordships will therefore humbly advise Her Majesty that the decree of the Supreme Court be reversed, and that the decree of the first Court be affirmed. The respondents must pay the costs of this appeal.

