1927.

[PRIVY COUNCIL.]

Present: Viscount Haldane, Lord Shaw, and Lord Warrington of Clyffe.

DINOHAMY *et al. v.* BALAHAMY *et al.*

Husband and wife—Presumption of marriage—Habit and repute—Agreement by widow relinquishing her rights—Validity.

Under the law of Ceylon where a man and woman are proved to have lived together as husband 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.

Sastry Velaider Aronegary v. Sembecutty Vaigalie[1] followed.

Where, on the death of a person, a child of the deceased by the first bed obtained a deed of agreement from the widow, which altered her status and extinguished her rights, and where it was not proved that she had fully understood the contents of the deed.—

Held, that the deed of agreement was no bar to her and her children's rights under the law of intestate succession.

APPEAL from a judgment of the Supreme Court. The facts are fully stated in the judgment of the Judicial Committee of the Privy Council.

June 16, 1927. Delivered by LORD SHAW.—

This is an appeal raising the question of the validity of a Sinhalese marriage. A petition was presented by the respondents in the District Court of Tangalla in Ceylon for letters of administration of the estate of one, who for short may be called Don Andris de Silva. Don Andris died on September 1, 1921. The application was made upon December 14 of that year by Singho Appu, the son-in-law of the deceased Don Andris. Don Andris died intestate.

The family history of Don Andris was that he had been regularly married in 1885, having as issue the daughter who, through her husband Singho Appu, now claims his whole estate. This first wife died in May, 1900.

Then in 1901, and for a course of twenty years until 1921, when Don Andris died, the proved family history was as follows:—

He married one Balahamy, with the procession, the giving of gifts, and other ceremonials familiar to the law of Ceylon. There was, however, one omission, namely, that the marriage was not registered, and in that sense the marriage was irregular. But registration, however important, was not by law essential. Don

[1] *6 A. C. 364.*

Andris and she lived together as apparently man and wife for these twenty years. During that period she bore him nine children, of whom eight are still alive. The father and mother and children all lived together as one family. At the time of his death she and the eight surviving children were living in the family house.

By the law of intestate succession in Ceylon, the estate of the deceased would have been divided, one-half to his widow and the other half equally among the nine children, namely, her eight, and the respondent, the child of the first marriage.

The respondents claim that this law of succession operates.

The appellants, however—Singho Appu and his wife—deny to the respondents any such right of succession. They maintained that Balahamy was not the wife of Don Andris, and that all her children were illegitimate. They accordingly claim that Dinohamy succeeded to the whole estate.

In the circumstances mentioned it is not to be wondered at that, when on December 14, 1921, letters of administration were granted to the appellant, Singho Appu, as son-in-law of the deceased and husband of Dinohamy the daughter by the first marriage, he considered it expedient to do something to fortify a claim to the estate. For the result of success in his application would be that the appellants would be able to disinherit and eject from the family home the first respondent and her eight children. A deed, purporting to be a deed of agreement, was accordingly prepared. It was made ready by December 18, namely, four days after letters of administration, and it was executed on December 23.

It is sufficient to say of that deed that the estate was declared wholly to belong to the appellant Dinohamy, the daughter of the first marriage. A certain portion of the property, however—about one-half—was to be given by her as a donation to the eight children; and the deed entirely disinherits their mother, who, as the widow of Don Andris, would have succeeded to the other half. It not only, however, does this, but it further states that Don Andris had "lived with the said . . . . Balahamy as his mistress and not having legally married her, eight children were born to them." She is accordingly, as stated, entirely disinherited by this alleged agreement.

There are only two real questions in the case—

First, was Balahamy married according to the law of Ceylon to Don Andris?

Secondly, are her or her children's rights affected by the deed of agreement.

The strength of the appellant's case—there being a total conflict between the witnesses on the one side and those on the other—is that the District Judge believed the appellants' witnesses. On

1927.

DELIVERED BY LORD SHAW

Dinohamy v. Balahamy

the other hand, the two Judges of the Supreme Court of Ceylon, by their judgment dated December 18, 1925, reversed the District Court's judgment, and on both the points in issue differed from the learned Judge, disbelieved the witnesses of the appellants, and believed those of the respondents.

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 Aronegiry v. Sembecutty Vaigalie* (*supra*)) 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*,[1] and making reference to the Scotch leading case, the *Breadalbane Case*.[2]

Since the *Breadalbane Case* has been mentioned it may be expedient to note these sentences from the judgment of Lord Cranworth therein:—

> "Marriage can only exist as the result of mutual agreement. The conduct of the parties, and of their friends and neighbours, in other words, habite and repute, may afford strong, and, in Scotland, attending to the laws of marriage there existing, unanswerable evidence, that at some unascertained time a mutual agreement to marry was entered into by the parties passing as man and wife. I cannot, however, think it correct to say that habite and repute in any case make the marriage. Repute can obviously have no such effect. It is, perhaps, less inaccurate to speak of habite creating marriage if by the word 'habite' we are to understand the daily acts of persons living together, which imply that they consider each other as husband and wife, and it may be taken as implying an agreement to be what they represent themselves as being. It seems to me, however, even here to be an improper use of the word to say that it makes marriage. The distinction is, perhaps one rather of words than of substance; but I prefer to say that habite and repute afford by the law of Scotland, as, indeed, of all countries, evidence of marriage, always strong, and in Scotland, unless met by counter evidence, generally conclusive."

Whether this distinction be merely one of words rather than one of substance does not, in the present case, really arise; because in

[1] *1 A. C. 686.* [2] *L. R. 2 H. L. Sc. 269.*

their Lordships' opinion the evidence in this case 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.

The parties lived together for twenty years in the same house, and eight children were born to them. The husband during his life recognized, by affectionate provisions, his wife and children. The evidence of the registrar of the district shows that for a long course of years the parties were recognized as married citizens, and even the family functions and ceremonies, such as, in particular, the reception of the relations and other guests in the family house by Don Andris and Balahamy as host and hostess—all such functions were conducted on the footing alone that they were man and wife. No evidence whatsoever is afforded of repudiation of this relation by husband or wife or anybody.

The learned Judges of the Supreme Court have discussed the evidence carefully, and have come to these conclusions. The Board thinks they are right.

The second point has reference to the alleged deed of agreement. It has already been noted as remarkable that Singho Appu thought it right within a few days of letters of administration being granted to him to fortify his and his wife's position by getting an agreement of the kind. The facts with regard to it are that the widow gave no instructions for its preparation; that she was not consulted as to its provisions; that she obeyed a message to go to Singho Appu's house, and that she there, at his request, signed the deed. She had no legal adviser. The deed was in English, but she could not read English. She says that she understood she was required to put her name to it because it concerned her half of the estate, but that she did not know anything else. It is almost beyond reason to expect that she would have knowingly signed a deed declaring that she herself had lived with Don Andris for twenty years as his mistress, and that all her children were illegitimate children.

The most careful examination of the conduct of the notary in such a case must be made. Its outstanding feature is that being instructed by one party to a transaction involving not only the extinction and alteration of patrimonial rights, but also a degrading alteration of the status and moral life of others who were to be made parties to the deed, he never seems to have suggested that it was a case for another notary being employed to protect the wife and children's interests. The transaction and the evidence by which it was supported are alike discreditable. It would require the very strongest evidence in such circumstances to prevent the respondents from being protected against such a transaction by a Court of law. Their Lordships agree with the Supreme Court that it is not proved

1927.

DELIVERED BY LORD SHAW

Dinohamy v. Balahamy

that the wife understood, or had sufficiently explained to her, this deed written in a foreign tongue, and think it is no bar to her and her children's rights under the Ceylon law of intestate succession.

Their Lordships do not enter further into the facts of the case as, for instance, the entries upon the register and other topics—upon all of which topics the Board agrees with the Supreme Court.

Their Lordships will humbly advise His Majesty that the appeal should be disallowed with costs.

Appeal dismissed.