1934 *Present :* **Drieberg, Akbar, and Poyser JJ.**

SETHUKAVALAR *v.* ALVAPILLAI.

188—D. C. Jaffna, 8,030.

Administration—Conflict of claims—Right of a widow or widower—Discretionary power of Court to pass over claim—Civil Procedure Code, s. 523.

Under ordinary circumstances the claim of a widow or widower to letters of administration to the estate of a deceased person is to be preferred, but the Court has power to pass over the claim in favour of another for good reasons.

CASE referred by Garvin S.P.J. and Poyser J. to a Bench of three Judges. Two questions of law were referred to to the Court—(1) whether section 523 of the Civil Procedure Code gives the District Court any discretion in the matter of the appointment of the widow or widower as administratrix or administrator, and (2) whether this preferentail right can be claimed also by the attorney of the widow or widower.

N. E. Weerasooria (with him *D. E. Wijeyewardene* and *Batuwantudawe*), for respondent, appellant.—This appeal raises a question relating to the interpretation of section 523 of the Civil Procedure Code. After the introduction of the Code, the Court has no discretion, except as to associating someone with the widow or widower in the grant of letters of administration.

In *Mahamado Ali v. Sella Natchia* [1], the earliest case on the point after the introduction of the Code, a widow's claim was preferred. In *In re Ukku Banda* [2], Bonser C.J. upheld a similar claim. In *Habibu v. Aliar Marikar* [3], a Muhammadan widow's claim for letters to her deceased husband's estate was preferred to all others. In *Appuhamy v. Menika* [4], (*binna* husband's claim), Wood Renton C.J. favoured the view that the wording in section 523 is imperative. In this case, a judgment of Sampayo J., at p. 151 of *19 N. L. R.*, was cited with approval. Counsel also cited *Thambiah v. Parupatham* [5] and *Pedurupillai v. Sewarichi* [6].

In *Cornelis Appuhamy v. Appuhamy* [7], Dalton J. held that a widower is entitled to letters even though he had been living apart from the deceased, in terms of a deed of settlement. In *Moosajee v. Carimjee* [8], Fisher C.J. upheld " a widow's right to have her claim to letters preferred to all others ". In *Kanagasunderam v. Sinniah* [9], the preferential right of a widow was recognized.

There are safeguards provided under the Code in regard to an administrator who may be guilty of misconduct. The draftsman, when he drafted section 523 of the Code, perhaps never contemplated the position arising under the *Thesawalamai.*

This interpretation of section 523 has been holding good for over thirty years and has been recognized so long by the Courts that it should not be disturbed now—see *Boyagoda v. Mendis* [10].

[1] *(1893) 2 C. L. R. 179.*
[2] *(1900) 4 N. L. R. 257.*
[3] *(1904) 3 Bal. 59.*
[4] *(1916) 19 N. L. R. 149.*
[5] *(1917) 4 C. W. R. 89.*
[6] *(1923) 2 Times of Ceylon L. R. 83.*
[7] *(1926) 28 N. L. R. 286.*
[8] *(1927) 29 N. L. R. 387.*
[9] *(1930) 32 N. L. R. 43.*
[10] *30 N. L. R. 321.*

S. Nadesan (with him *A. W. Nadarajah*), for petitioner, respondent.—The ordinary under the English law had no power to prefer others to a widower. See *31 Edw. III., st. 1, c. 11.* Also *29 Car. II., c. 3,* which enacts that "their husbands may demand and have administration". Though these words are peremptory, the Courts have in interpreting them refused to grant letters to a widower who did not have an interest in the estate—see *Williams on Executors (11th ed.), p. 321.* Similarly, in interpreting *21 Henry VIII., c. 5. s. 3,* the Courts have given effect to the principle "grant follows the interest", and despite the letter of the law have given effect to the spirit of the law by granting letters to one possessing an interest. See *Williams, pp. 377-378; In re Megson, (1899) 80 L. T. 295; In re Arden, (1898) 67 L. J. 70; In re Gill, (1828) 1 Haggard 342; Fielder v. Hangar, 3 Haggard 769.*

The paramount consideration with the English Courts has been the safety of the estate. This was ensured by refusing letters to one who had no interest as against one who had.

[DRIEBERG J.—If the administrator is asked to give security for the proper discharge of his duties, is that not a sufficient safeguard?] Security cannot provide an adequate safeguard; self-interest is the best safeguard.

These principles of English law are part of the law of Ceylon, for by section 27 of the Charter of 1833, the law of England relating to executors and administrators was introduced into Ceylon—see *Staples v. De Saram* [1] and *Fernando v. Fernando* [2]. Prior to the introduction of the Civil Procedure Code these principles have been accepted and followed in Ceylon. (*Ram., 1860-62, p. 5*)—*binna* husband refused letters; *In re Rolintina* (*Ram., 1872-76, p. 311*)—where it was held that the Court has a discretionary power in granting letters of administration to a widower; *In re Muttu Pulle, (1859) Lorenz, part III., p. 193;* and *Marshall's Judgments, pp. 3, 4, and 5.*

In this state of the law was section 523 of the Code enacted. The principles of English law introduced into Ceylon have not been abrogated by this section. Section 523 should therefore be interpreted subject to the principles, (*a*) that the safety of the estate must be ensured and (*b*) that the grant follows the interest.

The use of the word "prefer" shows that the legislature intended to give a discretion to the Court. There was no intention to repeal the law prevailing prior to 1889. The fact that a certain interpretation of section 523 has been recognized by the Courts for a long time is no ground why the section should not be differently interpreted now. The section enacts substantive law, and not a simple procedural provision. See *Pate v. Pate* [3], in which the Privy Council over-ruled an interpretation which had held good for a long number of years.

Even if the widower has a preferent right to letters, the widower's attorney has no such right. The Case of *Moosajee v. Carimjee* (*supra*) was not rightly decided. If the preferent right of a widow or widower is

[1] *Ram., 1863—68, p. 275.* [2] *(1908) 4 N. L. R. p. 201.*

[3] *18 N. L. R. at p. 293.*

created by statute, so is the preferent right of an attorney. Hence the absence of any reference to an attorney in section 523 indicates that an attorney cannot claim any preferent right.

Weerasooria, in reply.—The Courts Ordinance s. 69, confers jurisdiction in administration cases on the District Court. This gives a discretionary power, but such power is limited by section 523 of the Civil Procedure Code.

Cur. adv. vult.

December 19, 1934. AKBAR J.—

This case was referred to a Bench of three Judges by Garvin S.P.J. and Poyser J., and Poyser J. in his judgment has fully stated the facts. The two questions of law which he thought should be settled are whether section 523 of the Civil Procedure Code gives the Court any discretion in the matter of the appointment of the widow or widower as administratrix or administrator, and whether this preferential right (if any) can also be claimed by the attorney of the widow or widower. From the facts stated by Poyser J. it is clear that if the Court had a discretion in the matter under section 523 of the Civil Procedure Code, the District Court was right in rejecting the claim of the widower Ayathurai to administer his deceased wife's estate. Ayathurai had no interest in his wife's property under the *Thesawalamai*, and he himself had suggested in a letter to the District Judge that the proper person to administer the estate was the father or the brother of the deceased, who presumably have no objection to the appointment of the petitioner-respondent, brother-in-law of the deceased to the office of administrator. Ayathurai is away in the Federated Malay States and has applied for administration through his attorney, a man apparently living in another district than where the properties are situated.

Ayathurai it appears is now married to another woman and the District Judge found that he had been very dilatory in another testamentary case in which he was administrator. So that the Judge had ample material before him to hold against the claim of Ayathurai, if he had a discretion in the appointment of the administrator under section 523 of the Civil Procedure Code. The question is whether that section confers an absolute right on the widower. The relevant words are as follows:—"And in the like case of a conflict of claims for grant of administration where there is intestacy, the claim of the widow or widower shall be preferred to all others, and the claim of an heir to that of a creditor." Under this section (to use the words of some of the Judges of the Supreme Court who interpreted this section) the language used is no doubt peremptory or imperative in so far as the section says that the widow or widower's claim is to be preferred, but I cannot agree that the words "shall be preferred" mean that the widow or widower's claim is absolute and must prevail over those of all the others, even when the Judge is convinced, as in this case, that the widower is not a fit person to administer the estate. There can be no doubt that there is a series of cases decided by this Court, in which such an interpretation was adopted. In the first reported case after the Civil Procedure Code was enacted, viz., *In the matter of the Estate of S. L. M. Ahamadoe Lebbe*

Marikar, deceased[1], both Lawrie A.C.J. and Withers J. simply referred to the preferential rights of the widow without definitely stating that those rights were absolute. Lawrie A.C.J. said "The reasons given by the learned District Judge for refusing to give letters of administration to the widow are insufficient. By law she is to be preferred to the next of kin, much more is she to be preferred to a son-in-law, a stranger in blood and estate to the deceased." Withers J. said "I, too, think that the widow has a better claim to be declared entitled to take out letters of administration to those estates".

It will be seen from the case that the Supreme Court did recognize the widow's preferential claim—of which there can be no doubt from the words of the section—but that it did not regard those claims as being paramount and capable of over-riding all other claims in every instance, even when it was demonstrated that the widow was totally unfit to administer the estate. In the next case, however, *In re Intestacy of Ukku Banda, deceased*[2] the point was definitely decided by Bonzer C.J. and Browne A.J., and, if this was not a Bench of three Judges, we would have been constrained to follow this decision.

But even in that case, although Bonser C.J. thought that the language of the section was plain and that the cases referred to had no application, as they were decided before the passing of the Civil Procedure Code, the Chief Justice followed the old practice as laid down by Chief Justice Marshall and held that (as the Code did not say that a widow was to be entitled to sole administration but that her claim was to be preferred) it was quite open to the Court, if it thought it advisable in the interest of the estate, to associate some other person as a joint administrator.

The next case to which we were referred was *Appuhamy v. Menika*[3]. It will be seen from that case that objection was taken to a *binna* husband's right to administer his wife's estate as he had no right in his wife's estate after her death. A previous decision of De Sampayo J. and Shaw J. (*19 N. L. R., p. 151*) was followed in which the *4 N. L. R.* case was quoted with approval. In that case Wood Renton J. refused to follow the decision of the Supreme Court reported in *Ramanathan's Reports, 1860-1862, p. 5* and *3 Lorensz's Reports, p. 193*, because "the rules and regulations under which these cases were decided, while they no doubt indicate that a preference was intended to be assigned to the widow or widower of an intestate in claims for administration, do not express that preference in the peremptory language of section 523 of the Civil Procedure Code".

But Wood Renton J. went on to say that there was nothing unreasonable in the construction of the law that a *binna* husband was entitled to the preference conferred by that section even though he had no interest in the estate, because he had interests of another kind. "He is still her husband and the father of her children and it is quite right that he should have an opportunity of seeing that his wife's estate is properly dealt with and that the position of the children in regard to it is adequately safeguarded".

The only objection taken to the *binna* husband's rights was on the ground that he had no interest in his wife's property. There seems to

[1] *2 C. L. R. 179.* [2] *4 N. L. R. 257.* [3] *19 N. L. R. 149.*

have been children born out of the union, hence the further justification by Wood Renton J. But supposing the finding of the District Judge had been that the *binna* husband was totally unfit to administer his wife's estate, either because he was in jail for a long term of years or because his character was such that he should be deprived of this preferential claim, has the Judge no discretion even in such cases? *Thambiah v. Parupatham*[1] is a short judgment in which the case of *Appuhamy v. Menika* (*supra*) was followed in the following words: "Section 523 is imperative, and this has been recognized in the case of *Appuhamy v. Menika* as applying even if the widow or widower is not an heir".

In *Pedurupillai v. Sewarichi*[2] the two cases last quoted by me were followed. In *Cornelis Appuhamy v. Appuhamy*[3] the appellant applied for letters of administration to his wife's estate and it was objected to that there was a deed of separation between the two under which the appellant had no interest in the estate. The District Judge held against the appellant as by the deed he had no interest in the estate and as there was no child of the marriage to inherit it.

Dalton J. followed the *19 N. L. R.* case above quoted and said "As Wood Renton 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 an 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. Letters of administration were given to the widower, but the question whether he had lost his rights in the estate under the deed of separation was to be decided at a later stage.

In *Moosajee v. Carimjee*[4] Fisher C.J. and Drieberg J. followed Bonser C.J.'s judgment in these words: "If this were a case of a widow in the Island applying for a grant to herself her right to have her claim 'preferred to all others' would have to prevail". The main point decided in that case was whether the attorney of a widow from the Island was entitled to claim the preferential right to letters of administration.

Similarly in *Kanagasunderam v. Sinniah*[5] Garvin A.C.J. referred to *Moosajee v. Carimjee* (*supra*) and held that the manager of the estate of a lunatic widow was held entitled to have letters issued to him. Objection was taken that the widow was not an heir of her husband's property, but Garvin A.C.J. held that in the case before him a substantial part of the estate was acquired property and "that is a reason why this may well be regarded as a case in which the widow has a special interest apart from her preferential right to letters of administration", remarking also that "No special cause has been shown in this case why in recognition of the preferential rights of the widow letters should not be granted to the manager". He nowhere states that the provision is imperative in the sense that the Court is compelled to grant letters to a person having such a preferential right, even when it is satisfied that the administration of the estate will suffer thereby.

[1] *3 C. W. R. 89.*
[2] *(1923) 2 Times of Ceylon Law Report 83.*
[3] *28 N. L. R. 286.*
[4] *29 N. L. R. 387.*
[5] *32 N. L. R. 43.*

It will thus be seen that there is a series of two-Judge cases in which the interpretation was more or less put on section 523 that the words "shall be preferred to all others" meant that the claim of the widow was to be paramount. There are really only two decisions which were later followed: one being the decision of Bonser C.J. in *4 N. L. R. 257* and the other by Wood Renton J. in *19 N. L. R. 149.* Bonser C.J. said that the argument that section 523 must be read with a qualification, that she (*i.e.*, the widow) is to be preferred unless the Judge thinks that some other claimant would make a better administrator, was quite inconsistent with the plain language of the section. Wood Renton J. thought that the preference of the widow's or widower's claim was expressed in peremptory language. Their opinion has been endorsed by some of the later Judges. As regards the law existing in Ceylon before the Civil Procedure Code came into force, it was the English law which was applied. As stated by Marshall, page 3, "As regards the priority of the right of administration, it may be observed that the English law, which adopts the computations of the Civil law, in regulating the propinquity of kindred may safely be followed at least as regards Europeans and the descendants and the Sinhalese inhabitants".

Under the English law as pointed out by Clarence J. in *In the Matter of the Estate of D. Rolantina* (*Ram. 1872-1878, 311*) the husband's right was absolute, whereas in the case of the widow the Court had a discretion. One reason for the preference which the English law gave to the widower was due to the interest he had in his wife's property. Under the laws in force in Ceylon it may sometimes happen that a husband may get no interest in his wife's property viz., as in this case and in the case of a *binna* husband. Clarence J. following the ruling of the English Courts which recognized the principle of giving the management of the property to the person who had the beneficial interest in it and of refusing administration to the very person pointed out by the statutes, when it appeared that such person had no interest, held that the Court had a discretionary power of preferring the next of kin for good reasons not only in the case of the widow but in that of a widower. This being the law before the Civil Procedure Code, the question that has to be decided is whether there has been a change in the law enacted by section 523 and whether this change is given effect to in the words of section 523.

In spite of the opinion of the Judges of this Court mentioned by me above, I cannot think that this great and drastic change has been introduced by the words of section 523. If this contention is right, our law would go beyond the English law in regard to the position of a widow, by giving her an absolute right which she never had under the English law nor under our law as it stood prior to 1889. The fact that both the widow and the widower are grouped together in the same formula shows, I think, that the law that was meant to be codified in section 523 was the law as enunciated by Clarence J., namely, that under ordinary circumstances the widow or widower is to be preferred but that the Court has a discretionary power of preferring another person for good reasons. It is of course a discretionary power and the Court must give its reasons for its preference. In spite of the previous decisions of this Court I cannot give any other interpretation to the words "shall be preferred

to all others" than that in ordinary circumstances the claim of the widow or widower is to be preferred, but that the Court has got the power to pass over their claims in favour of other persons for good reasons.

This being my view, the second point reserved for consideration does not arise, and the appeal must be dismissed with costs.

DRIEBERG J.—I agree.

POYSER J.—I agree.

Appeal dismissed.