

APPPEAL from a judgment of the District Court, Chilaw.

N. E. Weerasooria, Q.C., with H. Wanigatunga and Cecil de S. Wijaratne,
for the plaintiff-appellant.

W. D. Gunasekera, for the 7th and 8th defendants-respondents.

Cur. adv. vult.

March 13, 1961. SINNETAMBY, J.—

The plaintiff instituted this action for partition of the land called Paluwelgalamukalana, alleging that he, the 1st defendant, and the 2nd defendant were co-owners. The 1st defendant William claimed the land exclusively as his own, basing it on prescription. William's claim, however, failed both in the original court and in appeal, and an interlocutory decree for partition was entered. Subsequently, it was discovered that certain other parties had to be added, and they were duly added: the interlocutory decree was accordingly amended on 18th February, 1955. Up to that stage, the 7th and 8th defendants were not parties to the action; but, on the 22nd of June, 1955, they moved to intervene claiming that Catherina Hamy, through whom the plaintiff, the 1st defendant, 2nd defendant and the other intervening defendants derived title, was not married to Juan Dabrera, to whom the property originally belonged. They alleged that Juan Dabrera died without issue and that they were the legal heirs of Juan Dabrera, being the children of his sister. The main question for decision, therefore, was whether Juan Dabrera was married to Catherina Hamy. If there was a marriage, the intervenients, namely the 7th and 8th defendants, would have no title: but, if they were not married, the plaintiff and the other defendants would not inherit. It was suggested for the plaintiff that these intervenients were put up by William to obtain a decree in their favour, with the object of depriving the plaintiff and others of their shares.

In order to succeed in their intervention, the 7th and 8th defendants had to establish an interest in the land by proving, first, that they were, in fact, heirs of Juan Dabrera, and, then, that Juan Dabrera was not married to Catherina Hamy. It is not necessary for us to deal with the question of whether the intervenients' mother is the sister of Juan Dabrera as we are satisfied that, upon the evidence, Juan Dabrera must be held to have married Catherina Hamy. No certificate of marriage was produced. The plaintiff claimed that the evidence establishes marriage by habit and repute. The learned Judge took the view that, to establish marriage by habit and repute, there must always be satisfactory evidence of some customary rites followed by evidence of habit and repute. In our view, he misdirected himself on this point. If one

of the parties to the marriage is alive, then of course, it would be necessary to establish the existence of marriage ceremonies, for, a party to the marriage must necessarily be aware of it and be able to give evidence in regard to it; but where neither of the parties is alive, and the marriage itself was contracted at a very early date, evidence of customary rites or religious rites would be difficult, if not impossible, to obtain, and is, therefore, not insisted on. It is for that reason that the law recognises proof of a marriage by habit and repute. Reference was made by learned counsel for the 7th and 8th defendants to *Kandiah v. Thangamany*¹ wherein acting Chief Justice Nagalingam made the following observations:—

“Under our law, however, some antecedent public ceremony in the presence of relatives, friends or third parties, had to take place before the mere circumstances of the parties living together as man and wife followed by recognition of their living together as man and wife by friends and relations can form the basis of a deduction that there was a lawful marriage between the parties. It is not unimportant to stress that the fact of two parties living together as man and wife and their being recognised as such by friends and relations gives rise to a presumption—and a presumption only—of marriage. It does not prove the fact of marriage, and the presumption is not an irrefutable presumption but one which may be disproved.”

In that case, there was evidence available and led to establish the performance of alleged customary marriage rites: that evidence was unsatisfactory and showed that an invalid marriage ceremony was performed. In those circumstances, the presumption of marriage by habit and repute could not be drawn, as the evidence led rebutted the presumption.

It is clear, therefore, that the fact that two persons are living together as husband and wife and are recognised as such by everybody in the circle in which they move creates a presumption in favour of marriage; and, in the absence of rebuttable evidence to the contrary, the Court is entitled to presume that the parties were duly married as required by law. On the other hand, if a party seeks to establish a customary marriage by the performance of some religious ceremony and fails in that, then, the presumption is rebutted and the mere fact that the two persons subsequently lived together as husband and wife does not establish marriage.

In the present case, no attempt was made to prove that there was a marriage solemnized according to religious or customary rites. All that was sought to be proved was evidence which would enable the presumption of marriage to be drawn. Had the learned Judge not taken a wrong view of the law on this question, he may, perhaps, have come to a different conclusion. The evidence shows that Juan Dabrera and his wife lived together and were accepted by everybody as husband

¹ (1953) 56 N. L. R. 568.

and wife. Emaline the 7th defendant stated that Juan Dabrera and Catherina Hamy were not married in the Roman Catholic church. That is understandable as Catherina Hamy was a Buddhist. That explains why Juan Dabrera was not given a Catholic funeral. From this fact, it would be most unreasonable to assume, as the learned trial Judge did, that the denial of a Catholic burial to Juan Dabrera was because he was not married to his wife. The only positive item of evidence against the marriage is the document 7D1, which is the birth certificate of one of the children, where the parents are stated not to have been married: but as was observed by the Judges who decided the case reported in 38 Ceylon Law Weekly at page 87, an entry of "not married" in a register is intended by parties who are illiterate to mean no more than "not registered". There undoubtedly is evidence to establish the fact that after Juan Dabrera married Catherina Hamy and conducted her to the village, there was no ceremony of marriage performed; but, this does not preclude the possibility, indeed the probability, of a marriage ceremony being performed in the bride's home at Mawila. There was no evidence that a ceremony was not performed at Moratuwa which is Juan Dabrera's home town or Mawila where Catherina Hamy's parents lived, but the evidence clearly discloses that from the moment of their arrival in the village they were accepted and treated as husband and wife.

I would accordingly hold that a marriage by habit and repute has been established and dismiss the intervention of the 7th and 8th defendants with costs both here and in the court below.

L. B. DE SILVA, J.—I agree.

Appeal allowed.

