1937 *Present :* **Moseley J. and Fernando A.J.**

SATHIYANATHAN *v.* SATHIYANATHAN.

203—D. C. Colombo, 2,414.

Divorce—Marriage of party to action before decree absolute—Application to enter decree absolute nunc pro tunc*—Death of party—Power of Court—Civil Procedure Code, s. 605.*

Where a decree *nisi* is entered for the dissolution of a marriage, the Court is not bound of its own motion to make the decree absolute after the expiration of the time limit.

The marriage of a party to a divorce action before the decree is made absolute is invalid.

An application to enter decree absolute *nunc pro tunc* should not be allowed where the rights of third parties are affected.

Quære, whether the Court has power to enter decree absolute where the marriage has been dissolved by the death of a party after decree *nisi.*

THE plaintiff, husband, brought an action for divorce against the first defendant his wife and decree *nisi* was entered on October 10, 1921. The second defendant, the co-respondent, married the first defendant after the period of three months from the date of decree *nisi,* but before the decree absolute. The plaintiff died in April, 1935, and the second defendant on March 18, 1936. The first defendant moved the District Court on September 14, 1936, to make absolute, *nunc pro tunc* the decree *nisi.* The purpose of the application was to make valid the marriage of the second defendant with the first defendant in order that the latter may succeed as one of the heirs of the second defendant. The learned District Judge refused the application because the marriage was *ipso facto* annulled by the death of the plaintiff. From this order the first defendant appeals.

H. V. Perera, K.C. (with him *D. W. Fernando* and *K. Subramaniam*), for first defendant, appellant.—According to English law the guilty party cannot apply to have the decree *nisi* made absolute. In Ceylon either party could make the application. A period of three months was fixed by the Court and after the expiration of that time the decree *nisi* could be made absolute. After the expiration of that time no cause can be shown. Hence the order to make the decree absolute is purely a ministerial act. Though the decree absolute is necessary it is merely a formal matter. Under section 625 of the Civil Procedure Code, the appeal is from a decree *nisi.* There is no appeal from the decree absolute. Even in the absence of a decree absolute, the parties may remarry. The Court may make decree *nisi* absolute while an appeal is pending. The Court has the power to do so. Alternatively as soon as the decree *nisi* is confirmed by the Supreme Court on appeal, the decree must be made absolute.

[FERNANDO J.—Should a decree *nisi* be entered in an action for nullity ?]

Different provisions apply for actions for nullity. Section 607 of the Civil Procedure Code deals with it.

The parties can marry immediately after the decree is made absolute.

[FERNANDO J.—Can a party marry while an appeal is pending?]

No. Section 625 of the Code prevents it. If the appeal is dismissed, it presupposes that the decree is to be made absolute, a party may marry at any time after the dismissal of the appeal, but not as long as the appeal is pending (*de Silva v. de Silva* [1]).

So far as the parties are concerned, the matter is decided by the decree *nisi* as the parties cannot be intervenients under section 604, and the Court after the expiration of the time should make the decree absolute. As this had not been done at that time, the marriage should be annulled *nunc pro tunc*.

The judgment of Mr. Justice Dalton in *Aserappa v. Aserappa* [2] indicates that a party should move the Court to have the decree *nisi* made absolute, but it is *obiter*. Alimony *pendente lite* is granted till the case is pending, that is till the decree is made absolute. Section 614 deals with alimony *pendente lite*. No application can be made till decree absolute.

Either party can apply for the decree to be made absolute (*Hulme-King v. de Silva* [3]). There is nothing in the way of making the decree absolute *nunc pro tunc* as no party has acquired any right. A Court cannot pass such an order in the case of an adjudication, but it will be granted where a Judge has forgotten some ministerial act or where no judicial discretion is to be exercised. (*10 Encyclopedia of Laws of England* (*2nd ed.*,), *p. 98.*)

E. B. Wikramanayake (*N. E. Weerasooria* with him), for second respondent, as *amicus curiae*.—There is no duty cast on the District Judge to make a decree absolute nor is there any duty for him to make it *nunc pro tunc*. As there is no provision in the Civil Procedure Code, the English law must be followed. *Aserappa v. Aserappa* [4] lays down the procedure to be followed. Parties after decree *nisi* may live together, but they need not remarry. The marriage continues till the decree is made absolute (*Hyman v. Hyman* [5]). The status of wife continues till that date (*Norman v. Villars* [6]). The three months is not the limit (*Silva v. Missinona* [7]). Divorce should never be granted as long as there is a chance of reconciliation. The only difference between English law and Ceylon law is that under the former only the innocent party can apply and under the latter either party can (*Aserappa v. Aserappa* (*supra*).)

Where a party dies, the Court has no jurisdiction to pronounce any judgment. The action ceases (*Stanhope v. Stanhope* [8]).

Section 839 does not give all the powers suggested by the appellants. There is no authority to show that a decree could be made absolute either *ex mero motu* or *nunc pro tunc*.

In England it has been held that if a party marries before the decree is made absolute, that marriage is void (*Rogers, otherwise Briscoe v. Halmshow* [9]). Hence the first defendant's second marriage is void and she has no right of succession to the property of the second defendant. She is making this application to enable her to obtain the rights of succession.

[1] (*1926*) *29 N. L. R. 378 at 379.*
[2] (*1935*) *37 N. L. R. 372 at 374.*
[3] (*1936*) *38 N. L. R. 63.*
[4] (*1935*) *37 N. L. R. 372.*
[5] (*1904*) *P. 403 at 406.*
[6] (*1877*) *2 Ex. 359.*
[7] (*1924*) *26 N. L. R. 113.*
[8] (*1886*) *54 L. T. 906.*
[9] (*1864*) *11 L. T. 21.*

H. V. Perera, in reply.—The position of the parties is fixed by the decree *nisi* (*Fender v. Mildmay* [1]).

Stanhope v. Stanhope [2] can be distinguished. There the husband obtained a decree *nisi* for the dissolution of marriage and before the expiry of the time he died. The widow would receive a benefit under the will of the husband and the petitioner applied leave to revive the divorce suit to prevent the widow from enjoying the benefit. In the present case the facts are different.

The rights that will be acquired are merely incidental. They are not part of the action. The rights of third parties should not be taken into consideration.

Cur. adv. vult.

October 20, 1937. FERNANDO A.J.—

The plaintiff in this action prayed for the dissolution of his marriage with the first defendant-appellant, and the second defendant was joined in the action as co-respondent. A decree *nisi* was entered on October 10, 1921, to be made absolute at the expiration of three months from that date, but no decree absolute was in fact entered.

Counsel for the appellant states that after three months from the date of the decree *nisi*, that is to say, on October 6, 1922, the first defendant married the second defendant. The second defendant is now dead, and a question has arisen whether the first defendant is entitled to succeed as one of the heirs of his estate. The application of the first defendant is contested by the other heirs of the second defendant who are represented in these proceedings by the Counsel who have been allowed to appear in this appeal as *amicus curiae*.

It was contended by Mr. H. V. Perera that on the expiration of three months from the date of the decree *nisi*, the District Court should have entered decree absolute *ex mero motu* even if there was no application for that purpose by any of the parties to the action, and the appellant's application to the Court was that a decree absolute should now be entered *nunc pro tunc*.

The learned District Judge refused the application for the reason that the plaintiff had died before the application, and that the marriage between the plaintiff and the first defendant had already been dissolved. It is admitted that the plaintiff died in September, 1935, and the application by the first defendant was made on September 14, 1936. It is also admitted that the application that the decree absolute be entered *nunc pro tunc* has been made because of the death of the plaintiff in September, 1935.

Mr. Perera contended that under section 605 of the Civil Procedure Code it was the duty of the Court to enter an order absolute. Section 605 is in these terms: "whenever a decree *nisi* has been made, and no sufficient cause has been shown why the same should not be made absolute as in the last preceding section provided within the time therein limited such decree *nisi* shall on the expiration of such time be made absolute."

In *de Silva v. de Silva* [3], Garvin J. ordered that the decree *nisi* entered in that action should be made absolute in spite of an appeal that had been

[1] *(1937) 3 All E. R. 402.* [2] *(1886) 54 L. T. 906.* [3] *(1926) 29 N. L. R. 378.*

filed against an order made in the decree *nisi* directing one of the parties to make a certain settlement of property. The appeal against the order directing a settlement, he thought, could not affect the question of the dissolution of the marriage. In the course of his judgment, Garvin J. uses these words: "at the expiration of three months, in the absence of any objection, the Court is required to make the decree so entered absolute". Lyall Grant J. in the same case said that if the reasons set out in section 604 of the Code are not brought forward, the decree is made absolute as a matter of course, and went on to state that the Civil Procedure Code appeared to contemplate a decree *nisi* being made absolute, even though an appeal may be pending against it. In the case of *Aserappa v. Aserappa*[1] Dalton J. observed that the practice of the Court of entering decrees absolute in matrimonial cases as a matter of course after the lapse of the prescribed period without the Court being moved thereto by either party was not justified by any provision of the Civil Procedure Code. "This" he states, "is the English practice, and I see nothing contrary to it in our Court. One can visualize a case without any difficulty in which the successful party might not wish to have the decree made absolute immediately the time limited expired. Cases are not unknown, if they are rare, of husbands and wives coming together again after a decree *nisi* has been entered." Maartensz J. in a separate judgment stated that he was unable to agree with the contention that the District Judge should have made the decree absolute on the expiration of three months from the date of the decree *nisi*, and if I may say so with all respect, he appears to have agreed with the opinion of Dalton J. that the person who requires the Court to move should move the Court and that the Court is not required to act of its own motion in making the decree absolute.

In *Hulme-King v. de Silva*[2] which is the same case as *de Silva v. de Silva*[3] their Lordships of the Privy Council observed that it had been held in Ceylon that there was nothing either in the law or the practice to prevent the application for a decree absolute being made by the innocent or by the guilty spouse and Lord Maugham proceeds to say that their Lordships see no reason for differing from the view, and indeed they were not invited to hold the contrary. In this respect, the practice in Ceylon differed in their Lordships' opinion from the English law, and they came to the conclusion which is expressed in these words: "if the conditions have been complied with (that is to say, if no cause has been shown, and the fixed period has elapsed) the Court is bound to make the decree absolute, and it has been held that in Ceylon, there is nothing either in the law or the practice to prevent the application being made by the innocent or by the guilty spouse." This judgment to my mind while expressly stating that either spouse may make the application, appears to contemplate the position that while the Court is bound to make the decree absolute, there should be for that purpose an application by one of the parties to the action. In these circumstances I do not think there is anything in the authorities which will enable us to disagree with the opinion expressed in *Aserappa v. Aserappa*[1] that there is nothing in

[1] *(1935) 37 N. L. R. 372.* [2] *38 N. L. R. 63.* [3] *(1926) 29 N. L. R. 378.*

our Code which requires that the Court should act of its own motion in making the decree absolute. I would repeat the observation of Dalton J. that the person who requires the Court to move should move the Court for that purpose. I would add that there was no good reason why the first defendant should not have applied that the decree *nisi* be made absolute before her marriage if she desired to conserve any rights that may accrue to her as a result of that marriage. I presume that all the formalities required by law for her marriage with the first defendant were duly observed, and the further requirement that the decree *nisi* should have been made absolute could have been observed by her without any difficulty.

Section 625 of the Civil Procedure Code provides that it shall be lawful for the respective parties to the marriage to marry again upon the decree *nisi* being made absolute. That section also refers to a case where a decree of nullity has been entered, and the words of the section appear to me to provide that in a case where a decree of nullity has been entered the parties may marry again when three months have expired from the date of the decree without any appeal therefrom, or if there is an appeal upon the confirmation of the decree of nullity by the Appeal Court. The words, "any such decree" in that section appear to my mind to refer to the decree of nullity and not to the decree *nisi*, because with regard to a decree *nisi*, it is expressly provided that the parties may marry again on the decree being made absolute. The proviso to that section contemplates two cases : (1) the case of an appeal to Her Majesty in Council, and (2) to a case where in appeal the order of the District Court refusing to dissolve the marriage has been set aside, and the Court of Appeal orders that the marriage be dissolved. The section is, perhaps, not very happily worded but in view of the requirement in section 605 that a decree *nisi* should be made absolute on the conditions set out in that section, I do not think the party to a marriage in respect of which a decree *nisi* has been entered is entitled in any circumstances to marry again until the decree *nisi* has been made absolute.

There seems to me to be another difficulty in the way of the appellant. Her application now is that the order making the decree absolute should be made *nunc pro tunc*. Such orders are sometimes made by Courts of law, but in practice such an order will not be made in a case where the interests of other parties may be affected by the order. If as I venture to think it was not lawful for the first defendant to marry again till her marriage with the plaintiff had been dissolved, either by order absolute or by the death of the plaintiff, then in the testamentary proceedings with regard to the estate of the second defendant, she would not be a person who is entitled to succeed as a widow of the second defendant. The heirs of the second defendant would be such persons as are entitled in law to succeed to his estate on the footing that he was not legally married. On the death of the second defendant, certain rights would devolve on his heirs on that footing, and the rights claimed by Mr. Weerasooria's clients will clearly be affected by an order dissolving the marriage between the plaintiff and the first defendant, as such order is made to date previous to the death of the plaintiff. The question would also arise whether the

Court would have power to enter such an order in a case where the marriage has already been dissolved by the death of the plaintiff. In my opinion, the learned District Judge was right in refusing the application, and I would accordingly dismiss the appeal.

MOSELEY J.—I agreed.

Appeal dismissed.