Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeal of Sastry Velaider Aronegary and another v *Sembecutty Vaigalie and others from the Supreme Court of the island of Ceylon; delivered 3rd February* 1881.

Present:

Sir Barnes Peacock.
Sir Montague E. Smith.
Sir Robert P. Collier.
Sir Richard Couch.

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 Pattenier. The suit was brought against the Defendants to recover a share of the property of Pattenier to which it was alleged that the second Plaintiff, as his widow, was entitled; the Plaintiffs also claimed a share which it was alleged had descended to her from a deceased child of Pattenier by her. The question is whether she was lawfully married to Pattenier, and the child legitimate.

The first Defendant is a brother of Pattenier, and was an executor under his will; the second Defendant was a son of Paramakuddi Kassenator, an uncle of the second Plaintiff; and the third Defendant was the wife of the second Defendant, and a daughter of Pattenier by a deceased wife. The learned Judge of the First Court found that there was a valid marriage. He said (Record, p. 91):—"First, it is indisputable that second "Plaintiff lived in the house"—that is, the house

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of Pattenier—" subsequent to the death of testa-
" tor's, that is, Pattenier's, second wife, the
" mother of third Defendant and her minor
" sister and brother. Second, it is also indis-
" putable that the second Plaintiff gave birth to
" a child in testator's house, which child survived
" the testator, though by a few months only.
" Third, the evidence in favour of second
" Plaintiff's being the wife vastly preponderates
" 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 $\frac{1}{32}$ 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, Defen-
" dants' 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 marriage was legally performed.

Their Lordships have no doubt, upon the evidence, that Pattenier 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 not do. They not only lived together as man and wife, but there is strong evidence to show that there was a legal marriage.

Pattenier 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 custom of

" the country, but she is not the lawfully regis-
" tered 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 22 or 23 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 Kassinatan'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 Pattenier's house to marry me there." (Record, p. 47.) 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 Pattenier. She says:—"We went on to
" the house. Rice was ready to be served.
" They spoke of serving me to the persons
" who accompanied me. Then there was a
" row. The row was commenced by my
" brother-in-law and brother, who stood at the
" gate." There were two brothers, one who stood at the gate and assisted in making the row,

and another who afterwards executed a deed of dowry which will be presently alluded to. "I "was at the 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 the 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. Pattenier gave me a "kuree 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 are now present as witnesses who were "then present Kannavate, Pavamattee, Katura-"men, and my uncle's wife. I do not know "whether Sivahami is present here as a witness "or not. On account of this row other cere-"monies 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 that 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 legality 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 the marriage

does not rest here. It is confirmed in the strongest manner by certain dowry deeds. On the 21st of October 1866 (the marriage having taken place on the 20th), Peramakuddi Kassanator, 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 Pattenier and the second Plaintiff a garden by way of dowry. It says: "On the 21st "day of October in the year 1866, I, Peramar "kuddi Kassinator, notary of Kattankuddiyiripu "in Batticoloa, do hereby acknowledge to have "granted a garden in dower to Sampakoddi "Sinnepullai, my niece."—that is, the second Plaintiff—"and Sinnepullai's husband, Sambe- "kodiajar Pattenier, 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 are to be possessed and enjoyed by the "aforesaid Sinnepullai and her husband, Patte- "nier, according to their pleasure, for ever." That deed was attested by four witnesses, and is stated to have been duly read over and explained to the parties, including Pattenier, 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 Pattenier, who retained it. It appears also from the evidence that Pattenier and the second Plaintiff took possession of the garden; that they used it; and that the second Plaintiff, after the death of Pattenier, executed a lease of the cocoa-nut trees growing in it to a tenant who was called as a witness, and who proved that under the lease he had possession of and gathered the cocoa-nuts. There seems to be,

therefore, no doubt that Pattenier and the second Plaintiff acted upon the deed, in which Pattenier 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 Pattenier and the 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 to Pattenier 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 Pattenier and the second Plaintiff, in which it was named Pattenier, which would not have been the case if it had been merely the son 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 Pattenier 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 Pattenier. 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 been merely a concubine of Pattenier. 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 Pattenier; and that the child which she bore was a legitimate child.

Again, there was a petition put in by the second Plaintiff on the 21st March 1870. The second Defendant at that time had not married the daughter of Pattenier, and was not interested, therefore, in setting up that the marriage was not a lawful one. The petition contained the following passage: "The peti-" tioner begs to inform the Court that she is the " third wife of the late Sembacutty Kannaku " Pattenier of Surepatte, a principal rich man " in this place. The Petitioner further says " that the said Sembaccutty Pattenier (her " husband) also gifted her clothes, and she used " and enjoyed and lived with him, till his " death, as husband and wife. The said Pe-" titioner further says that the said S. K. " Pattenier married her and lived with her " amicably, and also received dowry from her " in writing, and she brought forth two chil-" dren, who are dead. The Petitioner further " says that after the death of her husband his " brother, Sambacutte Vaigailie, has taken all " the jewels and ornaments, the clothes, and " he delays to return them;" and therefore she prays that she may be relieved. That document appears, acccording 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

Pattenier 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 has 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 " Plaintiffs 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 " at 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 con- " stitute a valid marriage amongst the Tamil " natives of the Batticoloa 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, 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-

" recognised ceremonial to be observed on occa-
" sions 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 mar-
" riage in question, but it is alleged that they
" could not have been on account of the
" disturbance which took place when the mar-
" riage 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 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 that in the district in which Pattenier 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* 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 down more "to my satisfaction than it is by Lord "Lyndhurst in the case of *Morris* v. *Davies*, "as determined in this House. It is not pre- "cisely the same presumption as exists in the "present case; but the principle is strictly "applicable to the presumption 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, dis- "'tinct, satisfactory, 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.* The Attorney General (1 Law Reports, Appeal Cases, 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 Reports, 2 House of Lords, 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 Pattenier and the second Plaintiff lived together as man and wife, and that Pattenier 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 custom 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 upon the evidence that there was a legal and a valid marriage.

Their Lordships, therefore, will 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.