Case No: SSRTF 98/1175

BAILII Citation Number: [2000] EWCA Civ 3008

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE ORDER OF THE SOCIAL SECURITY COMMISSIONERS

Royal Courts of Justice
Strand, London WC2A 2LL

22 October 1999

Before

LORD JUSTICE EVANS
LORD JUSTICE SCHIEMANN
and
LORD JUSTICE ROBERT WALKER

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CHIEF ADJUDICATION OFFICER — Appellant

- and -

KIRPAL KAUR BATH — Respondent

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(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 180 Fleet Street
London EC4A 2HD
Tel No 0171 421 4040, Fax No 0171 831 8838
Official Shorthand Writers to the Court)

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Mr J McManus QC, London WC2A 2LS (Instructed by the Department of Social Security for the Appellant)
The Respondent did not appear and was not represented.

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Erreur ! Source du renvoi introuvable. JUDGMENT

Friday 22 October 1999

LORD JUSTICE EVANS:

1. The Respondent to this appeal, Kirpal Kaur Bath, did not appear before us. She had succeeded in her appeal to the Social Security Commissioner, where she was assisted by counsel, and we were not told why she was not also represented in this Court.

2. The reason may well be lack of funds. She is a lady now aged 59 who in 1956 at the age of 16 went through a Sikh marriage ceremony with Zora Singh Bath, who was then aged 19 and was also a Sikh. They lived together as man and wife for 37 years until he died on 23 January 1994. They had two sons, born in 1963 and 1965. He built up a successful cash and carry business and in later years, as her sons grew up, she helped him in the business. He paid income tax and social security contributions on the basis, which was never queried, that he was a married man. When he died, she applied for the pension payable to a widow under section 38 of the Social Security Contributions and Benefits Act 1992. That was on 3 February 1994.

3. Her application was refused and the refusal was belatedly justified on the ground that she was not a widow, because there was "no evidence of a valid [marriage] ceremony in accordance with the Marriage Act 1949" (D.S.S. legal advice 5 August 1994). She appealed to the S.S.A.T. where the Adjudication officer said that he had been advised that the ceremony could not be accepted as a valid marriage. He continued "It has been established that the ceremony did not take place in a registered building, and it was also established that the ceremony had not been registered in a Registry Office". The Appeal Tribunal found that :-

> "The appellant went through a Sikh marriage ceremony at a Sikh temple which was not registered at the material time. The marriage was not registered in a

Registry Office".

Erreur ! Source du renvoi introuvable. Its decision was :- **Erreur ! Source du renvoi introuvable.**

> "Appeal disallowed. It has not been established, and cannot be presumed that there is a valid marriage between Kirpal Kaur Bath and Zora Singh Bath. This is because there is no evidence of a valid ceremony in accordance with the Marriage Act 1949, and therefore it is not valid for Social Security purposes. As a result, Widow's Pension is not payable on the contributions of Zorah Singh Bath because it has not been proved that she is his widow".

Erreur ! Source du renvoi introuvable. The reasons given were - **Erreur ! Source du renvoi introuvable.**

> "The Tribunal had enormous sympathy with the appellant's predicament. Unfortunately, at the time of her marriage ceremony the Sikh temple was not registered for performing marriages, nor had the marriage been registered in a Registry Office. As a result there had not been a valid ceremony in accordance with the Marriage act 1949, and this meant that the appellant is not entitled to Widow's Pension"

4. That decision was dated 24 May 1995. On 1 November 1995 she applied for leave to appeal out of time to a Social Security Commissioner. Her application was considered sympathetically and she was given leave on 15 December 1995. The Commissioner's decision is dated 7 May 1998. Part of the delay was caused by the department's failure to comply with its obligation to submit observations to the Commissioner. They were due by 14 March 1996 but not received until August or September (though bearing the date 19 March) because of "the need to seek legal advice from the department's solicitors" (letter seeking an extension of time dated 14.3.96). The reasons given for asking the Commissioner to dismiss the appeal were that the marriage ceremony had taken place in England but in a form not known to English law. Even between persons domiciled in India, and even if the Sikh temple had been registered as a place where marriage ceremonies could take place, the marriage could not be valid.

5. The Commissioner himself asked whether there was any room for the operation in this case of the presumption of marriage from cohabitation after the ceremony, referring

both parties to Halsbury's Laws of England (4th ed.) Vol. 22 para. 993. That was on 23 May 1997. The Adjudication officer responded on 18 July 1997 referring, for the first time, to Commissioner's Decision R(G) 270 a case decided by Sir Rawden Temple on 6 February 1970. This decision, it was suggested, "stands against the operation of the principles" stated in Halsbury.

Erreur ! Source du renvoi introuvable. The Commissioner allowed the appeal. He held -**Erreur ! Source du renvoi introuvable.**

> "In my view that `marriage' is validated by the common law presumption from long cohabitation, in pursuance of the policy of the law that, in the absence of the clearest possible reason why there should not be such a presumption, a ceremony of `marriage' bona fide entered by parties who thereafter who live monogamously and bring up children of the union should be respected and accorded the proper legal status of marriage".

6. Notwithstanding this decision in her favour, dated 7 May 1998, Mrs Bath has not been paid the pension to which the Commissioner held she is entitled, because, we were told, the department, now the Benefits Agency, exercised its power to withhold payment pending the present appeal. Nearly six years after her claim was first made, she has not received a penny.

7. The appellant was represented by Mr J.R. McManus Q.C. for whose assistance we are grateful. Rarely can it have been necessary for counsel, even one as skilled and experienced as Mr McManus is, to seek to justify such an unattractive case. For 37 years two departments of government, the Inland Revenue and the Department of Social Security, treated Mr Bath as a married man and claimed taxes and contributions accordingly. When Mrs Bath after his death claimed the pension to which his widow is entitled, for the first time, the Agency said that he was never married and that their children are illegitimate. Mr McManus submits that it is bound to refuse payment, even if the clearest possible estoppel

would arise, were the defendant a private citizen, because as a public authority it has no power to make any payment which is not permitted by the statute.

8. We were also told that the Agency is placed in a situation of real difficulty by the Commissioner's decision, conflicting as it does or seems to do with the decision in R(G)270 nearly thirty years ago. Adjudication officers therefore need guidance from the Court, we were told, and other appeals are pending. Nevertheless, no attempt was made to have those other appeals heard at the same time as this one, even when it became known that the respondent would not be represented. This appeal could have been adjourned, perhaps so that an amicus could be instructed, but that would have overlooked the urgent need for the respondent to know where she stands and not to be any longer deprived of the pension to which she is entitled, if the Commissioner's decision is correct.

9. Even if Adjudication officers are now aware of a conflict between the two Commissioners' Decisions and they have need of the Court's guidance accordingly, it does not appear from the documents before us that these doubts played any part in the decision to refuse Mrs Bath's application. Initially, the department confused Mr Bath with his cousin, who had emigrated to Canada, and the internal memorandum begins "Although Kirpal's marriage to Zora Singh Bath on 27.6.56 appears acceptable ...." (p.41). The Adjudication's Officer's submission to the SSAT includes -

> "3. Reported decisions of the Commissioner considered by the Adjudication officer to be relevant.
>
> None"

10. The deponent's submission to the Commissioner, as noted above, was based on a different ground, and it was not until the Commissioner raised the issue of a presumption from cohabitation that any reference was made to the earlier (1970) Decision.

11. Before us, Mr McManus confined himself to a single submission. This was that the presumption of marriage arising from cohabitation was rebutted in the present case by the S.S.A.T.'s finding that the Sikh temple in which the marriage ceremony took place in 1956 was not registered for such a purpose at that date under the Marriage Act 1949. The ceremony relied upon, therefore, was shown not to be a valid marriage ceremony, and no other ceremony could be presumed to have taken place at any other time.

Erreur ! Source du renvoi introuvable. The Commissioner's Decision

Erreur ! Source du renvoi introuvable.12. The Commissioner identified the issue as follows :- **Erreur ! Source du renvoi introuvable.**

> "The real issue is whether or not what was undoubtedly according to Sikh religious rites a marriage ceremony was invalidated by its taking place in a building, the Temple, which was not registered for marriages at the time, though it became registered subsequently. I have dealt with the case on that basis" (paragraph 10)."

13. After setting out paragraphs 992 and 993 of Halsbury's Laws (4th ed. Vol 22), he referred to Re Shephard [1904] 1 Ch.456, a decision of Kekewich, J. and to R(G) 2/70 "a decision of Sir Rawden Temple, a former Chief Commissioner and an expert in matrimonial law". Then he said :-

> "16. I naturally pay the greatest of respect to those statements by the learned Commissioner and I bear in mind the system of precedents of Commissioners' decisions, enjoined by a Tribunal of Commissioners in R(I) 12/75, paragraphs 21 et seq. Nevertheless, in the present case, I consider R(G) 2/70 distinguishable. In that case the claimant was relying on an alleged ceremony of marriage in an English registry office and not, as here, on a marriage according to different religious rites in a Temple of that religion. Moreover Re Shephard is, so far as I am concerned, a High Court decision, in pari materia, which I should follow unless there is any good reason why I should not. I have carefully read the entirety of the Law Report of Re Shephard. It seems too me that it carries the proposition for which it is cited and that I should follow it. There does not have been drawn to the attention of the Learned Commissioner who decided R(G) 2/70 the possibility that, where a

ceremony that the parties have relied on is shown to have been invalid, one ought then also to consider the authorities summarised in paragraph 992 of Halsbury's Laws i.e."Presumption from cohabitation without ceremony" (my underlining).

The reasoning which led to his decision, quoted above, was as follows :-

> "It should be remarked that if a person is able to have a marriage presumed where there has been no ceremony at all (paragraph 992), it would hardly be equitable that a person who has gone through a bona fide ceremony thought to be a marriage (and entered into long cohabitation on the strength of it) should be in a worse position. The legal position must in my view be this. First one asks whether or not a particular ceremony can be presumed to be have been a valid marriage. If it is decided that it cannot be so presumed, then one treats the case thereafter as if there has been no ceremony at all and looks at the remainder of the facts to see whether there can be presumption from cohabitation without ceremony. If there has been a long `monogamous' cohabitation with nothing to cast any doubt on the facts of the situation (i.e. the strong and weighty evidence to the contrary to which Halsbury refers), then the fact that there may have been an invalid ceremony in the first place does not in my view prevent there being a presumption of marriage from the facts themselves." (paragraph 17).

14. The Decision also includes references to a submission made under section 49 of the Marriage Act 1949 which provides that certain marriages are void when the parties to them "knowingly and wilfully" inter-marry without specified provisions of the Act being complied with, (paragraph 12), and to the common law concept of marriage (paragraph 18), to both of which I shall refer below.

Erreur ! Source du renvoi introuvable. Further facts*Further factsFurther facts***Erreur ! Source du renvoi introuvable.**

15. These were not in dispute. The Sikh marriage ceremony took place at the Sikh Temple, the Central Gurdwara, at 79 Sinclair Road, London W.14. There was a marriage ceremony duly administered by a Sikh priest in accordance with the Sikh custom and religion. There were up to fifty persons present and photographs were taken. In a letter dated 1st November 1995, Mrs Bath wrote :-

> "Like most other first wave immigrants, we had no knowledge of the law, were completely illiterate and led to believe, by our elders and peers, that we had followed the correct procedures. Both my husband and I have always been religious and we would have been very concerned if our marriage had not been carried out in accordance with the Sikh custom and religion or thought that our marriage was not valid".

16. Enquiries revealed that the temple moved from Sinclair Road to 62 Queensdale Road, London W1 sometime between 1956 and 1983. It was registered for marriages at the new address with effect from 26 September 1983. There was no evidence that it was not registered at either address <u>before</u> 1983, apart from the following correspondence. On 29 September 1994 the District Manager of the Benefits Agency wrote to the Temple asking "Could you please advise whether, in 1956, this Sikh temple was a registered building for performing marriages?" and President replied, by letter dated 4 October :-

> "..... please note that I came in this country in 1960 and at that time the Sikh temple as far as I know was not registered in performing the marriages. Some other old members of the temple had confirmed me this point".

17. Under section 41 of the Marriage Act 1949, the Registrar General was required to keep a book in which buildings which were places of religious worship could be registered for the purposes of the Act. There was no evidence as to the state of the book at any time. On the other hand, the respondent accepted in her letter dated 1 November 1995 that the building was not registered, and the Commissioner proceeded on the basis that it was not (paragraph 6). He referred to a later letter from the Office for National Statistics dated 25 June 1997 which confirmed that Queensdale Road was registered on 28 September 1983, but which made no express reference to the position of Sinclair Road before that date.

Erreur ! Source du renvoi introuvable. Marriage Act 1949*Marriage Act 1949**Marriage Act 1949***Erreur ! Source du renvoi introuvable.**

18. This was a consolidation Act which permits the solemnisation of a marriage in a building, being a place of worship registered for that purpose (section 41) "according to such form and ceremony as those persons [the couple being married] may see fit to adopt" (section 44(1)) provided that a Registrar or an authorised person is present (section 43) and subject to certain requirements including the presence of two or more witnesses (section 44(2)) and an exchange of appropriate undertakings (section 44(3)).

Section 49 reads :-

> "49. Void marriages
>
> If any persons knowingly and wilfully inter-marry under the provisions of this Part of this Act -
>
> ......
>
> (e) In any place other than the church, chapel, registered building office or other place specified in the notice of marriage and certificate of the superintendent registrar :-
>
> (f) In the case of a marriage in a registered building (not being a marriage in the presence of an authorised person), in the absence of the registrar of the registration district in which the registered building is situated ; ....
>
> The marriage shall be void".

19. This section, therefore, renders the marriage void, notwithstanding the exchange of vows, if the parties to it have "knowingly and wilfully" failed to comply with the relevant statutory provisions. There is no other provision in the Act which renders void or invalid a marriage which is not carried out in accordance with the statutory requirements as to place, persons present, etc., and so, in particular, there is no statutory provision to that effect when the parties concerned are unaware that there has been a failure to comply with the Act in some respect.

20. There can be no suggestion in the present case that either of the couple was aware of any defect. On the contrary, they were aged 16 and 19, they had recently come to this country and the ceremony was conducted by a senior churchman at the Temple in the presence of their family and friends. A marriage contract was made between them. There is no statutory provision which renders their marriage void.

Erreur ! Source du renvoi introuvable. Authorities

The common law presumption of marriage is set out in two paragraphs in Halsbury's Laws (above), each accompanied by extensive citations of decided cases :-

> "992. Presumption from co-habitation without ceremony.
> Where a man and a woman have cohabited for such a length of time and in such circumstances as to have acquired the reputation of being man and wife, a lawful marriage between them will be presumed, even if there is no positive evidence of any marriage ceremony having taken place, and the presumption can be rebutted only by strong and weighty evidence to the contrary.
>
> 993. Presumption from co-habitation after ceremony.
> Where there is evidence of a ceremony of marriage having been gone through, followed by the cohabitation of the parties, everything necessary for the validity of the marriage will be presumed in the absence of decisive evidence to the contrary, even though it may be necessary to presume the grant of a Special Licence or the death of a former spouse. In most cases a certificate of marriage will be available, and this will usually suffice to prove the marriage".

21. The authorities referred to include Piers v. Piers (1849) 2 H.L.Cas. 331, where the grant of a Special Licence by the bishop was presumed, even though the bishop testified his belief that he had not granted the licence, 30 years after the event (see also Hill v. Hill [1959] 1. W.L.R. 127) and R. v. Mainwaring (1856) 7 Cox CC192, where the due registration of a dissenting chapel was presumed.

In my judgment, these authorities show that the common law presumed from the fact of extended cohabitation as man and wife that the parties had each agreed to cohabit on that basis, and the presumption was extended to include an inference that the statutory requirements first introduced by Lord Hardwicke's Marriage Act 1753 had been duly complied with ; but in each case the presumption was capable of being rebutted by clear and convincing evidence. It is understandable why clear evidence was required to rebut the presumption after a long period of unchallenged cohabitation as man and wife, because the evidence in rebuttal would by definition refer to events many years in the past and might be concerned with matters that were not easily susceptible of proof at that distance of time.

22. The presumption was supplied by the House of Lords in a Scottish Case, Captain de Thoern v. A. - G (1876) 1 App. Cas. 686, where the marriage in 1862 was invalid, not because of any defect in form or as to any statutory requirement, but because the husband was not finally divorced from his previous wife. This was because the time for appealing from the divorce decree had not expired and both parties honestly believed that there was no obstacle to their union. The husband died 5 years later, and there were three sons of the marriage (one was born posthumously) and in 1872 the sons asked for a declaration of their own legitimacy. The Lord Chancellor, Lord Cairns, held that there "was ample ground for presuming, according to the law of Scotland, that marriage by consent of which cohabitation with habit and repute is evidence" (p.689). He then rejected the submission that such consent could not be inferred in the circumstances of that case because the parties were under the impression that the ceremony of marriage was a valid ceremony, therefore the need for a fresh contract did not arise. He referred to two authorities, Piers v. Piers (above) where "It was held in a most striking way as a general rule that the presumption of marriage is not the same as the presumption raised with regard to other facts, which may be presumed either the one-way or the other ; that the presumption of marriage is something much

stronger, and that from cohabitation with reputation a marriage is presumed unless there is the strong and cogent evidence to the contrary" (p.689-690). 23. The second case was Breadalbane [1866] L.R.2 H.L.S. 269 where "the presumption was held to be one that not only might be drawn but ought to be drawn from the cohabitation with habit and repute, although in that case the cohabitation commenced with the ceremony of marriage which not only was invalid by reason of the real husband of the woman being alive at the time, but was known to both parties to be invalid". In that case, Lord Westbury had said :-

> "There is nothing to warrant the proposition that the subsequent conduct of the parties shall be rendered ineffectual to prove marriage by reason of the existence at a previous period of some bar to the interchange of consent. It would be very unfortunate if it were so. Marriage may be contracted between parties in a foreign land where certain observations are required which from ignorance or mistake may not have been fulfilled ..... The parties having cohabited on the strength of an imperfect celebration, may afterwards come to Scotland and reside there for years, continuing the same course of life ..... I think a sounder rule and principle of law will be that you must infer the consent to have been given first moment when you find the parties able to enter into the contract" (p.691).

24. In Sastry etc. v. Sembecutty Vaigalie (1881) L.L.R. 6 App. Cas. 364 the Privy Council was concerned with the law of Ceylon, where the parties had gone through a form of marriage and shown an intention to be married. They not only lived together as man and wife, but there was strong evidence to show that there was a legal marriage (p.366). On the other hand, the wife herself gave evidence which raised doubts as to whether the ceremonies had been fully performed (p.367). The judgment, given by Sir Barnes Peacock, referred to the submission of Doctor Phillimore regarding Roman-Dutch law, and continued :-

> "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". (p.371).

25. That authority was cited to Kekewich J. in In re. Shephard (above). An English man

and woman travelled to France with the intention of getting married and they purported to go through a form of marriage there. They then lived together in England as man and wife for 30 years and had several children. The question of legitimacy arose. There was a conflict of evidence as to whether the French ceremony was valid. The judge was prepared to assume that the marriage, as alleged, was "impossible according to French law and according to the habits of law abiding people in France" (p.462). After quoting from the Sastry judgment (above) he continued :-

> "So that I have here a case of the highest authority getting rid of the fact of marriage, and recognition of children ; it does not show that either of these is essential ; but the parties were living as man and wife for the time mentioned in the report, and it was held that the presumption of marriage must prevail. Now here I have the intention to marry ; but that there is not a shadow of doubt. Some evidence about which there is a great deal of doubt. There is a somewhat romantic story, doubtful in its details, of a marriage de facto of something gone through to perfect the intention of marriage, and I have some evidence of recognition of children. Now, after 30 years, the Court has been asked to say that because the marriage has not been proved, and cannot be proved, these children are not to be admitted to share. I think I should be going against the authorities if I came to any such conclusion ...." (p.463-4)

26. Finally, in In re Green (1909) 25 TCR 222 Swinfen Eady J. held that a marriage by repute which was valid by the law of the foreign domicil of the parties should also be recognised as valid by the English Courts. The husband's first wife died in 1842. He went through a form of marriage with his deceased's wife's sister in 1850. The marriage was invalid under English law for that reason. In addition, he found that "his social position and comfort were affected by the view taken of the connexion" in England, and so in 1855 he emigrated to Brooklyn and was joined there by his second wife and their children. They became domiciled there and lived as man and wife until she died in 1907. Their child whose legitimacy was in question was born in 1861.

27. The judge held that the relevant period was from 1855 until 1861 and that the marriage was recognised by the local law. The report concludes -

> "Then it was suggested that without some formal ceremony the law of England would not recognise a foreign marriage ; but his Lordship was of opinion that what was recognised by the law of the domicile would be held good by the law of the domicile" (p.223)

Erreur ! Source du renvoi introuvable. Decision R(G) 2/70 (Sir Rawden Temple)

28. There was a ceremony of marriage of an unusual kind on 12 July 1947. There was a formal exchange of voluntary consent in the presence of witnesses, before a person whom the woman believed was a registrar. She bona fide believed that it was a valid ceremony. She was uncertain where it took place, but she said positively that it was not at the building which was the local register office. Nor was it shown that the requirements for a common law marriage in England were satisfied, because no episcopally ordained priest was present (para.10, citing R. v. Millis (1844) 10 Cl. & Fn. 534). The Chief Commissioner said this -

> "It seems to me, on the evidence as to what took place, that the "marriage" was not celebrated in an authorised mode in a stipulated place by a proper official, and that it was void ipso jure",

and he concluded :-

> "As I see it, if the claimant was not married by the ceremony of 12th July 1947 she was not married at all, and, with regret, I have felt obliged to come to the conclusion that she was not so married"(ibid.).

29. He then considered the judgment in Re Shephard. He did not find any great assistance in it and felt unable to follow it. "Where there is evidence that the marriage asserted can only derive from a particular ceremony having validly taken place, it seems to me that the formal validity of that ceremony is unaffected by the fact of cohabitation thereafter .... such cohabitation .... has no bearing on the validity of the ceremony itself". (page 11).

30. The parties had cohabited as man and wife for 21 years, until his death, and they had

two children. The Commissioner dealt with this aspect as follows :-

> "13. The local tribunal applied the principle that where there is doubtful or inconclusive evidence of a ceremony of marriage having been performed, possibly imperfectly, and cohabitation thereafter, the validity of the marriage will be presumed in the absence of evidence to the contrary. *Russell v. Attorney-General* [1949] PAGE 391 ; *Piers v. Piers* (1849) 2 H.L. Cas.331. On the evidence they accepted, this could only have application to the ceremony, as described by the claimant, occurring on 12th July 1947 ; and if I am correct in my view of the ceremony, there was, I think, no room for the application of any such principle and presumption to save the invalid ceremony. I do not see how the presumption could have been involved rejecting the claimant's evidence".

Erreur ! Source du renvoi introuvable. Conclusions*ConclusionsConclusions***Erreur ! Source du renvoi introuvable.**

31.	These authorities show that when the man and women have cohabited as man and wife for a significant period there is a strong presumption that they have agreed to do so, in proper form. Thus in Scotland (Captain de Thoren) and Brooklyn, N.Y. (In re Green) it was sufficient that their agreement could be implied. When there is, as there is in England, a legal requirement that the marriage ceremony shall take a certain form, then the presumption operates to show that the proper form was observed, and it can only be displaced by what I would call positive, not merely `clear', evidence (see the authorities cited in support of Halsbury's Laws para.993). How positive, and how clear, must depend among other things upon the strength of the evidence which gives rise to the presumption - primarily, the length of cohabitation and evidence that the parties regarded themselves and were treated by others as man and wife.

32.	I would agree with the Commissioner's Decision R(G) 2/70 that when there is positive evidence that the statutory requirements were not complied with, then the presumption cannot be relied upon to establish that they were.

However, that is not the end of the matter. Mr McManus' submission assumes that if the place of worship where the ceremony takes place is not registered in accordance with the Act then the marriage is "invalid", or more precisely, that it does not count as a marriage for the purposes of the social security legislation regarding widows' pensions. This leads to the remarkable conclusion, apart from the injustice of which the Respondent complains, that a valid marriage ceremony may be presumed where there is no evidence from the surviving widow, as where she refuses to co-operate by providing information, but it may not be presumed when, as here, she gives a truthful account which leads to the discovery that there was a failure to comply with the requirements of the Act, of which she was and remained unaware. Likewise, when as here she accepts the truth of what the department alleges against her, she is in a worse position than if she had insisted on their producing positive evidence of non-registration (which they have not done). Even more remarkable is the consequence referred to by the Commissioner (paragraph 17). A marriage could be presumed from long cohabitation when there was no ceremony, but not when a bona fide ceremony failed to comply with all the requirements of the Act, perhaps for some trivial reason.

33. In my judgment, the submission is fallacious, for this reason. There is no statutory provision that a marriage, otherwise carried out in proper form, by an authorised celebrant and at a place of worship eligible to be registered under the Act, is invalid merely on the ground that the building was not registered, for whatever reason. The marriage was not void or voidable under the law in force before 1971 (see Halsbury's Laws (4^{th} ed.) Vol.13 paras. 538-9) nor was it rendered void by section 49 of the 1949 Act.

34. The Commissioner in Decision R(G) 2/70 cited the judgment of Ormrod J. in Collett v. Collett [1968] P.482 for the proposition "The general tendency of the law as it has been developed has been to preserve marriages where the ceremonial aspects were in order".

Ormrod J. held :-

> "In my judgment, the principle which emerges from the corpus of legislation regulating the formation of marriages in England and from the reported cases arising therefrom, is that if a ceremony of marriage has actually taken place which, as a ceremony, would be sufficient to constitute a valid marriage, the courts will hold the marriage valid unless constrained by express statutory enactment to hold otherwise"

35. The requisites of a valid marriage are set out in Halsbury's Laws (4^{th}. ed.) Vol. 22 para.907. They include "(b) that certain forms and ceremonies should be observed". The principle stated by Ormrod J. is adopted in Halsbury, and there is no reference to any statutory provisions which might constrain the conclusion that the marriage is invalid if the place of worship where the ceremony is held is not registered.

36. For this reason, I would hold that Mr and Mrs Bath were validly married in 1956 by reason of the ceremony at the Sikh temple at Sinclair Road, notwithstanding that the Temple was not registered at that date pursuant to the Act. This assumes, of course, that they were unaware of that fact. The contrary is not and cannot be suggested. It is noteworthy that guilty knowledge by both parties is necessary for the marriage to be void under section 49 (Halsbury's Laws Vol.22 para. 914 no.23). Unless both participate, it is not invalid (ibid.).

37. Where does this leave Commissioner's Decision R(G) 2/70? Clearly, in my view, the basis of the decision was the positive evidence that the ceremony had taken place elsewhere than at a Registered Office. No priest officiated, as was necessary for a common law marriage, and it was not shown that a Registrar was present (though I wonder why the common law presumption did not assist the applicant to establish this). He found, therefore, that the ceremonial aspects were not in order (his words in paragraph 13) and that the presumption could not displace positive evidence that the ceremony took place where it was not permitted by the Act. He did not consider whether, in the absence of statutory

provision, the fact that the unidentified building was not a registered building was sufficient to render the marriage “invalid”, but this may have been because the claimant did not assert that she thought that the building was a Register Office (see para.3) nor that “she went to any place other than A”, which was not (para.6).

38. That case, therefore, was clearly distinguishable on its facts from the present case. If it decides that a marriage is “invalid,” meaning void or of no effect, by reason of non-compliance with any of the statutory requirements, even in the absence of express statutory provision to that effect, then in my respectful view that is not a correct statement of the law. I appreciate that we have not heard full argument on what may be an important general question of law, and I can only express this as my present view. The valuable Bromley’s Family Law (9th ed.) at page 34 et seq and 82 et seq does not indicate that it is wrong.

Erreur ! Source du renvoi introuvable. The present case **Erreur ! Source du renvoi introuvable.**

39. The Commissioner based his decision on the common law presumption arising from long cohabitation and held that the presumption overcomes the admitted fact that the requirements of a valid ceremony were not complied with in one respect. In my view, his conclusion was correct, for the reason which I have summarised above, namely, that the failure to comply was not sufficient to render the marriage “invalid” under the statute. I agree with him, however, that the presumption has an important part to play. There is no evidence whether the celebrant was a duly authorised person under the Act, and it must certainly be presumed that he was. I would also be prepared to hold, notwithstanding the finding that the Temple was not registered under the Act, that the evidence relied upon by the department was not sufficiently positive to displace a presumption that the building was registered. The letters from the current senior officers of the Temple in its new location are

not even the best evidence, which could and should be produced, in the form of the book, which there was a statutory obligation to keep. The applicant simply does not know, and her "admission" therefore is of no weight as evidence in support of the department's case.

40. Finally, the Commissioner referred to the position at common law (paragraph 18). There is a complication in the present case, because the celebrant was not an episcopally appointed priest (R. v. Millis, above) although he may be presumed to have been duly authorised and the proper person to perform the ceremony according to Sikh rites and custom. This could give rise to questions of domicil, which it is unnecessary for us to enter into. Likewise, Re Shepard was concerned with a marriage ceremony conducted overseas, and I do not regard it as relevant here.

Erreur ! Source du renvoi introuvable.41. For these reasons, in my judgment, the appeal fails. I trust that Mrs Bath will be paid her pension forthwith.*41. For these reasons, in my judgment, the appeal fails. I trust that Mrs Bath will be paid her pension forthwith.41. For these reasons, in my judgment, the appeal fails. I trust that Mrs Bath will be paid her pension forthwith.***Erreur ! Source du renvoi introuvable.**

Erreur ! Source du renvoi introuvable. Schiemann, L.J.Schiemann, L.J.Schiemann, L.J.

I have had the advantage of reading in draft the judgments of Evans and Robert Walker LJJ. I agree with them that this appeal should be dismissed. As a relative stranger in the area of matrimonial law I prefer to rest my reasoning on the narrower grounds set out by Robert Walker L.J.

1. I agree with Evans LJ that this appeal should be dismissed. I reach that conclusion by reference to the presumption of marriage arising from long cohabitation, and the absence of compelling evidence to rebut that presumption.

2. Apart from the presumption, the law as to the validity of marriages solemnized (or said to have been solemnized) in England is now wholly statutory. The statutory rules are to be found (and were to be found in 1956, when Kirpal Kaur Bath went through a Sikh marriage ceremony with Zora Singh Bath at the Central Gurdwara, 79 Sinclair Road London W14) in the Marriage Act 1949 ("the 1949 Act"). The 1949 Act (which was a consolidating statute) has been amended, principally by statutes enacted in 1970, 1983 and 1986, but the amendments are relatively minor and not material for present purposes. Section 11(a)(iii) of the Matrimonial Causes Act 1973 does not take the matter any further.

3. However the 1949 Act and the statutes which it consolidated (and indeed all the statute law dealing with marriage in England, going back to Lord Hardwicke's Marriage Act of 1753) were built on a foundation of ecclesiastical law of great antiquity. Lord Hardwicke's Marriage Act was intended to curb the scandal of clandestine marriages (at a time when a married woman's fortune automatically became, at common law, the property of her husband). Other statutes were aimed at permitting persons of different religious affiliations (notably Quakers and Jews) to be lawfully married otherwise than in accordance with the rites of the Church of England. Many of the statutory provisions were permissive or directory in character. For instance s.21 of the Marriage Act 1823 (now reproduced in s.22 of the 1949 Act) required two or more witnesses, as well as the officiating clergyman, to be present at any marriage solemnized according to the rites of the Church of England. But it was held in *Wing v Taylor* (1861) 2 Sw & Tr.278 that non-compliance did not make a

marriage void.

4. The scheme of the 1949 Act, so far as now material, is that Part I deals with restrictions on marriage (that is, capacity); Part II deals with marriage according to the rites of the Church of England; and Part III deals with marriage under a superintendent registrar's certificate. In Part I, sections 1 (prohibited degrees) and 2 (persons under sixteen) state expressly that non-compliance makes a marriage void. Section 3 requires parental consent (unless dispensed with) to the marriage under Part III of a person under full age, but s.48(1)(b) makes plain that non-compliance does not invalidate a marriage. Section 4 (marriage may be solemnized between 8 am and 6 p.m.) appears to be directory only, although a deliberate breach exposes the offender to a severe criminal sanction (s.75(1)(a)).

5. This absence of a clear and complete code as to which irregularities do, and which do not, make a marriage void is carried forward into Parts II and III of the 1949 Act. Parts II and III each contain one section (ss.24 and 48) stating expressly that proof of compliance with certain procedural requirements is unnecessary, and that no "evidence shall be given to prove the contrary in any proceedings touching the validity of the marriage". Each also contains one section (ss.25 and 49) stating expressly that a marriage is void if the parties to it "knowingly and wilfully intermarry" in contravention of the requirements specified in those respective sections. The cases of non-compliance listed in s.49 include -

> "(a) without having given due notice of marriage to the superintendent registrar;
>
> (b) without a certificate for marriage having been duly issued by the superintendent registrar to whom notice of marriage was given;
>
> ...
>
> (e) in any place other than the church, chapel, registered building, office or other place specified in the notice of marriage and certificate of the superintendent

registrar;

(f) in the case of a marriage in a registered building (not being a marriage in the presence of an authorised person), in the absence of a registrar of the registration district in which the registered building is situated; ”

6. As Evans LJ has observed, the parties to the Sikh marriage ceremony were then aged 16 and 19. They had recently come to this country and they were unfamiliar with the English language and with English laws and customs. They intended to get married and they did not intend to break the law in any way. They did not therefore come within the scope of s.49, and there is no statutory provision expressly rendering their marriage void.

7. Nevertheless there was (on the Chief Adjudication Officer’s view of the facts, and apart from any presumption) a manifold non-compliance with the provisions of Part III of the 1949 Act: no notice of marriage under s.27, no declaration under s.28, no entry in the marriage notice book under s.31, no certificate under s.32, no registered building under s.41, and no registrar or authorized person present under s.44. If in this case the husband and wife had been compelled by adverse circumstances to separate soon after the ceremony, so that no presumption arose from cohabitation, I feel real doubt whether they could have been regarded as lawfully married under English law, despite the logic of the argument based on the mental state required for a marriage to be void under s.49.

8. In *Collett v Collett* 1968 P 482 (a case on the Foreign Marriages Act 1892 concerned with a marriage conducted in dramatic circumstances at the British Consulate in Prague in 1948) Ormrod J distinguished between directory and essential provisions of that Act despite the presence of a limited provision (s.13) comparable to ss.24 and 48 of the 1949 Act, and the absence of any provision comparable to ss.25 and 49. Ormrod J emphasized (in a passage which Evans LJ has already cited) the importance of upholding, wherever possible,

the validity of marriages entered into in good faith.

9. This court did not hear any submissions on the decision of Judge Aglionby in *Gereis v Yagoub* [1997] 1 FLR 854 (discussed in Bromley's Family Law, 9th ed pp 82-3) and I prefer to express no view on it except to note that some reliance seems to have been placed on the Christian character of the ceremony (at a Coptic Orthodox church not registered for marriages).

But in this case it is unnecessary to go further into the issue of validity of an irregular marriage ceremony which is not followed by long cohabitation. Where there is an irregular ceremony which is followed by long cohabitation, it would be contrary to the general policy of the law to refuse to extend to the parties the benefit of a presumption which would apply to them if there were no evidence of any ceremony at all. I agree with Evans LJ, for the reasons which he gives, that there is insufficient evidence to rebut the presumption in this case.

Order: Appeal dismissed.