ELSIE PROUD .....SUPPLIANT; 1925 Nov. 28.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Returned Soldiers' Insurance Act—Beneficiaries—Proof of Marriage—Presumption.

P. a returned soldier, was insured under The Returned Soldiers' Insurance Act, the beneficiary named being "Elsie Proud, wife of the insured." Upon P's death, payment to suppliant was refused because of the absence of certificate of marriage or of other satisfactory proof of marriage. No certificate was produced at trial, but the uncontradicted testimony of suppliant and others established that she had been married in New York by one said to be a clergyman, that they co-habited until P's death, as man and wife, that children were born to her by P., that P. had in various ways acknowledged her as his wife, and that she was generally reputed and known as such in the community. The Act allows insurance to be made in favour of the wife, or wife and children only.

Held, that the suppliant had discharged the burden of proof upon her and had established a strong presumption of her marriage to P., which the Crown had failed to rebut; and that she was entitled to recover the amount of the insurance sued for.

2. That even if the marriage had been performed by an unauthorized person, and was impossible according to the place where it was performed, nevertheless, the presumption of marriage must prevail on the facts proved.

ACTION to recover from the Crown the amount of a policy of insurance taken out by the late husband of the suppliant under the provisions of the Returned Soldiers' Insurance Act.

Edmonton, October 14, 1925.

Action now tried before the Honourable Mr. Justice Maclean.

G. H. Steer for the suppliant.

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F. D. Byers, K.C. for the respondent.

The facts are stated in the reasons for judgment.

MACLEAN J. now 28th November, 1925, rendered judgment (1).

This is a Petition of Right in which the suppliant claims to recover from the Crown the sum of $1,000 and interest, under a policy of insurance in that sum, issued upon the life of P. E. Proud, under the provisions of the Returned Soldiers Insurance Act, Chap. 54, Statutes of Canada, 1920, the beneficiary thereunder, being named as "Elsie Proud, wife of the insured." The statute referred to was designed to grant to returned men, limited insurance upon favourable terms for the benefit of certain classes of beneficiaries. A married man might name only his wife, his child or children, or both, as beneficiaries. A single man might name only his future wife, or his future wife and children, as beneficiaries.

The insured died in Edmonton in February, 1924. The suppliant applied to the department of Government administering the Act, for payment of the amount payable under the policy of insurance in question, but this apparently was refused upon the ground that no certificate of marriage, or satisfactory evidence of marriage, had been produced.

The suppliant as a witness on her own behalf, stated at the trial that she was married to the deceased P. E. Proud, in March, 1922, in New York, with whom and where she lived for about one year, when they both moved to Edmonton, Alberta, where they lived as man and wife until the death of Proud in February, 1924. She was unable to produce a marriage certificate or in fact any thing in the nature of the best evidence of the marriage, but she persistently asserted that she was then married to the deceased, by a person whom she believed to be a clergyman, in the city of New York, and I have no reason to doubt her testimony in this regard. To those who knew them in Edmonton, they were reputed man and wife, and Proud spoke of the suppliant as his wife. He furnished the Registrar of Vital Statistics information in regard to the birth, in August, 1923, of twins, to the sup-

(1) An appeal has been taken to the Supreme Court of Canada.

pliant by him, and in this record these children are described as legitimate children of the suppliant, and he the father. The statement furnished in this connection was signed by the deceased, Proud. A newspaper announcement of the subsequent death of these children was very probably furnished by the deceased. His application for membership in the Great War Veterans' Association describes his wife as his next of kin. His conduct unquestionably caused his acquaintances in Edmonton to assume they were man and wife. The cohabitation was professedly and publicly, husband and wife; and by their conduct they were known as husband and wife. It might be said further that the deceased enjoyed a good reputation among his acquaintances in Edmonton.

I apprehend the law applicable to the issue in this action, to be comprehensively stated in Halsbury's Laws of England, Vol. 16, p. 309, and as follows:—

603. Where a man and 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, though there may be no positive evidence of any marriage having taken place, and the presumption can be rebutted only by strong and weighty evidence to the contrary.

604. 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 license.

I would also refer to Best on Evidence, 11th edition, p. 353, where it is said that

cohabitation and reputation are held to be presumptive evidence of marriage,

and to *Campbell* v. *Campbell* (1); *Morris* v. *Davies* (2); *Piers* v. *Piers* (3); *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie* (4); *Collins* v. *Bishop* (5), and *In re Shepherd* (6).

Habit and repute do not as a matter of fact constitute marriage, but serve only as evidence and presumption of a marriage having been celebrated between competent persons to enter into it. More satisfactory than presumption of course, would be proof of a marriage in fact, over and above presumption, but nevertheless the presump-

(1) [1867] L.R. 1 H.L. Sc. 182.
(2) [1836] 5 C. & F. 163.
(3) [1849] 2 H.L. Cas. p. 331.
(4) [1881] 6 A.C. 364.
(5) [1878] 48 L.J. Ch. 31.
(6) [1904] 1 Ch.D. 456.

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tion of marriage from cohabitation, particularly when accompanied by some evidence supporting that presumption, would appear to be a well-settled principle of law, and for very good reasons. The validity of a marriage cannot obviously be tried like any other question of fact, which is independent of presumption. And this presumption is not lightly to be repelled. It is not to be broken in upon by a mere balance of probability, but as the authorities state, the presumption must prevail, unless this is most satisfactorily repelled by evidence in the cause, appearing conclusive to those who have to decide the question. In this case the Crown did not offer any positive evidence to rebut the presumption of marriage, and we have the positive declaration of the claimant as to a marriage ceremony. We have the acknowledgment by the deceased husband, of the relationship of man and wife, in the insurance policy sued upon, which is just as strong as if he had named the claimant as his wife, and a legatee, under a will. And there is further evidence of the acknowledgment of the relationship of man and wife which I have already mentioned. The failure of the claimant to recall with exactness, the time and place of the marriage, is not at all surprising to one having had an opportunity of seeing and hearing her as a witness at the trial. But even if the marriage ceremony was performed by an unauthorized person, and the marriage impossible according to the law of the state of New York, still I think the presumption of marriage under the evidence presented to me would and should prevail. There is authority for the statement, that statutes prescribing forms of marriage are directory, and a failure to comply with them would not render the marriage void unless the statute so provided.

It has been urged that cohabitation here was but for a short period of time. This probably is suggested because, in certain reported cases, the period of cohabitation covered a lengthy period, and the fact was regarded as important in strengthening the presumption. It could not mean more. Here the deceased Proud lived all his life, after his marriage which I think is to be presumed, with the claimant and more he could not do. He died during the continuance of cohabitation with the suppliant. I cannot conceive of any process of reasoning by which a presumption in law might be negatived by the fact that cohabita-

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tion covered only a comparatively short period of time, and as I have stated, unless accompanied by other evidence calculated to destroy the presumption. Here, there is no evidence in my opinion to rebut the presumption.

Such being the law, and there being no reason why in fact I should not accept the evidence of the suppliant as to her marriage to Proud, and which is uncontradicted, nothing remains but to find that the suppliant is entitled to succeed in her action, and she shall have judgment for the principal sum mentioned in the policy of insurance, and her costs of action. I cannot allow the claim for interest.

Judgment accordingly.