[JOSEPHIDES, J.]

NIKI JOSEPH CAREY (OTHERWISE EVANGELOU) (No. 2),
Petitioner,

v.

JOSEPH CAREY,
Respondent.

(*Matrimonial Petition No.* 9/65).

Matrimonial Causes—Practice—Petition—Service of—Service of petition after expiry of the time prescribed by the Rules (12 *months*) *and prior to the renewal of the petition—An irregularity but not a nullity—Proceedings, therefore, not nullified and the irregularity may be cured—Discretion of the Court in that respect—The Matrimonial Causes Rules, rule* 98 (1) *and* 102—*Cfr. the old English Rules of the Supreme Court, Order* 70, *rules* 2 *and* 3; *the* 1962 *English Rules of the Supreme Court, Order* 2, *rule* 3, *and the new English Rules of the Supreme Court, Order* 2, *rule* 2—*Cfr. also the English Rules of the Supeme Court* (*before their recent revision*), *Order* 8, *rule* 1 *which is substantially reproduced in our Matrimonial Causes Rules, rule* 98 (1) (supra).

Practice—Service of petition after its expiry and before its renewal—An irregularity but not a nullity—It can, therefore, in a proper case be considered as a good service—Discretion of the Court—Factors to be taken into account—See, also, under Matrimonial Causes, above.

The material facts of this case are as follows : The petition was filed on the 1st October, 1965, and served on the respondent in Ireland on the 14th October, 1966, 14 days after the expiry of twelve months from the filing of the petition. On the 30th January, 1967, on the petitioner's application, the Court ordered that the petition be renewed for six months from the date of the order, under the provisions of rule 98 (1) of our Matrimonial Causes Rules (see *Carey* v. *Carey* (No.1) reported in this Part, *ante*, at p. 1). The question which arises now for sonsideration is whether the service of the petition 14 days after the expiry of the time prescribed by the Rules (12 months), and prior to the renewal of the petition on the 30th January, 1967, as aforesaid, is good service or not.

In ruling that the service of the petition effected on the respondent on the 14th October, 1966, is good service, the Court :

Held, (1) rule 98 (1) of our Matrimonial Causes Rules (note: it is fully set out in the judgment, *post*) reproduces substantially the provisions of the English Order 8, rule 1(before the recent revision of the English Rules). Now, in the case *Sheldon* v. *Brown Bayley's Steelworks Ltd* [1953] 2 Q.B. 393 C.A. and [1953[2 All E.R. 894 C.A., it was held that the service of a writ of summons effected more than twelve months after its date, when by virtue of Order 8, rule 1, *supra*, it had ceased to be in force, is not a nullity but an irregularity which had been waived by the unconditional appearance of the defendant. Not being a nullity, according to Singleton L.J., it is something which can be renewed, while a nullity cannot be renewed.

(2) True, in the present case the irregularity has not been waived by the respondent. But we have the additional fact that the petition has, since the service on the respondent on the 14th October, 1966, been renewed by order of this Court on the 30th January, 1967 (*supra*).

(3) Relying on the *Sheldon* case (*supra*) I am of the opinion that in the present case the service of the petition after the expiry of the twelve months and before its renewal by this Court on the 30th January, 1967, (*supra*) is an irregularity but not a nullity and will not, therefore, nullify the proceedings.

(4) True, in the present case the irregularity has not been waived by the respondent (as it was in the *Sheldon* case, *supra*, by the defendant). But we have the additional fact that the petition has, since its service on the respondent on the 14th October, 1966 (*supra*) been renewed by order of this Court on the 30th January, 1967 (*supra*).

(5) In considering this matter, I take into account that (a) no question of limitation of the action (petition) arises; (b) even if the irregularity were not waived, or even if the respondent did object to the service of the petition, it would only mean fresh service on him; and (c) the respondent has, up to the present time, that is about four months after the service of the petition on him, failed either to enter an appearance, or apply to set aside the service for irregularity. In this connection it should be borne in mind that an application to set aside for irregularity shall not be allowed unless it is made within a reasonable time; Cfr. rule 102 of our Matrimonial Causes Rules.

(6) For all the above reasons, I am of the view that the service of the petition effected on the respondent on the 14th October, 1966, is good service, and I rule accordingly. Costs in this application to be borne by the petitioner in any event.

Order accordingly.

Cases referred to :

Hamp v. *Warren* (1843) 12 L.J. EX. 215;

Sheldon v. *Brown Bayley's Steelworks Ltd.* [1953] 2 Q.B. 393,C.A.; and [1953] 2 All E.R. 894, C.A., followed.

Ruling.

Ruling on the question whether the service of the matrimonial Petition on the respondent effected on the 14th October, 1966, is good service.

L. Clerides, for the petitioner.

Respondent not appearing.

The following Ruling was delivered by:

JOSEPHIDES, J : The question for determination before me is whether the service of the matrimonial petition on the respondent effected on the 14th Octber, 1966, is good service or not.

The material facts are as follows : The petition was filed on the 1st October, 1965, and served on the respondent in Dublin, Ireland, on the 14th October, 1966, that is to say, 14 days after the expiry of twelve months from the filing of the petition, which is a petition for nullity on the ground of the respondent's prior marriage to another woman which was still subsisting on the day of the marriage of the parties.

On the 30th January, 1967, on the petitioner's application, I ordered that the petition be renewed for six months from the date of the order, under the provisions of rule 98 (1) of our Matrimonial Causes Rules*. The question which arises now for consideration is whether the service of the petition 14 days after the expiry of the time prescribed by the Rules (12 months), and prior to the renewal of the petition on the 30th January, 1967, is good service or not.

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*Vide Judgment published in this Part at p. 1 ante.

Counsel for the petitioner in support of his application cited to me extracts from the Yearly Practice 1938, pages 56 and 61; the Annual Practice 1960, pages 104 and 92, in which reference is made to *Hamp* v. *Warren* (1843) 12 L.J. Ex. 215. The full report of this case was not made available to the Court and, it being an old case, it is not helpful, as we are not aware of the existing rule at the time. It is also to be noted that this case is now omitted from the Supreme Court Practice 1967.

The Court then referred counsel to the case of *Sheldon* v. *Brown Bayley's Steelworks Ltd*, [1953] 2 Q.B. 393, C.A., and allowed him time to look up the case and address the Court. It seems that unfortunately counsel missed the Judgment of the Court of Appeal in that case and he cited the Judgment of Barry, J., as reported in [1953] 2 All E.R. at page 382. This Judgment was clearly against him but he tried to distinguish it on certain grounds put forward by him.

Barry, J. held that "the service of a writ after the expiration of the time prescribed by the rules was not an irregularity which could be rectified by waiver; a writ so served was ineffectual for all purposes; and, therefore, the service on the defendants was a nullity and they were entitled to have it set aside" (page 382).

As I was not convinced that the authorities cited by counsel supported the application, I took time to consider the matter. In doing so I traced the Judgment of the Court of Appeal in the *Sheldon* case ([1953] 2 Q.B. 393), which is also reported in the same volume of the All England Reports in which the Judgment of Barry, J. is reported. The Court of Appeal in reversing the decision of Barry, J. held that—

> "Failure to serve the writ within the prescribed time did not render it a nullity, but was an irregularity which had been waived by the defendants' unconditional appearance, and, therefore, service of the writ would not be set aside". ([1953] 2 All E.R. 894).

That was a case in which a plaintiff in an action under the Fatal Accidents Act, 1846, issued a writ within twelve months of the death as required by section 3 of that Act, but only effected service of it more than twelve months after its date, when, by virtue of the English Rules of the Supreme Court, Order 8, rule 1, it had ceased to be in force. The defendants entered an unconditional appearance to the writ, and later

applied to have the service set aside on the ground that the writ had become a nullity.

It is, I think, convenient to state here that rule 98 (1) of our Matrimonial Causes Rules reproduces substantially the provisions of the English Order 8, rule 1 (before the recent revision of the English Rules). Our rule 98 (1) reads as follows :

> "98.—(1) No petition shall be in force for more than twelve months from the day of its issue including that day; but if the respondent or co-respondent named in it has not been served, the petitioner may, before the twelve months expire, apply for an order to renew the petition; and a Judge, if satisfied that reasonable efforts have been made to serve such respondent or co-respondent, or for other good reasons, may order that the petition be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed petition....."

In the course of his Judgment in the *Sheldon* case, Singleton, L.J., said (at page 896) :

> "I do not regard it as strictly accurate to describe a writ which has not been served within twelve months as a nullity. It is not as though it had never been issued. It is something which can be renewed. A nullity cannot be renewed. The court can grant an application which results in making it just as effective as it was before the twelve months' period had elapsed. I do not think that the Court had in mind what had been said in *Kerly's* case [1901] 1 Ch. 471, 478), to which I have referred. Moreover, it was not necessary for the decision of the Court in *Battersby's* case ([1944] 2 All E.R. 387) to consider this. The question was whether the court would exercise the discretion which it had under Ord. 64 r. 7, to renew a writ when the renewal would deprive a defendant of the benefit of a limitation which had accrued, and the judgment was to the effect that the discretiom ought not to be exercised in such circumstances. If the writ had been a nullity, there would have been no point in considering whether the court should exercise its discretion to renew it. The position under Ord. 8 r.1, is that the writ is not in force for the purpose of service after the twelve months' period had run. It is still a writ. The unconditional appearance by the second defendants is a step in the action. It amounts to a

waiver with regard to service It prevents the second defendants' being able to contend successfully that the service on them is bad"

Denning, L J , at page 897, said

"On Oct. 13, 1952, they entered an unconditional appearance, but they soon afterwards got to know what the first defendants had done, and then they also applied to get the service of the writ set aside The question is whether they are prevented from so doing by reason of their unconditional appearance This depends on whether the service of a writ after the twelve months permitted by the rule has expired is a nullity or an irregularity If it was an irregularity, then the irregularity was waived by the unconditional appearance But if it was a nullity, then it could not be waived at all It was not only bad, but incurably bad

In determining the question, it is important to notice that, even after twelve months have expired, the writ can be renewed This is not done under Ord 8 r 1, for that only permits renewal before the twelve months have expired It is done under Ord 64, r 7, which is the general rule permitting enlargement of time It was first done in 1877 by Sir George Jessel, M R , in *Re Jones*, 1877, 46 L J Ch 316 which has been accepted as good law ever since Now, if a writ can be renewed after the twelve months have expired, that must mean that it is not then a nullity

There are other reasons, too, why the writ cannot be considered a nullity Suppose a defendant, who is served after the twelve months, deliberately enters an unconditional appearance and goes to trial It may be that it is a case in which no statute of limitation avails him and he does not think it worth while to object to the service of the writ, because he knows that it would only mean the issue of a fresh one Could he thereafter turn round and say that all proceedings were void on the ground that the writ was a nullity? Clearly not That shows that the service out of time was only an irregularity which could be waived"

"When the rule says that after twelve months the writ is no longer in force, it only means that it is no longer

in force for the purpose of service : see *Re Kerly, Son & Verden* ([1901] 1 Ch. 479). In my opinion, the service of the writ after the twelve months was not a nullity but an irregularity which was waived by the unconditional appearance. I agree that the appeal should be allowed".

It will thus be seen that service of the writ after twelve months is not a nullity but an irregularity which is waived by the unconditional appearance of the defendant. Not being a nullity, according to Singleton L.J., it is something which can be renewed, while a nullity cannot be renewed.

In the present case the service of the petition after the expiry of the twelve months and before its renewal is an irregularity which has not been waived by the respondent but we have the additional fact that the petition has, since the service on the respondent, been renewed for six months from the 30th January, 1967. In these circumstances, has this Court power to waive such irregularity or has the order of renewal retrospective effect?

In considering this matter, I take into account that (a) no question of limitation of the action (petition) arises; (b) even if the irregularity were not waived, or even if the respondent did object to the service of the petition, it would only mean fresh service on him; and (c) the respondent has, up to the present time, that is, about four months after the service of the petition on him, failed either to enter an appearance, or apply to set aside the service for irregularity. In this connection it should be borne in mind that an application to set aside for irregularity shall not be allowed unless it is made within a reasonable time; Cf. rule 102 of our Matrimonial Causes Rules; the old English Rules of the Supreme Court, Order 70, rules 2 and 3; the 1962 English R.S.C., Order 2, rule 3, and the new English R.S.C. 1965, Order 2, rule 2.

As already stated, the service of the petition after the expiry of the twelve months is an irregularity but not a nullity and will not, therefore, nullify the proceedings. It was open to the respondent to apply within a reasonable time to set aside the service before or after entering an appearance, but he has failed to do so up to now, although four months have elapsed since service on him. Considering the circumstances of this case, including the renewal of the petition and the failure of the respondent to apply within a reasonable time to set aside

the service of the petition, I am of the view that the service effected on him on the 14th October, 1966, is good service and I rule accordingly.

Costs in this application, as well as in the application for renewal, to be borne by the petitioner in any event.

Order accordingly.