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*Re* Estate of SUNDARA, Deceased.

RANKIRI, Petitioner.

UKKU, Administratrix, Respondent.

*D. C., Kandy, 2,061 (Testamentary).*

*Kandyan Law—Acquired property of deceased intestate—Right thereto of illegitimate children—Rights of widow and sister of deceased.*

The Kandyan Law does not distinguish between illegitimate children born in adultery and merely natural children.

If there be no widow and legitimate children, the illegitimate children succeed to the whole of the acquired property of the father, movable and immovable.

*Mahatmaya v. Banda, 2 S. C. R. 142,* approved.

It is not all offspring of casual intercourse that are so entitled to succeed, but only those illegitimate children who have been publicly acknowledged by their father or born in his house under circumstances showing an act of open recognition of cohabitation with their mother.

If there be a widow and a sister of the deceased intestate, besides illegitimate children, his ancestral lands devolve on the sister, and the widow has a life interest in the acquired lands.

THIS was an application by one Rankiri, sister of the above-named Sundara, deceased, for a judicial settlement of the accounts of his estate. It raised the question whether

as sister and next of kin to the deceased she was entitled to succeed to his acquired property in preference to his illegitimate children.

It appeared that Sundara contracted a legal marriage with Ukku in 1867; that he lived with her at his house until his death, which took place on 5th June, 1898; that during the last seven years of his life he lived in concubinage with Rankiri, the petitioner, who bore him two children, Horatali and Vimali; that the lawfully married wife Ukku bore him three children, all of whom, however, predeceased their father; that the widow applied for letters of administration to her deceased husband's estate in June, 1898, naming in the petition as the heirs-at-law herself and her deceased husband's sister Rankiri, the present applicant; that the two illegitimate children of the deceased by their next friend, to wit, their mother Rankiri, sued the administratrix in D. C., Kandy, 13,907, complaining of her refusal to recognize their claim as heirs of the intestate, and prayed the Court to declare them heirs of the intestate, and entitled to the whole of his estate, and to order the administratrix to administer it on that footing; that the administratrix answered that the deceased's sister Rankiri was entitled to all the inherited property of the deceased, and that she herself was entitled to all the movables and the acquired landed property absolutely; and that the District Judge decreed that the illegitimate children were entitled to the acquired property of the deceased, subject to the widow's life interest therein, and the widow entitled to the movables.

The sister of the deceased Rankiri, unknown to whom judgment had been given for the illegitimate children in D. C., Kandy, 13,907, now petitioned the Court in the testamentary suit claiming the right to succeed to the acquired property of the deceased, subject to the life interest of the widow, and prayed for a judicial settlement of the estate on that basis. On citation issued by the Court, the illegitimate children appeared by their mother Rankiri and resisted the claim of the applicant. Issues were framed on 1st March, 1902, one of which was the following:—Are these illegitimate children entitled to any share in the property of the intestate when his widow and full-sister have survived him?

The District Judge (Mr. G. A. Baumgartner) held that the original authorities in Kandyan Law relied on by the counsel for the illegitimate children—viz., *Sawers, p. 7*, cited by Marshall at p. 338 of his *Judgments, Niti Nighanduwa, p. 14;* Perera's *Armour, pp. 8 and 34*—did not warrant the conclusion that illegitimate children were entitled to inherit their father's acquired property; that they only determined that the issue of a marriage

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with a low-caste wife should have certain rights of inheritance in their father's property; that the old Kandyan customs placed the low-caste wife and her children under disabilities, and in the case of a man of high caste cohabiting with a woman of inferior caste and maintaining that woman in his house, attended and assisted by her until his demise, the children born of such a woman would have a right to their father's acquired property if he did not leave him surviving his lawful widow and legitimate issue; that Rankiri did not cohabit with the deceased in his own house, but lived about a mile from it; and that, even if illegitimate children had a right to succeed to their father's acquired property, as laid down by Lawrie, A.C.J., in *2 S.C.R. 142*, section 26 of Ordinance No. 3 of 1870 abrogated such right.

The District Judge decreed that Rankiri, the sister of the deceased, was entitled, subject to the life interest of the widow, to the whole of the acquired movable property; that the illegitimate children were not entitled to it; that Rankiri was entitled to the inherited movable property; and that the estate of the deceased should be administered on the footing of such principles of succession.

The illegitimate children appealed.

The appeal came on for hearing before two Judges on 3rd November, 1902, and was ordered to be reserved for a Full Bench.

On the 12th and 14th August, 1903, the case was argued before Layard, C.J., Wendt, J., and Middleton, J.

*Van Langenberg*, for appellant.—Whatever rights the ancient Kandyan Law gave to illegitimate children are left untouched by the Ordinance No. 3 of 1870. This statute affects the marriage of the parents, but leaves the Law of Inheritance unchanged. According to *Armour* (Perera's Edition, p. 178) illegitimate children have the right to succeed where there are no legitimate issue or widow. C.R., Matale, 5,002; *Sup. Ct. Minutes*, 27th October, 1902; *Niti Nighanduwa, p. 71; 2 Thomson's Institutes, 141; Sawers, p. 7;* D. C., Kandy, 97,916, *Sup. Ct. Minutes*, 12th August, 1887.

*Bawa* (with him *Dornhorst, K.C.*), for respondents.—Prior to the passing of the Ordinance No. 13 of 1859 it was lawful for Kandyans to have more than one wife. Perera's *Armour, p. 9*. After that Ordinance, only legitimate children had a right to succeed. The Ordinance No. 3 of 1870 recognized unregistered monogamous marriages and abolished polygamy. The effect of these Ordinances was to give to a single wife the rights which she shared in olden days with other wives. The appellants are not polygamous issue,

but adulterine issue, and are therefore prohibited from succession. The unoin of the deceased with Rankiri would not be good even before the Ordinance No. 13 of 1859, section 33 of which is reproduced as section 27 of Ordinance No. 3 of 1870. To benefit by the law prior to 1859 the appellants must bring themselves strictly within the Kandyan Law. It contemplated full marriages and irregular marriages. Perera's books call the latter " espousals ". The children born of such espousals or irregular marriages are not illegitimate children, but deemed to be illegitimate children, so as to give them only a limited right of inheritance. Even this limited right is objected to by the Ordinance. As regards the case in *2 S. C. R. 142*, there was no widow there nor legitimate children. Therefore the other class of children was allowed to inherit. In *3 N. L. R. 376* the point was not argued, and in the unreported Matale C. R. case the class of children was not extended. Never were the rights of illegitimate children sustained where there were legitimate children. In *6 N. L. R. 104* irregular marriages were considered, and the question was whether the woman was married in *bina* or *diga*.

*Van Langenberg*, in reply.—The Legislature has not abrogated the old law of inheritance. It aimed at suppressing polygamy, not the prevention of illegitimate children from sharing in the inheritance where neither widow nor legitimate children were alive. The law of every civilized nation allows illegitimate children to demand maintenance, and the Kandyan Law does not draw a line of demarcation between illegitimate children and the children of irregular marriages. The words " espouse " and " deemed " have been too often dealt with by this Court to allow a new construction to be put on this. In *2 S. C. R. 142*, Lawrie, A.C.J., gives the whole of the property to illegitimate children, as there was no legitimate issue.

*Cur. adv. vult.*

1st October, 1903. WENDT, J.—

The question on this appeal is as to the rights of illegitimate children under the Kandyan Law. The appellants were begotten by the intestate Sundara Vidane of one Hewapedigedera Rankiri during the subsistence of his marriage with one Ranhawadigedera Ukku (the first respondent), and he died leaving him surviving his widow, the said Ukku, the appellants, and a full sister Delankapedigedera Rankiri, the petitioner. The great bulk of his estate consisted of lands " acquired " by him, and the contest relates to these lands. His ancestral lands admittedly devolved on the sister, and have been conveyed to her by Ukku, who is his

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administratrix. It is also admitted that Ukku, as widow, has a life interest in the acquired lands. The question is, who is entitled to the *dominium* of these lands, the illegitimate children or the sister? The District Judge rightly held that any claim of the widow to the *dominium* (which according to Perera's *Armour*, p. 23, could only prevail against her husband's "more distant relations, a paternal aunt's children, for instance") was excluded by the existence of the sister, and the widow has not appealed.

The Kandyan Law draws no distinction between illegitimate children begotten in adultery and merely natural children. (*Per* Dias, J., in D. C., Kandy, 97,916; *Civ. Min.* 12th August, 1887.)

*Armour* at p. 34 states the law as follows:—"In some cases illegitimate children are even competent to inherit their father's purchased lands, as well as goods and chattels. Thus if a man of high caste cohabited with a woman of inferior caste or inferior family rank, and maintained that woman in his own house, and was attended and assisted by her until his demise, then, in case that man died intestate and left not a widow who had been lawfully wedded to him, and left not legitimate issue, his landed property, which he had acquired by purchase, will devolve to his illegitimate issue, the child or children of the said woman of low caste or inferior family rank; but his *paraveni* or ancestral lands will remain to his next of kin amongst his blood relations." And he says the same thing at page 8.

The *Niti Nighanduwa, p. 14*, declares that the children of a concubine will "in some instances" inherit their father's acquired property, movable and immovable.

Sawers (p. 7) lays it down that "the children of a wife of an inferior caste to the husband cannot inherit any part of the *paraveni* or hereditary property of the father, that is to say, the property which has descended to him from his ancestors, while a descendant or one of the pure blood of these ancestors, however remote, remains to inherit. But the issue of the low-caste wife can inherit the lands acquired by their father by purchase or by gift from strangers, but should no provision of this kind exist for the children of the low-caste wife, they will in that case be entitled to temporary support from their father's hereditary property."

In the case of *Mahatmaya v. Banda, 2 S. C. R. 142*, the deceased had left illegitimate children, but no widow and no ascertained next of kin. The defendant was sued in detinue and set up no claim by inheritance. Lawrie, J., whose opinion owing to his long experience as District Judge of Kandy and as a Justice of this Court is justly regarded as of the highest authority on questions

of Kandyan Law, laid it down that "it is well-established Kandyan Law that, provided there be no legitimate children and no widow, illegitimate children succeed to the whole of the acquired property of the father," and he cited the passages I have quoted from *Sawers* (adopted by Marshall's *Judgments, p. 338*), the *Niti Nighanduwa*, and *Armour*, as well as the case of *Silva v. Carolinahamy* (*1 Lor. 189, Austin, 147*). The case before Lawrie, J., was one relating to movables only, but the proposition he stated applied as well to lands, and it will be noticed that Armour expressly mentions lands.

In *Kiri Menika v. Mutu Menika, 3 N. L. R. 376*, where the plaintiffs were illegitimate children and their mother, and there was no widow, the defendants were the issue of a predeceased brother of the intestate. It was agreed, in the Court below, that if the property in question was "acquired" property the plaintiffs were entitled to judgment, and Lawrie, J., held the property was acquired. But he dealt with the claim of the plaintiffs to inherit, and quoted once more the passages from *Sawers*, *Armour*, and the *Niti Nighanduwa*.

The District Judge in the present case rightly held that the opinion of Lawrie, J., in *Mahatmaya v. Banda* was sufficient authority for deciding against the appellants, inasmuch as the intestate had left a widow, and I think his judgment ought to be affirmed.

The District Judge, however, went further than was necessary for the purposes of the case and expressed the opinion that illegitimate children cannot now, under any circumstances whatever, inherit any interest in their reputed father's estate. His view was that "illegitimate" children in the sense of the old Kandyan Law were the issue of an actual marriage, as for instance with a woman of lower caste. "The old Kandyan customs," he says, "placed the low-caste wife and her children under disabilities, and the supposed law that illegitimate children generally had a right to succeed to the acquired property was nothing more than a mode of relief against those disabilities. It was a partial recognition of an actual marriage, as marriages went in those days." In the view I have already expressed it is unnecessary to consider this large question, but as it was argued before us I would say that in my opinion the law is too well settled to be now disturbed.

The point was directly raised in the case of *Silva v. Carolinahamy* in 1856, and the decision there cannot be explained away in the manner adopted by the District Judge. The plaintiff there too was a sister and claimed certain acquired land of the intestate

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as his sole next of kin. The defendant in her original answer pleaded that she was the widow and claimed the property for herself and on behalf of her child. At the first trial the District Judge found the marriage not proved, but he held that the child, though illegitimate, was entitled to the acquired land and gave judgment accordingly. In appeal "the Supreme Court was of opinion that the Court below was wrong in departing from the pleadings, the answer having set up a marriage which had not been proved; and thereupon remanded the case to allow the parties to proceed on amended pleadings". At the second trial the District Judge decided in the same way as before and plaintiff again appealed. Respondent's counsel relied on the passage in *Armour, p. 34*, and complained of the Appellate Court having in its former decision "gone upon a question of pleading without deciding upon the merits.....The facts of the case, however, prove a clear marriage; and the Supreme Court, on the last occasion, had sufficient before it to decide on the merits"—meaning by the merits, of course, the rights of the child as an illegitimate child, not the question of marriage, on which the Court had refused to reverse the finding of the District Judge. The Supreme Court affirmed the second judgment, but it is impossible, in face of the report, to say, as the present District Judge says, that the affirmance perhaps proceeded upon the finding that the marriage was proved. This decision, then, was a distinct recognition of the principle that, where there was no marriage, the illegitimate issue took the father's acquired property.

This case was followed by *Mahatmaya v. Banda*, in which Lawrie, A.C.J., and Withers and Browne, J.J., held the illegitimate children entitled to their father's movable estate, where the parents' connection had begun after the Ordinance No. 13 of 1859 had come into operation, and where therefore there could be no pretence of a marriage without due registration.

In *Kiri Menika v. Mutu Menika* too the alleged marriage fell under the Ordinance, and was held by Lawrie, J., to be altogether invalid, yet he gave judgment for the children for their father's acquired lands.

MIDDLETON, J.—

The facts in connection with this case are fully and carefully set out in the printed judgment of the District Judge in the first eighteen paragraphs, and I therefore, deem it unnecessary to recapitulate them.

The question we have to decide is whether the appellants, who are admittedly the illegitimate children of one Sundara Vidane Duraya, deceased intestate, born during the existence of his legal

marriage with Ranhawadigedera Ukku, are entitled to succeed to his acquired immovable property as against a full-sister Rankiri, who survives him.

The District Judge has held that they are not so entitled on the ground " that even if the Kandyan Law conferred such a right it was swept away by section 26 of the Kandyan Marriage Ordinance, No. 3 of 1870, and that the acquired immovable property devolves on the sister as next of kin, subject to the life interest of the widow ".

The District Judge has very carefully and elaborately gone into and set out the law which bears on the question, but I am unable to agree in his conclusion (paragraph 29) that " the original authorities on Kandyan Law relied on do not warrant the conclusion that illegitimate children are entitled to inherit their father's acquired property, but determine that the issue of a marriage with a low-caste wife should have certain rights of inheritance ".

I admit the word " illegitimacy " does not necessarily imply the non-existence of a marriage. *Armour, p. 8, section 7; Niti Nighanduwa, p. 13.*

A curious thing however is, that the law seems to infer (*Armour, section 6, p. 7,* quoting *Sawers*) that concubinage with a woman of equal caste may result in fully legitimate issue; while upon marriage with a low-caste woman (section 7) the issue will be deemed illegitimate and only capable of sharing in the acquired property of their father. Section 2 of p. 34 of *Armour* appears to me to be opposed to the District Judge's conclusion.

The books seem to refer to offspring of an unlawful marriage who are deemed to be illegitimate, and those actually and purely illegitimate as not purporting to be the issue of wedlock, as illegitimate, although different rules regarding inheritance would appear to be applicable to their cases. *Armour, section 7, p. 8, Niti Nighanduwa, pp. 56, 71.*

The only clear and detailed references to the rights of purely illegitimate children are in section 2 of p. 34 of *Armour*, and p. 56 of the *Niti Nighanduwa.*

So far as I can discover there is nothing to be found in *Armour* or *Sawers* which shows that any purely illegitimate child might share in his father's acquired property, but only that purely illegitimate children born under the circumstances mentioned in section 2 of p. 34 of *Armour* might succeed to his purchased property. This would exclude all offspring of casual intercourse or of a woman maintained in another house.

The *Niti Nighanduwa* at p. 56, referring to a natural child, gives " in some instances rights of inheritance " to the recognized

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illegitimate child of a secret cohabitation; and at p. 71 allows the illegitimate child to share with the legitimate child in the acquired immovable property, or if none to receive a suitable share of the movables.

The illegitimate children referred to at p. 71 may of course be the offspring of what Armour terms an unlawful marriage. I think therefore the rule enunciated by Lawrie, J., *2 S.C.R., p. 134*, although the question then affected movables only, is good, but might be enlarged to the extent of saying that where there are no legitimate children and no widow, purely illegitimate children publicly acknowledged by their father or born in his house, under circumstances showing an open acknowledgment of the existence of cohabitation with their mother, succeed to the purchased or acquired property of their father. The doctrine of acknowledgment by the father seems to me to underlie the right of inheritance by illegitimate children. The widow is entitled to all movables of her intestate husband, not including those inherited by him with, or forming part of, his *paraveni* estate (*Sawers, chap. V.*, and *Armour, section 26, p. 22*, quoting *Sawers*) in the event of there being no *presumably* legitimate children; and the same chapter of *Sawers* implies the widow's right to the usufruct of the lands, which is again assumed at p. 8, chap. I. If there are no such children, nor an adopted child, nor parents, nor any near relations, the widow by *lathimi* right succeeds to the possession of the deceased's entire estate, including *paraveni* lands (*Armour, section 26, p. 22*); but the last paragraph of the same section, p. 23, if the deceased without issue has survived his parents, brothers and sisters and their children, gives her an absolute *lathimi* right of acquest to such lands as belonged to the deceased which he did not derive by inheritance.

If therefore there were a sister of the deceased living, as is the case here, this would bar the widow's absolute *lathimi* right to the acquired property.

If there were no sister, the widow's absolute *lathimi* right would bar the illegitimate children, and therefore the illegitimate children here are in my opinion barred both by the widow and the full-sister, and could not inherit any part of their father's acquired land under the old Kandyan Law.

As it appears now unnecessary to decide whether the Ordinances of 1859 and 1870 have affected the rights of illegitimate children, I do not propose to enunciate the opinion I had formed, especially in view of the fact that the law appears to have been deemed settled since 1856.

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I think, therefore, that this appeal should be dismissed with costs. and the judgment of the District Judge should be affirmed, following the decision reported in *2 S. C. R., p. 142.*

LAYARD, C.J.—

I agree with my brothers in thinking this judgment should be affirmed. The District Judge was right in following the judgment of this Court in the case of *Mahatmaya v. Banda, 2 S. C. R. 142.*

It was argued in appeal that the District Judge was wrong in holding that an illegitimate child cannot now under any circumstances inherit any interests in their reputed father's estate. It is, as pointed out by my brother Wendt in his judgment, unnecessary for the purpose of deciding this case to find on that point. The question, however, was very fully argued before us, and I think it right to state that my own opinion is that I am bound by the collective decision of this Court in the case of *Mahatmaya v. Banda,* and I shall follow that decision until a higher tribunal holds that illegitimate children cannot now under any circumstances inherit any interests in their reputed father's estate.