*Present:* De Sampayo J.

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PUNCHIRALA *v.* PERERA.

*271—C. R. Badulla, 3,741.*

*Kandyan law—Child born in adultery—Inheritance.*

Under the Kandyan law a child born in adultery is not disqualified from succeeding to his father's property.

THE facts appear from the judgment.

A. *St. V. Jayawardene* (with him *H. V. Perera*), for plaintiff, appellant.

*J. W. de Silva*, for defendant, respondent.

*Cur. adv. vult.*

March 5, 1919. DE SAMPAYO J.

The only point for consideration in this case is whether under the Kandyan law a child born in adultery is disqualified from succeeding to the father's property. The facts are that the third defendant is the daughter of one Kiri Banda and Heen Menica, who were associated as husband and wife for a great many years. Heen Menica, before this association began, was lawfully married to a low-country man named Franciscu Perera, and the third defendant was born during the subsistence of that marriage. The plaintiff, who is a brother of Kiri Banda, sets up title by inheritance to an undivided half share of a certain field which the two brothers owned in common, and the third defendant claims the same as sole heir of Kiri Banda.

After the death of Franciscu Perera in 1910, Kiri Banda and Heen Menica contracted a legal marriage, which was registered under the Marriage Registration Ordinance, No. 19 of 1907, and it was contended for the third defendant in the Court below that she was thereby legitimized. I think the learned Commissioner was right in refusing to uphold that contention. The Kandyan Marriage Ordinance, No. 3 of 1870, section 30, declares that every marriage registered under the provisions of that Ordinance shall render legitimate any children who may have been procreated by the parties thereto previous to their intermarriage. It will be observed that this section does not contain the qualification stated in section 22 of the Marriage Registration Ordinance, No. 19 of 1907, which excludes children procreated in adultery from the benefit of legitimation, and if the marriage between Kiri Banda and Heen Menica had been registered under the Ordinance No. 3 of 1870, the third defendant would no doubt have been legitimized. It is true that section 2 of the Ordinance No. 14 of 1909, which was enacted in order to remove any doubt whether marriages between Kandyans

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may be registered under the Marriage Registration Ordinance No. 19 of 1907, declares that such registration shall be lawful, and marriages so registered shall be valid. But at the same time it provides that marriages so registered shall, " as regards the capacity of the parties to contract marriage, the grounds on which the marriage may be dissolved, and in all other respects, " be governed by the Ordinance No. 19 of 1907, and that the provisions of the Kandyan Marriage Ordinance, No. 3 of 1870, shall have no application whatever thereto. Consequently, the exception to legitimation in the case of children procreated in adultery applies to Kandyans who intentionally or otherwise register their marriages under the general Marriage Registration Ordinance, No. 19 of 1907. There is a saving clause, however, which conserves to such children the rights of succession to property, for the second proviso to section 2 declares that the circumstance that a marriage between Kandyans has been registered under the Marriage Registration Ordinance, No. 19 of 1907, shall not affect the rights of the parties, or the rights of persons claiming title from or through them, to succeed to property " according to the rules of Kandyan law. "

The real question in this case, therefore, is What is the Kandyan law with regard to adulterine children? It is well known that illegitimate children are not altogether excluded even from paternal inheritance. There is no exception found in the text books with regard to illegitimate children who are also adulterine; and this, I think, is at least negative evidence that the Kandyan law did not exclude them. The Ordinance No. 3 of 1870, according to which illegitimate children without qualification are legitimatized by the subsequent marriage of the parents, appears to observe the spirit of the Kandyan law. There is no reported case to the contrary, though in the course of a century there must have been numerous cases involving this point. On the other hand, we are not wholly without judicial guidance. In D. C. Kandy, 97,916,[1] Dias J., who was a judge of authority in this branch of law, was of opinion that the Kandyan law made no distinction between illegitimate children begotten in adultery and merely natural children. *In re Sunda*,[2] Wendt J., another judge of equal authority, made an observation to the same effect. See also *Modder's Kandyan Law, page 390*, where it is stated as a general proposition that there is no such distinction. It is not irrelevant to point out that the social ideas of the community, which in matters of this kind is after all the basis of the law, are not such as necessarily conflict with this view of the law.

I think the learned Commissioner arrived at a right conclusion in this case. The appeal is dismissed, with costs.

*Appeal dismissed.*

[1] *S. C. Min., Aug. 12, 1887.*

[2] *(1903) 7 N. L. R. 364.*