Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Wood Renton.

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WICKREMENAYAKE *et al. v.* PERERA *et al.*

D. C., Kandy, 2,191.

Adulterine bastards—Children born ex prohibito concubitu *or* damnato coitu—*Right to inherit mother's property—Roman-Dutch Law—Non-access—Evidence of husband.*

A husband is a competent witness to prove non-access.

Under the Roman-Dutch Law adulterine bastards, inasmuch as they were born *ex prohibito concubitu*, were debarred from inheriting the property of their mother.

Adultery being no longer an offence, such persons cannot now be said to be born *ex prohibito concubitu* or *ex damnato coitu*, and are therefore not prevented from taking by inheritance from their mother.

APPEAL from a judgment of the District Judge of Kandy, (F. R. Dias, Esq.). The facts are fully set out in the following judgment of Middleton J. on a previous appeal (October 11, 1907):—

"The question in this case is whether the adulterine offspring of a deceased woman are entitled to inherit their mother's property with the legitimate issue. It has apparently been admitted by the proctor for the respondents to this appeal that they were, in fact,

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the issue of the adulterous consortment of their mother and a man other than her husband. This is an admission against the interests of the respondents, who are minors, which the Court would not allow to be made on their behalf, if upon that admission it found itself bound to decide against their claims. The children in question are admittedly the offspring of low-country Sinhalese and not Kandyans.

" The learned District Judge has held in favour of the respondents' claim on grounds which he has extracted from the judgments of myself and De Sampayo A.P.J. in *Karonchihamy v. Angohamy.*[1] The authorities on the question are Vanderlinden (*1, X., 3, p. 164, of Henry's translation*), who says that illegitimate children succeed to the inheritance of their mother *ab intestato*, as the mother makes no bastards. Grotius (*2, 27 and 28, p. 190, of Maasdorp's translation, Book II., chapter XXVII., section 28*) says: ' In reference to the mother, illegitimate children are in the same relation as legitimate, unless, indeed, they are sprung *ex prohibito concubitu*, in which case they and their descendants cannot inherit *ab intestato.*' Van der Keesel (*Book II., chapter VII., section 345, Lorenz's translation*) says: ' In Dordrecht under a particular law and in South Holland adulterine and incestuous children also succeed to the mother.' Section 40 of Ordinance No. 15 of 1876 makes the rules of the Roman-Dutch Law as it prevailed in North Holland to govern *casus omissi.* Van Leeuwen, in the *Censura Forensus, Part I., Book I., chapter III., section 10*, says: '*Ex damnato vero coitu nati sunt adulterini et incestuosi qui neque patri neque matri eorumque agnatis aut cognatis succedere possunt ..... nisi quoad alimenta necessaria.* The preceding section 8, as translated by Schneider, p. 37, shows that the term ' *illegitimati* ' embraced both *naturales spurii* and those *ex damnato coitu nati*, the two former having the right of inheritance from their mother, but not the latter. Voet (*38, 17, 9*) says: '*nostris tamen et plurium aliorum moribus its progeniti adulterinis accensendi sunt, et ob id ne matri quidem ab intestato heredes esse possunt.*' I gather from Voet that there was some doubt as to whether bastards, *naturales*, or *spurii* could inherit from their mother according to the opinion of some writers.

" I am not aware that the Ceylon Law or Sinhalese custom recognize any difference between incestuous and adulterine bastards and bastards not so procreated, but the English Law gives no right of inheritance from the mother to any bastard. It seems unreasonable and inequitable to apply the doctrine of the Canon Law to the case of Sinhalese.

" Van Leeuwen (*Vol. I., p. 51, of Kotze's translation*) says: ' children procreated in adultery cannot be legitimated, inasmuch as according to the ecclesiastical laws there can be no marriage with the woman with whom we have formerly lived in adultery.'

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"The Full Court has held in *Karonchihamy v. Angohamy* (*ubi supra*) that it is not illegal in Ceylon for a man who has lived in adultery with a woman during the liftetime of his wife to marry such woman after the death of his wife. Section 22 of Ordinance No. 2 of 1895, however, still enforces the principle of the Roman-Dutch Law that children procreated in adultery cannot be legitimated. But section 37 of Ordinance No. 15 of 1876 lays it down that illegitimate children inherit the property of their intestate mother, but not that of their father or that of the relatives of their mother.

"The word 'illegitimate' in its full significance would include adulterine bastards. Under the Roman-Dutch Law adultery was a criminal offence, and the offspring of adultery or incest were termed 'children *ex damnato coitu*,' owing to the influence of the Canon Law upon the prevailing Dutch Civil Law. In Ceylon, notwithstanding the Political Ordinance of 1580, adultery is not a criminal offence, and no case has been cited to us showing that the Courts have recognized either the incapacity of adulterine bastards to inherit from their mother or the converse. The consequential effects of the Full Court decision in *Karonchihamy v. Angohamy* (*ubi supra*) would be that children born of the parents before the marriage would not be made legitimate by the marriage owing to the effect of section 22 of Ordinance No. 2 of 1895, but would still be illegitimate.

"The law for recognizing the marriage does away with the ecclesiastical ban of *damnatus*, but still refuses them specially the rights of legitimate children to inherit from their father. Why, therefore, should not the offspring have the status of ordinary illegitimate children, and inherit from their mother on the principle that a mother makes no bastards?

"It seems to me that there is nothing to militate against such a conclusion, except the effete principle of the old Roman-Dutch Ecclesiastico Civil Law, which enacted that adultery was a crime and that the sins of the parents should be visited on the innocent offspring of it. I do not wish to be supposed to be supporting the theory that adultery is no moral offence, but merely to enunciate what I deem to be a plain principle of equitable right founded on fair reasoning.

"I am afraid, however, that Roman-Dutch Law, which must be held to apply to this case, is too clear to be disregarded. With considerable reluctance, therefore, I feel bound to hold that if these petitioners are adulterine offspring, they are not entitled to inherit their mother's property with the legitimate issue. I think, therefore, that the judgment of the District Judge must be set aside, and the case sent back for the trial of the issue whether these children are illegitimate or not, as proposed by my Lord. The respondents should pay the costs of the appeal, the costs in the Court below to abide the Judge's decision."

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The case having gone back, the District Judge after hearing evidence made the following order (February 27, 1908):—

" The only issue before the Court, as directed by the Supreme Court, is whether or not the two minor children of the intestate who are now petitioning for a judicial settlement are or are not illegitimate, that is to say, whether they were the children of her lawful husband, the administrator, or not.

" On the evidence that has been led there can be no doubt on that point, namely, that they are not his children, but were born to John Dias Wickremenayake in adultery during the subsistence of her marriage with the administrator.

" Under the circumstances, and in view of the law as enunciated by the Supreme Court in this case, I find that the petitioners are not entitled to inherit any of their mother's property with her legitimate children.

" I therefore dismiss their petition of January 26, 1906, with costs, to be paid by their father and next friend personally. "

The petitioners appealed.

Van Langenberg, for the appellants.

Sampayo, K.C., for the respondents.

Cur. adv. vult.

June 29, 1908. HUTCHINSON C.J.—

This appeal raises a question of fact, and also a question of law, which is not quite covered by authority. The question of fact is whether the two infant petitioners are the legitimate or the illegitimate children of their mother, the deceased intestate, whose estate is being administered. There is an affidavit by John Dias Wickremenayake, the petitioners' next friend, deposing that the intestate was his wife (which, however, admittedly is not the fact), and lived with him as such from 1887 until her death, having long previouly separated from her husband (who is the administrator of her estate); that during her cohabitation with him she gave birth to the petitioners, and that he is their father. Her father deposed that in 1882, in consequence of her husband's ill-treatment of her, she went to live with him at Gampola, and lived with him from 1882 to 1887, and that he maintained her, and that her husband never came to see her during that time, and did not contribute towards her maintenance; and that in 1887 she went and lived with J. D. Wickremenayake, and lived with him until she died. Her husband deposed that in 1882 her father removed her from Kotte, where they were living, to Gampola; that after that they never lived together, and in fact he never saw her till her death; that the petitioners were not his children; that he never went in search of his wife, or made any attempt to get her back.

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Upon this evidence the District Judge thought that there could be no doubt that the petitioners were not the children of the husband, but were born to J. D. Wickremenayake in adultery. I think that was a right conclusion. The appellants' counsel has suggested that the husband's evidence ought not to admitted in such a case to prove that he had no access to his wife; and there is a dictum of Layard C.J. in *6 N. L. R. 381* to that effect, an opinion upon which, it is said, Magistrates have acted in cases of application against a husband for maintenance of a child. Section 112 of the Evidence Ordinance makes the fact of a child having been born during the continuance of the marriage conclusive proof that it is the legitimate child of the husband, unless it can be shown that he had no access to the mother at any time when the child could have been begotten. Section 120 enacts that in all civil proceedings the husband or wife of any party to the suit shall be competent witnesses. The husband is therefore a competent witness for the purpose of proving that he had no access. Suppose it were proved that the wife had been living continuously in Colombo, and living with another man during the whole of the twelve months before the child's birth, and the husband was called as a witness to prove that during the whole of that time he had been living in England. His evidence, according to the view which has been urged upon us, would be inadmissible; but the law and reason alike declare that it is admissible. Possibly all that Layard C.J. meant was that it is not enough for the husband so swear that he had no connection with his wife, if it is possible that he had, as it would be, for example, if they were living in the same village.

The remaining question is whether the woman's illegitimate children born in adultery are entitled to inherit her estate. The marriage was in 1870, so that section 37 of the Ordinance No. 15 of 1876 does not apply. Neither does section 40 apply; that section makes the Roman-Dutch Law as it prevailed in North Holland applicable, "if the present Ordinance is silent"; but by section 24 that does not apply to this case, because section 40 only applies where the intestate dies after the Proclamation of the Ordinance and is then unmarried, which was not the case here. So that we have to decide the question according to the law of this Colony as if the Ordinance had not been passed.

When the case was before this Court on a previous appeal, Middleton J. considered this question on the assumption, which was not then proved, that the children were illegitimate. He expressed an opinion that by the Roman-Dutch Law illegitimate children born in adultery are not entitled to inherit their mother's property with the legitimate issue. He gives the authorities in detail, and I need not go through them again. In the argument before us reference was also made to Grotius, *2, 18, 7; 1, 12, 2-4;* and Maasdorp's *Law of Persons, 8, 108.* The rule which I gather from the authorities

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is that children sprung *ex prohibito concubitu* are debarred from inheriting. And *prohibitus concubitus* seems to mean the same thing as *damnatus coitus*, viz., a *concubitus*, which is an offence against the law. And as the *concubitus* of a man who is not her husband with a woman who has a husband living was such an offence, and as incest was also such an offence, it followed that children born in adultery or incest could not inherit. But now that adultery is no longer an offence, it is not *prohibitus* in any other sense than the living together of an unmarried man with an unmarried woman is *prohibitus*. I think, therefore, that children born in adultery are not now born *ex prohibito concubitu*, and that they have the status simply of ordinary illegitimate children, and can inherit their mother's estate with her legitimate children. I would allow the appeal, and declare that the petitioners are entitled to share in the estate of their mother Jane Perera, together with her legitimate children, and I would remit the case to the District Court to dispose of on that footing. I think the costs of this appeal should be paid out of the estate.

WOOD RENTON J.—

I agree that the appellants are proved to be adulterine bastards; and I think that the Roman-Dutch Law which made children born *ex prohibito concubitu* or *ex damnato coitu* incapable of succeeding to any share of their mother's estate is in force in Ceylon. The question, however, remains whether, under the Roman-Dutch Law, the incapacity of adulterine bastards in the eye of the law of intestate succession was an incapacity inherent in their status, or one arising from the fact that the union from which they sprang was positively prohibited and punished as a criminal offence. In other words, did the Roman-Dutch jurists mean that adultery *per se* could create no right of intestate succession, or did they give it merely as an illustration of a *prohibitus concubitus* or *damnatus coitus* for the time being under their own law. With diffidence and hesitation I adopt the later view. The words "*overwonne bastarden*" (unlawfully begotten), which the Roman-Dutch jurists applied in distinguishing the offspring of a *prohibitus concubitus* from the "*speelkinderen*," or mere bastards, seem to point to the conclusion that is was the prohibition of the union that created the incapacity (see *Van Leeuwen, Kotze's translation, I., ch. VII., ss. 3 and 7; Nathan, Common Law of S. A.; I., p. 213, s. 379*). In Ceylon adultery unlike incest, is not a criminal offence, it is not prohibited by law, save in the case of incestuous adultery; after the dissolution of the marriage tie which made the relationship adulterous, the parties can marry (*Karonchihamy v. Angohamy*[1]), although section 22 of Ordinance No. 19 of 1907, *i.e.*, enacting earlier legislative provisions,

[1] *(1904) 8 N. L. R. 1.*

prevents them from legitimating the children of their union by the marriage. Adultery is a moral offence, and the law discourages it. But I do not think that unless it is incestuous it is now a *prohibitus concubitus* or *damnatus coitus* in Ceylon within the meaning of Roman-Dutch Law I agree to the order proposed by my Lord the Chief Justice.

Appeal allowed.