1948 *Present :* **Jayetileke and Dias JJ.**

UKKU, Appellant, *and* HORATHALA, Respondent

S. C. 244—D. C. Matale, L 65

Kandyan Law—Acquired property—Right of succession—Illegitimate half brothers and sisters—Ordinance No. 39 of 1938, Sections 16 and 17.

The words " brother " and " sister " in section 16 and 17 of the Kandyan Law Ordinance, No. 39 of 1938, connote a legitimate brother or sister of the full or the half blood. Neither under these sections nor under the customary law of the Kandyans can an illegitimate child inherit from a *collateral* source.

APPEAL from a judgment of the District Judge, Matale.

C. R. Gunaratne, for plaintiffs appellants.

B. Aluwihare, with *T. B. Dissanayake*, for defendant respondent.

December 17, 1948. DIAS J.—

The parties to this action are Kandyans and are governed by the Kandyan Law.

[1] (*1868*) *L. R. 3 H. L. 330.*
[2] (*1918*) *21 N. L. R. p. 75.*
[3] (*1924*) *25 N. L. R. 481.*
[4] (*1927*) *29 N. L. R. 330.*

Wewekumbure Daranda Kumbura was the acquired property of a man named Kaluduraya under deed P 2 of 1864. He died leaving seven children including two daughters, Subadie and Kumudu. Subadie, who is alleged to have died previous to September 27, 1909 (the relevancy of this date will become manifest presently), was married *in diga* to Banduwa (now deceased) and they had a daughter Somadari. Kumudu, the daughter of Kaluduraya, was married *in binna*, and she died leaving the defendant and six other children or the issue of deceased children. They are *not parties to this action.*

It is admitted that after the death of her lawfully married husband Banduwa, Subadi (mother of Somadari) formed an irregular union with a man named Mohotha, and bore to him the first to the third plaintiffs and Kiriduraya who is dead, who is represented in this action by his widow the eighth plaintiff and his children, the fourth to the seventh and ninth plaintiffs. These parties being Kandyans and the union between Subadi and Mohotha not having been registered under the Kandyan Marriage Registration Ordinance, it follows that the plaintiffs are the illegitimate children of Subadi both under the customary Kandyan Law as well as under section 14 of the Kandyan Declaration and Amendment Ordinance, No. 39 of 1938 [1].

Kaluduraya, the maternal grandfather of Somadari, by deed P 1 dated September 27, 1909 (*i.e.*, after the death of his daughter Subadi as stated earlier), donated the field to his granddaughter Somadari, who died intestate after Ordinance No. 39 of 1938 became law, leaving surviving her, her maternal uncles and aunts (if any), her first cousins including the defendant, his brothers and sisters and the issue of his deceased brothers and sisters. There also probably exist the descendants of the other brothers and sisters of Subadi and Kumudu. There are also the *illegitimate issue* of Somadari's mother Subadi, namely, the plaintiffs. Neither parent of Somadari survived her. The main question is whether these " illegitimate half brothers and sisters " and their descendants are the sole intestate heirs of Somadari ?

As Somadari died after the commencement of Ordinance No. 39 of 1938, her property would devolve under the Ordinance provided the statute makes provision for her case.

The questions for decision are :

(*a*) Is the field in question the " acquired property " of Somadari ?
(*b*) On the death intestate of Somadari leaving no parents surviving, whether her intestate heirs are :—

(i) The illegitimate issue of her deceased mother Subadi (the plaintiffs) ? or
(ii) Her maternal legitimate collateral relatives including the defendant ?

It was assumed at the argument that as Somadari had died after the commencement of Ordinance No. 39 of 1938, therefore that Ordinance applied to her. That is correct, but the Ordinance does not purport to be

[1] *Legislative Enactments (1941) Supplement pp. 25–35.*

an exhaustive Code of the Kandyan Law of inheritance. So much of the preamble to the Statute which the Editor of the Legislative Enactments has published shows that the Ordinance was intended merely " to declare and amend the Kandyan Law *in certain respects* ".

At the argument before us it was assumed that sections 16 and 17 of Ordinance No. 39 of 1938 applied to this case. Even if it does, I find it impossible to hold that uterine illegitimate brothers and sisters of Somadari or their progeny can be designated " brother or sister or brothers and sisters or the descendant or descendants of any brother or sister " of Somadari within the meaning of section 16 (*b*), or that they are " of the half-blood " in relation to Somadari within the meaning of section 17 (*b*). There is no definition in the Ordinance as to what is meant by " a brother ", " a sister " or " brothers and sisters of the half-blood ". These words all connote " legitimate " brothers and sisters of the full or the half-blood. Stroud in his Judicial Dictionary under the word " Relations " says : " The accurate meaning of ' Relations ' or ' Relatives ' is *Legitimate* Relatives—*Scale-Hayne v. Jodrell* [1]—but this word like all other words involving *prima facie* the idea of legitimacy, e.g., Child, Issue, Wife, Husband, Brother, Nephew may include illegitimate relatives *if such be designated* ". This is the principle underlying the local decision of *Kiriya v. Ukku* [2] where in a Kandyan deed of gift the words " Children ", " Issue " or " Descendants " were held to mean legitimate and not illegitimate children, issue or descendants, even although under the customary law of the Kandyans illegitimate children inherit the acquired property of their deceased parent. Under the word " Brother " Stroud says : " A gift to ' Brothers ', ' Sisters ' include the half blood ", and he adds : " A gift to ' Brothers and Sisters ', *the testator knowing himself to be illegitimate*, imports his putative brothers and sisters (*re Cameron* 91 Law Times 176)". This, of course, is understandable. As between illegitimate issue of the same mother, they are all brothers and sisters, for a mother makes no bastard. Counsel for the appellant has been unable to cite any authority to justify me in holding (assuming that Ordinance No. 39 of 1938 governs this case) that these plaintiffs can be designated the half-brothers and sisters of the deceased Somadari.

The case of *Setuwa v. Sirimalie* [3] has no application to the question now under consideration. In that case the deceased Nanduwa died in 1943 (*i.e.*, after Ordinance No. 39 of 1938 had become law) leaving illegitimate children, and the question whether they inherited anything from their father depended on whether Nanduwa's property was " paraveni " or " acquired " property. In the former event the illegitimate children would not inherit. In the latter event they would. Section 10 of the Ordinance gave a statutory definition of what is meant by " paraveni " and " acquired property ". Wijeyewardene J. pointed out that the property would be " paraveni " unless it came within the proviso to section 10 (1), which enacted that " if the deceased shall not have left him surviving any ' child or descendant ', property which had been the acquired property of the person from whom it passed to the

[1] *(1891) A. C. 304.* [2] *(1914) 17 N. L. R. 361.*

[3] *(1947) 48 N. L. R. 391.*

deceased, shall be deemed acquired property of the deceased ". The question to be decided, therefore, was whether the word " child " in the proviso included " illegitimate children "? The draftsman of the proviso having knowledge of the customary law of the Kandyans by which illegitimate children inherited the " acquired property " of their deceased parents along with their legitimate issue, was careful to use the word " child ". I would, therefore, respectfully agree with the decision in *Setuwa v. Sirimalie* (*supra*). It has no application to the problem which confronts me—see also *Mohideen v. Punchibanda* [1].

Incidentally, the case of *Setuwa v. Sirimalie* (*supra*) shows that in the case before us Somadari having died without issue, legitimate or illegitimate, the property which came to her on deed P 1 from her maternal grandfather Kaluduraya, who himself acquired it on deed P 2 of 1864, was her " acquired property " both under the Ordinance as well as under the customary law.

In construing a legislative enactment one is entitled to inquire into its history. In *Kuma v. Banda* [2] the Divisional Court in construing the Kandyan Marriage Ordinance 1870 examined various documents including Sessional Papers, the Report of the Select Committee of the Legislature on the Ordinance, the Preamble of the Ordinance, &c. As is well known, Ordinance No. 39 of 1938 was enacted in consequence of the recommendations made by the Kandyan Law Commission of 1935 [3]. A study of this Report shows that the original intention of the Legislature had been to codify the whole of the Kandyan Law (see paragraphs 2–17). This was abandoned. The endeavour of the Kandyan Law Commission was not to codify the whole Kandyan Law, but " to remove uncertainties in the law as at present understood, to re-establish those portions of the old law which, as a result of judicial interpretation, have developed along lines at variance with the spirit of ancient customs, and to recommend alterations or additions to the old law where it may appear to be no longer in accord with modern conditions " (see paragraph 23). One of the matters the Commission considered was " The law of intestate succession " (see paragraphs 24, 135). The rights of " Illegitimate Children " were ully dealt with in detail in paragraphs 197–210, 281, 288, 292. It is clear from the recommendations of the Commission that, far from enlarging the rights of illegitimate children to inherit from their deceased parents, they desired these rights to be restricted—see paragraph 208 where the Commissioners said : " We have given the subject very careful consideration, and are of opinion that illegitimate children should no be placed on the same footing as legitimate children, *even as regards inheritance to the acquired estate of their father* (i.e., by descent). We would, accordingly, recommend that illegitimate children be declared to have no rights whatsoever to the *paraveni* property of their father, and that legitimate children or their issue should be declared to exclude absolutely illegitimate children, illegitimate children being entitled to the *acquired estate* of their *father only* in the absence of legitimate children or their issue, and also subject to the life-interest of the widow, if any ". Again in paragraph

[1] *(1947) 48 N. L. R. 318* [2] *(1920) 21 N. L. R. 294.*
[3] *Sessional Paper XXIV—1935.*

210 they say: " . . . . But we do feel that illegitimate Kandyan children should not be regarded as of the same status as legitimate Kandyan children for the purpose of inheriting the *acquired* property of their father, or, indeed, *for any other purpose whatsoever* ". These recommendations are now reproduced in section 15 of the Ordinance. Nowhere was it suggested that illegitimate children should be entitled to inherit acquired property from *a collateral source*, e.g., from a legitimate child of the common mother. There was no need to provide for the right of illegitimate children to inherit from their mother—because a mother makes no bastard. That is why section 15 of the Ordinance opens with the words " When *a man* shall die intestate . . . . . ".

The Bar has not been able to cite a single authority either from the Law Reports or from the institutional writers to show that the customary law of the Kandyans recognized the right of an illegitimate child to inherit from a collateral source. Such a principle would appear to run counter to the whole scheme of the law relating to the customary Kandyan Law of Intestate Succession. I have not been able to find a single authority where on the death of a legitimate daughter unmarried and issueless *leaving no parents*, that the illegitimate children of her father or mother can inherit *from her*. The nearest case one can find is that of *Appuhamy v. Lapaya* [1] but that was a case of inheritance *by descent*, and not one of inheritance from *a collateral source*, which is the case here. *Armour* (*Perera's Edition*), page 8, section 7, deals with the case of a man who had an illegitimate son. The father died first and then the grandfather. Armour says: " Therefore, in case that man (the father) died before his parents, his children by that woman will have no right to any share of his parent's estate. The said children will be entitled to inherit only such property as their father himself acquired by purchase or other means of acquest ". If then an illegitimate child could not inherit the property of his paternal grandfather in the direct line of descent, it must follow surely that such child cannot inherit from *a collateral source?* I am, therefore, of opinion that neither under sections 16 and 17 of Ordinance No. 39 of 1938 nor under the customary law of the Kandyans can the plaintiffs succeed.

The intestate heirs of Somadiri are her maternal legitimate relatives including the defendant. The answer of the defendant shows that his case was that his mother Kumudu had " adopted " Somadiri as her daughter, and he claimed to be the sole heir of his " adopted sister ". This claim however was not raised in the issues.

It is unnecessary to discuss who should succeed Somadari as the plaintiff's action cannot in any event succeed. No question of prescription has been raised or decided.

I set aside the decree appealed against and dismiss the plaintiff's action with costs both here and below.

JAYETILEKE J.—I agree.

Appeal allowed.

[1] *(1905) 8 N. L. R. 328.*