[FULL BENCH.]

1920.

Present : Bertram C.J. and De Sampayo J. and Loos A.J.

KUMA *v.* BANDA.

256—C. R. Anuradhapura, 9,948

Kandyan law—Ordinance No. 3 of 1870—Father's right to inherit acquired property of illegitimate son—History of the Ordinance may be looked at in order to interpret Ordinance—The materials which may be used for ascertaining that history.

Children who might under the acient Kandyan law be considered legitimate can no longer claim that status if the marriage of their parents has not been registered, and if under the Kandyan law illegitimate children in any given case have rights of inheritance, they have the same rights now, but not otherwise.

A father of an illegitimate child has no right of succession to the acquired property of such child.

For the purpose of construing an Ordinance where the meaning of it is doubtful, and even where a doubt is suggested, though not entertained, it is legitimate to inquire into its history.

BERTRAM C.J.—If for the purpose of ascertaining the history of an enactment we may look at the report of the Royal Commission on which it is founded, and at the report of a Select Committee antecedent to its introduction, I see no reason why we may not refer to the report of a Select Committee to which the measure was referred for consideration, in so far as that report deals with the history of the question out of which the legislation arose.

THE facts appear from the judgment of De Sampayo J.

Bawa, K.C. (with him *Weerasinghe*), for defendant, appellant.—The non-registration of a marriage between Kandyans does not affect the mutual rights of inheritance between parents and children. Under the old Kandyan law a child had full rights of inheritance if his parents were of equal rank and had cohabited together with the consent of their relatives. The fact that the customary marriage ceremonies were not performed, and that there was consequently no legal marriage, did not deprive the child of his rights. Rights of inheritance between parents and children depended not on the legal validity of the parents' marriage, but on parentage, subject to the requirements as to equality of rank and family consent. If these requirements were fulfilled. the children were legitimate. It is with reference to these requirements that the terms " legitimate " and " illegitimate " are defined in the *Nitinigandawa*, where the rule is stated that a father cannot inherit the property of his illegitimate child. The Kandyan conception of

legitimacy cannot be separated from the rules of inheritance. We are not justified in importing a conception of legitimacy foreign to the Kandyan system of law into these rules.

When Ordinance No. 3 of 1870 declared that no marriage shall be valid unless registered, it had in mind the validity of the marriage as between the spouses. If the Legislature had intended to take away the rights of inheritance of persons who had such rights under the Kandyan law, it would have done so in express terms. There is no reference in the Ordinance to rights of inheritance. It has always been recognized that the Kandyan rules of inheritance have been unaffected by legislation. (See *Raja v. Elisa, Modder, p. 510.)*

That the non-registration of a marriage does not affect questions of inheritance is illustrated by the forfeiture which operates on the *diga* marriage of a daughter. Though such marriage is invalid through non-registration, the daughter loses her rights of inheritance. (Sec. *2 C. L. R. 54.*)

According to Kandyan law, when a son dies issueless, his property goes to his nearest blood relation, *i.e.*, to his father, unless the child be the issue of a prohibited union, and illegitimate children succeed to their father's property. *Appuhamy v. Lapaya;*[1] *In re the estate of Sundara;*[2] *Ran Menika v. Menik Etana.*[3] Father's right to inherit is not affected by formalities attendant on marriage.

Counsel also cited *Modder, p. 391; In re the Estate of Punchi Banda;* [4] *Ranhotia v. Biinda;* [5] *Punchirala v. Perera.* [6]

H. V. Perera, for plaintiff, respondent.—Though the old Kandyan rules of inheritance have not been changed by legislation, the effect of the alteration of the marriage laws is to alter the operation of those rules. The rules of inheritance define the persons who are entitled to succeed to the property of a deceased person by reference to the legal relationship they bear to him. Legal relationship depends on legitimacy, which is a corollary of marriage. The sole test of the legitimacy of children is the validity of the marriage of their parents. The persons described as legitimate in the *Nitiniganduwa* and other books on Kandyan law are in every case the children of a marriage which was valid under the Kandyan customary law. Where persons of the same caste and rank cohabited together with the consent of their relatives; their issue were considered legitimate, for the simple reason that such cohabitation constituted a lawful marriage. (See *Armour 6 and Sawers 33* cited in *Modder at p. 249.*)

Ordinance No. 3 of 1870 abrogates the old laws of marriage and makes registration the sole test of the validity of marriage and consequently of legitimacy. There was no necessity to state in

[1] *(1905) 8 N. L. R. 328.*
[2] *(1907) 10 N. L. R. 129.*
[3] *(1907) 10 N. L. R. 153.*
[4] *(1907) 2 A. C. R. 29.*
[5] *(1909) 12 N. L. R. 111.*
[6] *(1919) 21 N. L. R. 145.*

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express terms that such registration was to be the sole test of legitimacy. Illegitimacy is involved in the conception of an invalid marriage. Even if the Kandyan idea of illegitimacy was different, we are here dealing with an Ordinance of 1870, and must give the words used by the legislator the ordinary meaning that they bear in British legislation. That the Legislature intended to make legitimacy depend on registration is indicated by the provisions of sections 24 and 30.

The history of the Kandyan Marriage Ordinances shows that the main object of the Legislature was to do away with the uncertainty as to rights of inheritance arising out of the complications of Kandyan marriage by providing a uniform test of the validity of marriage.

It was clearly recognized that the effect of non-registration was to bastardize the children. *Modder, pp. 222-226.*

The conditions under which a *diga* marriage works a forfeiture bear no analogy to the conditions determining legitimacy. A *de facto diga* marriage works a forfeiture because the incident on which the forfeiture is based is not the marriage, but the severance of the daughter's connection with *mulgedera. Punchimahatmaya v. Charlis.*[1]

The effect of giving the children of unregistered unions full rights of inheritance would be to raise concubinage to the level of a legal marriage and practically to legalize polygamy.

Counsel also cited *Banda v. Banda;*[2] *Ukku v. Kirihonda:*[3] and *198 D. C. Kegalla, 4,968.*[4]

Bawa, K.C., in reply.—The provisions of sections 24 and 30 of Ordinance No. 3 of 1870 as to the legitimization of children by the registration of marriage have merely the effect of enlarging the class of persons who are regarded as legitimate in Kandyan law. Nowhere in the Ordinance is it laid down that registration is the only source of legitimacy.

Cur. adv. vult.

February 13, 1920. BERTRAM C.J.—

This case raises a fundamental point in the Kandyan Law of Inheritance. The question we have to determine arises upon a very bold and paradoxical contention raised by Mr. Bawa. It is nothing less than this, that, in spite of the Kandyan Marriage Ordinance, No. 3 of 1870, the mutual rights of inheritance between parents and children do not depend upon the question whether the union of the parents was registered as a marriage under that Ordinance, but rather upon the question whether that union was in accordance with the principles of Kandyan customary law. He maintains that, when the Ordinance enacted that the validity of a marriage should depend on its registration, it had in mind

[1] *(1908) 3 A. C. R. 89.*
[2] *(1916) 19 N. L. R. 126.*
[3] *(1902) 12 N. L. R. 104.*
[4] *S. C. M. Oct. 3, 1919.*

validity simply from the point of view of the wife. It was not intended, so he suggests, to affect the legitimacy of the children of the marriage or their rights of inheritance. To put the matter in another way, he would say that, though registration of a marriage would of itself insure legitimacy to the children born of that marriage, such registration is not the only source of legitimacy, and that the children born even of an unregistered marriage are legitimate (or deemed to be legitimate) if the customary requirements of the Kandyan law have been observed.

This proposition is so surprising that it would seem hardly to be arguable. But it has, in fact, been argued and must be considered. There is no actual authority cited for the proposition. The only semblance or shadow of authority which can be found is a dictum by my Brother De Sampayo in a case reported in *Modder's Kandyan Law page 510, Raja v. Elisa*,[1] to the effect that "British legislation has, no doubt, provided a uniform and compulsory form of marriage for the Kandyans, but the principles of inheritance to be found in the ancient Kandyan law remain unaffected." This dictum, however, if properly understood, contains nothing to support Mr. Bawa's contention. Nor is there anything to support Mr. Bawa in the Ordinance itself. *Primâ facie*, and unless some necessity is shown for a different construction, when the Ordinance in section 11 says that no marriage shall be "valid" unless registered, it means, "valid" not only from the point of view of the status of the wife, but also from the point of view of the legitimacy of the children. Legitimacy, in all English legislation on the subject (and, indeed, in all civilized legislation), has always been a corollary of marriage, and inheritance, subject to special exceptions, always depends on legitimacy. Under these exceptions—sometimes customary, sometimes statutory—an illegitimate child may have certain rights of inheritance, but this does not affect the main position. Mr. Bawa, however, seeks to impute a special construction of the Ordinance, from a consideration not of the words of the Ordinance, but of the history of the subject to which it relates, and not the whole history, but a part of it only, and, further, as I propose ultimately to show, upon a misconstruction of that part.

The basis of his whole case is a suggestion that in the Kandyan law inheritance did not depend upon legitimacy, and that under certain circumstances children who were not legitimate were in the same position from the point of view of inheritance as those who were. Presupposing, therefore, this special class of children, who, though not legitimate, were entitled to inheritance, he suggests that the whole method of stating the legal position should be revised. Inheritance, he says, should be considered as depending not upon legitimacy, but upon parentage, unless there is something

[1] *S. C. Civ. Min, May 27, 1913.*

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in the mutual position of the parents (as regards caste and family consent) which disentitles their offspring to succeed to them, or them to succeed to their offspring. The proposition that in Kandyan law there existed a special class of children, who, though not legitimate, were entitled to full rights of inheritance, is to my mind at least, dubious. But, whether it is dubious or not, I propose to show that if the whole history of the subject be examined, and if the words of the Ordinance are construed in the light of this history, it will appear that its intention was that legitimacy was to be dependent upon registration of marriage, and that (subject to the special rights of illegitimate children as illegitimate children) inheritance was to be dependent upon legitimacy.

Before we address ourselves to this subject, it is essential, in the first instance, to determine to what extent we are entitled to look at the history of the Ordinance in order to interpret its provisions, and what materials we are entitled to use for the purpose of ascertaining that history. This question is considered by Wood Renton J. in *Babappu v. Don Andris.*[1] For the purpose of this case, I think, that it requires further examination, to which I will accordingly submit it.

The materials available for the purpose of ascertaining the history of this Ordinance consist of certain despatches, a minute by the Governor, a series of reports by public officers published in the form of Sessional Papers, the preamble to Ordinance No. 13 of 1859, and the report of the Select Committee of the Legislature upon the Ordinance of 1870.

It is settled by a series of weighty authorities that for the purpose of construing an Ordinance, where the meaning of it is doubtful, and even where a doubt is suggested, though not entertained, it is legitimate to inquire into its history. The first of these authorities is *Heydon's Case*,[2] decided in the 26th year of the reign of Queen Elizabeth, and reported in *3 Coke*. Certain general rules were there laid down by the Judges of the Court of Exchequer. It was resolved that "for the sure and true interpretation of all the statutes . . . . four things are to be considered:—

"First.—What was the common law before the making of the Act?

"Second.—What was the mischief and defect for which the common law did not provide?

"Third.—What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth?

"And Fourth.—The true reason of the remedy."

It was added, in words that have a special applicability to the present case, that it was the office of all the Judges to make such constructions as shall "suppress the mischief and advance the remedy," and to "suppress subtle inventions and evasions for continuance of the mischief."

[1] *(1910) 13 N. L. R. 273.* [2] *(1584) 3 Coke 637.*

Another early authority is *Stradling v. Morgan.* [1] This is cited and expounded by Lord Justice Turner in *Hawkins v. Gathercole.*[2] It was an interpretation of an Act of Parliament (*1 & 2 Victoria, c. 110*), which made a registered judgment operate under certain circumstances as a charge upon an ecclesiastical benefice. In summing up the position, Lord Justice Turner says: " In determining the question before us, we have, therefore, to consider not merely the words of this Act of Parliament, but the whole intent of the Legislature, to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign (meaning extraneous) circumstances so far as they can justly be considered to throw light upon the subject. "

In 1863, in another well-known case, *The Attorney-General v Sillem,* [3] Bramwell B. stated the position with rather less emphasis: " It may be a legitimate mode of determining the meaning of a doubtful document to place those who have to expound it in the situation of those who made it; and so, perhaps, history may be referred to to show what facts existed bringing about a statute, and what matters influenced men's minds when it was made. "

Lord Blackburn in 1873, in the House of Lords, delivering a judgment in the case of *River Wear Commissioners v. Adamson* [4] said: " In all cases the object is to see . . . . what the circumstances were with reference to which the words were used. " Lord Halsbury in *Herron v. Rathmines and Rathgar Improvement Commissioners*[5] emphasized the legitimacy of considering " the subject-matter with which the Legislature was dealing, and the facts existing at the time with respect to which the Legislature was legislating. " The most forcible recent expression of the principle is to be found in what is known as the " Solio " case in Lord Halsbury's judgment.[6]

" It appears to me that to construe the statute now in question, it is not only legitimate, but highly convenient, to refer both to the former Act and to the ascertained evils to which the former Act had given rise, and to the later Act which provided the remedy. "

An interesting exemplification of this principle has reached us in the last few days. In his judgment in the case of *The Attorney-General v. Brown,*[7] of which at present we have only a newspaper report, Sankey J., in deciding that section 43 of the Customs Consolidation Act of 1876 did not give the Government general powers to prohibit imports, used these expressions: " But from 1845 onward a great change came over the country, a change in the direction of Free Trade. " Referring to the Customs Act of 1853, he said: " It rang out the old and rang in the new . . . . It is the Magna Charta of Free Trade, " and further, " could

[1] *Plowden 204.*
[2] *6 De G. M. & G. 1.*
[3] *(1863) 2 H. & C. 431.*
[4] *(1877) 2 A. C. 743.*
[5] *(1892) A. C. 498.*
[6] *(1898) A. C. 576.*
[7] *Not reported yet.*

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Parliament ever have intended, at the moment of the birth of Free Trade, to hand over to the Executive an absolute power to prohibit the importation of every and any article? "

The reason for the principle is clearly explained by Jessel M. R. in *Holme v. Guy*:[1] " The Court is not to be oblivious . . . . . of the history of law and legislation. Although the Court is not at liberty to construe an Act of Parliament by the motives which influenced the Legislature, yet when the history of law and legislation tell the Court . . . . what the object of the Legislature was, the Court is to see whether the terms of the section are such as fairly carry out that object and no other, and to read the section with a view of finding out what it means, and not with a view to extending it to something that was not intended. " In other words, history is not to be used for the purpose of controlling the interpretation of a statute, which must in every case depend on the actual words used, but for the purpose of suggesting the true interpretation of the words and for dissipating fallacious suggestions engendered by a partial consideration of the subject only. The test of any suggested interpretation must be the words of the enactment itself. The source of the suggested interpretation need not necessarily be the words themselves, but may be derived from extraneous and concomitant circumstances. There is always, of course, a danger that, instead of acting in this way, the Court " may make out the intention from some other sources of information and then construe the words of the statute so as to meet the assumed intention " (*Per* Pollock C. B. in *The Attorney-General v. Sillem*,[2] *page 514*), but this is a danger against which it is possible to take intellectual precautions.

The next question we have to consider is the materials to which we are entitled to refer for the purpose of considering the history of an enactment. These are very wide, and have in modern times, been distinctly enlarged. In the important case of *The Attorney-General v. Sillem*, [2] which was decided at the time of the American Civil War, and was a decision on the *Foreign Enlistment Act* (*59 Geo. 111, c. 59*), both sides referred to diplomatic correspondence at the time of the passing of the Act, the circumstances attending its passing as described in Allison's History of Europe, the speech of Sir S. Shepherd in introducing the bill, the speeches of Canning and of Huskisson. who was a minister when the Act passed, in subsequent Parliamentary debates. The Judges referred somewhat charily to some of these materials, Pollock C. B. observing that " in order to have a comprehensive view of the whole subject, " it may be " useful to become acquainted with the history of the statute. " Pigott B. said: " Certainly I do not consider myself at liberty to look upon them in any other light, except as matters of history as to the state of our law at the date of this statute. I

[1] *5 Ch. D. 905.* [2] *(1863) 2 H. & C. 431.*

allude to the debates in Parliament, the correspondence of English and American Ministers of State, Mr. Hamilton's Rules of 1793, and the writings of modern historians." All the Judges, while emphasizing the principle that the interpretation of a statute must depend on its actual terms, listened to these materials and took general note of them. Similarly, Wood Renton J. and Middleton J. in *Babappu v. Don Andris* [1] thought themselves entitled to read the despatches interchanged between the Governor and the Secretary of State and the legal opinions of the Law Officers of the Crown embodied therein.

At one time it was thought that it was not legitimate to refer to reports of Royal Commissions on which legislation was based. There are emphatic protests against such references by eminent Judges, *e.g.*, Pollock C. B. and Parker B. in *Martin v. Hemming.* [2] *Cf.* also *Ewart v. Williams.* [3] But these have now been superseded by the judgment of the House of Lords in the "Solio" case, [4] where Lord Halsbury, dealing with the Patents, Designs, and Trade Marks Act of 1883, which was founded on the report of a Royal Commission, said: "My Lords, I think no more accurate source of information as to what was the evil or defect which the Act of Parliament now under consideration was intended to remedy can be imagined than the report of that Commission." In a previous case, *Wigram v. Fryer,* [5] the act under consideration had been preceded by the report of a Select Committee of the House of Commons, and a reference to that report was made in the preamble. North J., in delivering judgment, said: "So far as the report of the Select Committee is recited in the Act, the recommendations contained in it are of the utmost importance in considering what the effect of the Act is. They state what the difficulties are." In view of the judgment in the "Solio" case, it may now be taken that the report of a previous Select Committee may be referred to, whether it is cited in the preamble or not. We may take it, therefore, that it is legitimate for us to refer to official correspondence and to officially published reports of Government Officers (who are in the same position as Royal Commissioners), as well as to matters of ordinary public knowledge.

The only further question we have to consider is, whether it is legitimate to refer to the report of a Select Committee not made antecedently to the legislation, but made upon the terms of the Ordinance itself? This is an incident of "Parliamentary history," and it is sometimes suggested that there is a principle which absolutely forbids any reference to Parliamentary proceedings for the purpose of the construction of a legislative enactment. There are several dicta which point very strongly in this direction, *e.g.*, *per*

[1] *(1910) 13 N. L. R. 273.*
[2] *(1854) 18 Jur. 1004.*
[3] *(1854) 3 Drew. 21.*
[4] *(1898) A. C. 576.*
[5] *(1887) L. R. 36 Ch. D. 99.*

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Lord Coleridge in *R. v. Hertford College* [1] ("The Parliamentary history of a statute is wisely inadmissible to explain it"), and *per* Lord Halisbury in *Herron v. Rathmines and Rathgar Improvement Commissioners*.[2] But if the actual cases be examined, the impression produced is by no means the same as that derived from a mere perusal of the text books, and it is certainly not the case that the principle is established for all purposes and without qualification.

The incidents generally discussed are:—

(*a*) The speeches made in introducing a bill.

(*b*) Speeches made in subsequent debates.

(*c*) Amendments made in Committee.

Such an incident as the considered report of a Select Committee, to which the bill is referred for report, has no customary parallel in English Parliamentary proceedings.

With regard to the introductory speeches, it may be noted that evidence of this sort was accepted in the case of *The Attorney-General v. Sillem* [3] "in order to have a comprehensive view of the whole subject," and these speeches were referred to as part of the history of the case, as, for example, in Bramwell B's judgment on page 539. In 1862 Lord Westbury, a very eminent authority, thought himself justified, when discussing the Brankruptcy Act of 1861, which he would appear himself to have drafted or settled as Attorney-General, in referring to the speeches of the members of the House of Commons who introduced the bill of 1860, and the bill which afterwards became law in 1861, for the purpose of ascertaining the "state of the law which I have described and the complaints made of it both on the one ground and on the other," adding, "I do this for the purpose only of putting the interpreter of the law in the position in which the Legislature itself was placed, and this is done properly for the purpose of gaining assistance in interpreting the words of the law, not that one will be warranted in giving to those words any different meaning from that which is consistent with their ordinary signification, but at the same time it may somewhat assist in interpreting those words, and in ascertaining the object to which they were directed." He added that he had endeavoured "to consider the language as if it were now presented to me for the first time." So also in *The South Eastern Railway Company v. The Railway Commissioners*, [4] Cockburn C.J. referred to the object of the Act as explained on its introduction by Mr. Cardwell, and also the justification of its provisions advanced by the Lord Chancellor in the House of Lords. On the other hand, it will be noted that attempts to introduce references to Parliamentary debates on controversial points arising under modern educational legislation have been resisted. In *R. v. West Riding of Yorkshire*

[1] *(1878) 3 Q. B. D. 707.*
[2] *(1892) A. C. 498.*
[3] *(1863) 2 H. & C. 431.*
[4] *(1880) 5 Q. B. D. 23.*

County Council, [1] Farwell L. J. declared that the Court would not be justified in admitting as evidence speeches made in either House. It does not appear what was the nature of the speeches, that is to say, whether they were introductory speeches and for the purpose of explaining the position with which the Act had to deal, or whether they were of a controversial nature. In a subsequent case, *R. v. Board of Education*, [2] Lord Alverstone C.J. said that the Court had not taken into consideration in the least the speeches made in Parliament, and referred to in the affidavits on which the rules were moved. These were speeches made in the course of the debate on the address, and were not speeches on the bill itself. The Chief Justice added: " I express no opinion as to whether in a proper case a statement of facts might be proved from speeches in Parliament. " It may be taken, therefore, that it is still an open question whether speeches in the Legislature, made for the purpose of explaining the historical situation with which a statute is intended to deal, are admissible as part of the history of the subject.

Next with regard to the proceedings in Committee. References to these have been excluded by several authorities. The first was as early as 1769 in the case of *Miller v. Taylor*, [3] where Willes J., discussing the first of the Copyright Act of Queen Anne, said: " The sense and meaning of an Act of Parliament must be collected from what it says when passed into a law; and not from the history of changes it underwent in the House where it took its rise." The learned Judge did, in fact, nevertheless discuss the proceedings in Committee, and the changes which were brought in Committee, and explained that they justified his decision. So also, as a matter of history, and not for the purpose of controlling their interpretation, the learned Judges in the case of *The Attorney-General v. Sillem* [4] allowed it to be explained to them that all the trouble about the interpretation of the Act was caused by the introduction of certain words by a member " not originally a friend of the bill." But Pollock C. B. was careful to add that " neither this Court nor any other Court can construe any statute, and least of all a criminal statute, by what counsel are pleased to suggest were alterations made in Committee by a Member of Parliament, who was ' no friend of the bill,' even though the Journals of the House should give some sanction to the proposition. " In *Hudson v. Tooth*, [5] dealing with the Public Worship Regulation Act, Mellor J. said: " When we recollect how the Act came to be passed, the circumstances under which it went through Parliament, the criticism which it underwent, and the protections which it was supposed were inserted in it, I cannot doubt that the origin of this provision was this." In another ecclesiastical case, *Herbert v. Purchas*, [6] the Lords of the

[1] *(1906) 2 K. B. 676.*
[2] *(1909) 2 K. B. 1072.*
[3] *4 Burr. 322.*
[4] *(1863) 2 H. & C. 431.*
[5] *(1877) 3 Q. B. D. 55.*
[6] *(1871) 3 P. C. 648.*

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Privy Council referred to conferences between the House of Lords and the House of Commons in the reign of Queen Elizabeth on the Act of Uniformity, not with reference to the particular provision of that Act under consideration in that case, but for the purpose of indicating the temper of Parliament with regard to the whole subject.

I have cited these cases for the purpose of considering whether it would be legitimate to refer to the report of the Select Committee on the Kandyan Marriage Act of 1870. It appears to me that just as in a proper case it might well be that (in the words of Lord Alverstone) " a statement of fact might be proved from speeches in Parliament," so a statement of fact (*i.e.*, of the history of the question leading up to the law) might well be proved by a statement recorded in the report of a Select Committee on the law itself. If for the purpose of ascertaining the history of an enactment, we may look at the report of the Royal Commission on which it is founded (the Solio case [1]) and at the report of a Select Committee antecedent to its introduction (*Wigram v. Fryer* [2]). I see no reason why we may not refer to the report of a Select Committee to which the measure was referred for consideration, in so far as that report (and for the purpose of this case it is not necessary to go further) deals with the history of the question out of which the legislation arose. I propose, therefore, to refer to it.

I will now proceed to examine the whole history of this question. Under the original Kandyan law, marriage, which involved no element of a religious nature, was contracted in various ways. Its validity depended not so much on the observances of any special rites or customary ceremonies, but on the status of the contracting parties and on family consent. Among the higher classes it was accompanied by long, expensive, elaborate ceremonies. (See *Armour, page 10; Modder's Kandyan Law, page 248.*) These ceremonies were not possible for the general body of the people, and there was another form of marriage accompanied by less exacting observances. (See *Sawer's Digest of Kandyan Law* quoted in *Perera's Collection, page 109.*)

There was also a third form of union, in which no special ceremonies were observed, but in which the parties simply cohabited together. This union is referred to in *Armour, page 13,* and in *Solomon's Manual,* quoted in *Perera, page 163,* as " concubinage," and it has, therefore, been doubted whether it was, in fact, a marriage. It appears, however, from both the passages cited that there was no difference between the effect of such a union and that of a more regular marriage. The union is " considered as a marriage," and the issue had " all the privileges of legitimate children." It is not necessary for the purpose of this case to decide this point, and I speak with an imperfect acquaintance with

[1] *(1898) A. C. 576.*

[2] *(1887) L. R. 36 Ch. D. 99.*

the subject, but, in my opinion, this form of union was a marriage, provided that the requisites of a legal marriage in regard to caste and consent were complied with. I am brought to this conclusion by two passages in the official papers which I have referred to above. One is in a letter of the late Mr. Berwick, then District Judge of Kandy, and afterwards Acting District Judge of Colombo. The letter is dated October 11, 1869, and the passage is as follows: "It must be distinctly kept in view that in the Kandyan law cohabitation between parties of equal rank was marriage." Mr. Berwick adds the following footnote to his letter: "In its true sense of living together: the woman cooking for the man and keeping his hut, in ordinary cases; and being an acknowledged mistress of the domestic menage (or, at least, a partner in it) among the exceptionally richer classes."

The other passage is from the report of the Sub-Committee above referred to, and is signed by Mr. R. F. Morgan, afterwards Sir Richard Morgan, then Queen's Advocate, and ultimately Chief Justice: "Among the higher and more influential classes marriage was solemnized by the Magul Paha, or five feasts; but these were not considered necessary to constitute lawful wedlock. The continued cohabitation of a man and woman of the same caste, equal in respect of family, rank, and station in society, such alliance countenanced or sanctioned by their parents, or rather not objected to by some decisive act on their part, was sufficient to constitute wedlock." This would also seem to be the effect of a decision of the Supreme Court cited in *Modder's Kandyan Law, page 250; Ran Menika v. Appuhami and Ukku Menika* [1].

The importance of this is that Mr. Bawa bases his argument on the supposition that the children of these unions were illegitimate. Inasmuch as these children had full rights of inheritance, he argues that inheritance in Kandyan law did not depend on legitimacy. He says, therefore, that if the Ordinance of 1870 deprived these children of their rights of inheritance, which they enjoyed in Kandyan law, it was altering a considerable portion of Kandyan law of inheritance without saying anything about it. If, however, these unions are not correctly described as concubinage, but are really a form of marriage, this argument falls to the ground.

To resume the history of marriage. About the year 1858 representation appear to have been made to the Governor by the Kandyan Chiefs, professing to speak for the people, and asking him to reform the Kandyan Law of Marriage. This matter was duly referred to the Secretary of State by the Governor Sir Henry Ward. In 1858 an Ordinance was passed to give effect to the supposed desires of the Kandyan people, but was not approved, and the following year, 1859, another Ordinance was enacted, No. 13 of that year, entitled "An Ordinance to amend the law of

[1] *S. C. Min., September 8, 1863.*

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Marriage in the Kandyan Provinces." It contains a long preamble, and refers to the Kandyan Convention. It recited the saving to the right to the Sovereign in that Convention to redress grievances and reform abuses; that the existence by custom of the Kandyans of polyandry and polygamy is unsuited to the present condition of the Kandyans, and in no way sanctioned by their national religion; that this custom was a great hardship and oppression to the industrious classes, and the cause of litigation, murder, and other crimes; and had therefore become a grievance and abuse within the meaning of the Convention. It further recited that in order that redress should be effected, the Registrar of Marriages should make provision through the legislation of the Island for the contracting and solemnization of marriages in the Kandyan Provinces, and for the registration of such marriages and for the dissolution of such marriages.

The Ordinance declared all forms of polygamy illegal, and set up a system of registration of marriage. By section 28 it validated all existing marriages if contracted according to the forms, institutions, and customs in use among the Kandyans. By section 29 it allowed all such existing marriages to be registered, and by section 32 declared that every marriage contracted or registered under that Ordinance under certain limitations should render legitimate any children born of the parties thereto previous to their marriage. The most important section was section 2, which declared that no future marriage should be valid unless registered in manner and form as in the Ordinance provided, and solemnized in the presence of the Registrar. The Ordinance also made important changes in the law of divorce. Previously, under the Kandyan law, either party could divorce the other party at will. By section 31 the grounds for divorce were made approximately those in English law, and divorce suits were to be heard by the District Courts.

If we are to accept Mr. Bawa's contention, all that this Ordinance intended was to define the status of the wife in view of the abolition of polygamy, and to declare that in future there could be no lawful wives, except by means of registration of marriages. This suggestion, baseless in itself, is proved by subsequent history to be absolutely fantastic.

In 1866 or 1867 Lord Carnarvon, the Secretary of State for the Colonies, would appear to have addressed a despatch to the Governor making inquiries as to the working of the Ordinance. Reports from Government Agents and District Judges were called for and were collected. A series of Sessional Papers, III., X., XIV., XXI., and XXVII. of 1869, were issued leading up to the enactment of Ordinance No. 3 of 1870.

With what are these Sessional Papers mainly concerned? They are all concerned with the appalling increase in illegitimacy resulting from the working of the Ordinance of 1859. The law was in advance of the time. The Kandyan people had never really desired it, and

were not even conscious of its existence. In so far as they were conscious of it, they, for the most part, ignored it, though the figures varied in different districts. The increase in illegitimacy appears to have been due to two causes: Firstly, the people did not trouble to register their marriages; secondly, they declined to recognize the new fetters on their dissolubility. They continued to dissolve them as they had done before, and to contract fresh unions, which they sometimes registered. The children of these unregistered marriages and unauthorized new connections were all illegitimate. The very fact that a registered marriage was only dissoluble by a suit in the District Court, and only on specified grounds of itself, deterred the populace from registration. The result of that act was " to familiarize the population with the new conceptions of bastardy, bigamy, and adultery. " The most forcible of these reports is that of Mr. Berwick, District Judge of Kandy, and afterwards Acting District Judge of Colombo: " I am constrained, therefore, to concur with those who have arrived at the conclusion that the effect of the new law in its present working will be to bastardize and disinherit multitudes of the generation now being born, who would otherwise have had, under the old law, the status of legitimacy . . . . We are unsettling the rights of property for the next two generations, and we must foresee an immense flood of litigation and discontent, and of grievous moral hardship in the future." In a subsequent paper of great interest, in which he made recommendations as to remedies, he said: " It must be distinctly kept in view that by the Kandyan law cohabitation between persons of equal rank was marriage (and any connection short of cohabitation is scarcely known), consequently there were no bastards, or, at all events, the disability of bastardy hardly existed under that law, which confined it to a very few cases of what were called ' prohibited unions,' which, in practice, rarely or never took place." He was anxious to restore freedom of divorce. Other officers spoke in the same sense, but did not go so far in their recommendations. Mr. Paterson, the Assistant Government Agent, Anuradhapura, wrote in 1868: " The majority of the people do not appear to appreciate the advantage of the Marriage Ordinance, and, accordingly, object to having their marriages registered. Of course, under the existing law, such marriages are illegal, and the children born of them are illegitimate. I have frequently pointed out to the people the consequences of the non-registration of their marriages, in the fact that their children will be unable to inherit property." On August 28, 1869, the Governor, Sir Hercules Robinson, issued a minute (Sessional Paper XIV. of 1869), in which he classified the unions affected by the Marriage Ordinance under seven heads, and noted that the issue of five out of these seven categories were illegitimate on the ground of non-registration, and observed: " It is probably within the mark to assume that two-thirds of the

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existing unions are illegal, and that four-fifths of the rising generation born within the last eight or nine years are illegitimate."

Mr. F. R. Saunders, in a later report (November 18, 1869), observes: "It is registration that makes what we call 'marriage,' and when there is no registration . . . . the issue . . . . . are illegitimate."

On November 11 the Governor invited the Judges of the Supreme Court to give him their advice on a draft bill which had been submitted for an amendment of the Ordinance, and in particular as to the desirability of increased facilities for divorce, and also on "the extent to which relief should be afforded to the illegitimate issue of non-registered and invalid registered unions." The Judges tendered their advice. The Judges, like the Governor, assumed that the issue is bastardized by the want of registration, and that bastardization implied disinheritance. I do not cite all these expressions of opinion as a "contemporary exposition" of the Ordinance of 1859, but simply as showing the problems with which the Government and the Legislature supposed itself faced when they enacted the Ordinance of 1870.

We are now in a position to consider the report of the Select Committee on the bill. The report recited that "but a small proportion of the connections formed in the last ten years had been registered," and that the number of judicial divorces had been almost *nil*. It quoted several passages from reports of Government officers of the nature above indicated and from the Governor's Minute, adding: "It follows that a large number of the rising generation have been bastardized by the operation of the Ordinance of 1859." It further quotes the following passage from the Governor's Minute: "The eldest child born, since the bringing into operation of the Ordinance No. 13 of 1859, cannot be now more than nine years of age, but fifteen or twenty years hence, or even sooner, if matters be left as they are, a state of antagonism must arise between the natural and legal claimants to property, which it is impossible to contemplate without dismay." The Committee accordingly considered "How far it was necessary to amend the Ordinance of 1859, and directed their attention to (1) the registration of marriages; (2) their dissolution; and (3) the legitimization of issue."

Incidentally they noted that one of the first objects of the Ordinance was to provide against "the uncertainty arising from oral testimony in proof of marriages," and they quoted a further passage from the Governor's Minute emphasizing the necessity of "a legal record of the formation and dissolution of matrimonial connections," which would "thus do away with a fruitful source of uncertainty and litigation as to the rights of inheritance arising from the difficulty of tracing and proving in our Courts, after a lapse of years, by oral testimony alone, the complications of Kandyan alliances."

What the Legislature ultimately decided, on the recommendations of the Select Committee, appears from the terms of the Ordinance itself. They re-enacted the old Ordinance, preserving its main lines, and retaining the crucial section (section 11), which declared "no marriage shall be valid unless registered." With regard to dissolution, they declined to follow the recommendations of Mr. Berwick and the Judges of the Supreme Court to restore the old law, but, instead, substantially enlarged the grounds of divorce, allowing a dissolution by mutual consent, or upon actual "separation from bed and board for a year," and they provided that divorces should take place before the Registrar, and should not require a judicial decree of the District Court. With regard to legitimization, all customary unions up to date were validated on registration (section 25); all registered marriages between parties to other marriages, who had separated without first obtaining a decree of divorce, were validated (section 28). In both these cases there was a saving of cases where persons had actually entered into possession of property on the basis of their legal rights.

After this recital of the history of the Ordinance, it is almost superfluous to discuss Mr. Bawa's contention. In view of the problems with which the Legislature was faced, it would be absurd to suggest that in re-enacting section 11 they used the word "valid" in any but its full ordinary and legal sense. The theory that they meant that the wife should be the only lawful wife, but that the children should not necessarily be the only lawful children, or that the rights of inheritance of children should not depend on the lawfulness of their birth, is plainly a figment. The final passage quoted from the Governor's Minute as to the necessity of doing away with "a fruitful source of uncertainty and litigation as to the rights of inheritance" is itself decisive. That passage indicates concisely one of the principal problems with which the Legislature had to deal both in 1859 and in 1870. It is plain that registration was adopted as a solution of that problem. The Legislature adopted in 1859, and perpetuated in 1870, the principle of "registration on pain of nullity." This solution would have been no solution unless nullity were intended to operate in its fullest sense.

There is always, of course, the question whether, faced with these problems and realizing the necessity for a solution, the Legislature in fact used words which were effective for securing a solution. Of that there can be no doubt. The meaning hitherto accepted is the ordinary and natural one; that now, for the first time, suggested is an artificial one.

I have a word to add on the passage quoted from a former judgment of my Brother De Sampayo. It appears to me, if I may say so, that that observation expresses the solution with the utmost exactitude. It is the law of marriage which determines what people are entitled to be ranked in particular categories of relationship;

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it is the law of inheritance which determines in any given case which of those persons, so ranked, are entitled to succeed to the goods of the *præpositus*. The legislation of 1859 and 1870 changed the law of marriage; it left the law of inheritance untouched.

With regard to the supposed special class of cases (referred to above as the third type of Kandyan union), in which it is suggested that children born in concubinage were deemed to be legitimate, my view is that those unions were really marriages. But, if this view is wrong, and they were, in fact, a form of concubinage, then my opinion is that the children were "deemed to be legitimate," because the union was "deemed to be a valid marriage." The Ordinances of 1859 and 1870, however, now say definitely that no marriage shall be valid unless registered. Such unions, therefore, even if "deemed to be valid" before the Ordinances, could be so deemed no longer, and, consequently, the offspring of such unions could no longer be "deemed to be legitimate." This case, however, does not belong to that class.

As to the facts of this case, the appellant claims as the father of the deceased. His marriage was solemnized according to the customary observances, the bride being duly conducted to his house. The union would, therefore, appear to have been of the second class above referred to, and under the old Kandyan law the marriage would have been valid and the issue legitimate. But it was not registered. The father, therefore, can only claim to succeed to his son as an illegitimate son. But it is definitely laid down in the authorities (see *Nitinigandúwa, page 15*) that the father of an illegitimate child has no right of succession to his property. The appellant's claim, therefore, fails, and the respondent, who traces his claim through the mother, has the prior right.

In my opinion, therefore, the appeal should be dismissed, with costs.

DE SAMPAYO J.—

The question involved in this case is simple, and the answer, I think, is not difficult. It arises on the following state of facts. One Kiribanda died intestate in November, 1919, and the dispute is to the landed property which he had acquired in his lifetime and left at his death. His parents were the defendant and one Kirimenika, who married each other in 1886, according to custom, but did not register their marriage. Kirimenika predeceased Kiribanda about twenty-five years ago, and her nearest relative was Ranhamy, a half-brother on the mother's side. The plaintiff is daughter of Ranhamy, who died about fifteen years ago. She claims the property of Kiribanda as his sole heiress, while the defendant alleges that he is the heir of his son Kiribanda. The question for decision is, which of them inherits Kiribanda's property under the law applicable to Kandyans? The Commissioner has decided the issue

in favour of the plaintiff, on the ground that Kiribanda being illegitimate, the defendant, as his father, has no right of inheritance, and that the plaintiff being the nearest and only relative on the mother's side takes the entire inheritance.

It is contended on behalf of the defendant that the legitimacy of children must be decided according to Kandyan law, even though the marriage of the parents has not been registered as required by the Ordinance No. 3 of 1870. I do not think that this contention can prevail. It is true that the Kandyan law laid emphasis not so much on the form of marriage as on certain social views as to the propriety of the association between a man and a woman. But all those conceptions have been swept away by the Ordinance by making registration essential to the validity of a marriage, which, under the general principles of law, is the determining factor as regards the legitimacy of children. Consequently, children who might under the ancient Kandyan law be considered legitimate can no longer claim that status if the marriage of their parents has not been registered; and if under the Kandyan law illegitimate children in any given case have rights of inheritance, they have the same rights now, but not otherwise. In *Raja v. Elisa* (*Modder, page 510*) I observed that the Ordinance No. 3 of 1870 left the principles of inheritance unaffected. That judgment cannot be pushed further. I had there to consider the question whether the illegitimate child of a woman could inherit from his mother's mother, and for the reasons given it was held that he could. In arriving at that conclusion I alluded, incidentally, to the Kandyan conceptions of marriage and legitimacy for the purpose of showing, not that the child was legitimate, but that, though illegitimate, he was an heir of the grandmother. The Ordinance No. 3 of 1870, however, has the effect of bringing the terms " legitimate " and " illegitimate " as regards their significance into line with the general principle of law on the subject. That being so, the deceased Kiribanda must be taken to have been illegitimate, and the Kandyan law of inheritance must be applied in this case on that footing. I have no reason to modify the opinion I expressed in *Banda v. Banda*,[1] on the authority of the *Nitinigandawa*, that under the Kandyan law the father is not an heir to his illegitimate son in respect of the acquired property.

For these reasons I agree that this appeal should be dismissed, with costs.

Loos J.—

I have had the great advantage of perusing and considering the judgments of my Lord the Chief Justice and my Brother De Sampayo, with which I agree, and I find that there is nothing that I can usefully add thereto.

[1] *(1916) 19 N. L. R. 126.*