THE

NEW LAW REPORTS OF CEYLON

VOLUME VIII

KARONCHIHAMY *v.* ANGOHAMY.

1904.
October 18

D. C., Kandy, 6,563.

(In review, preparatory to appeal to H. M. in Council.)

Marriage—Legality of a man marrying a woman with whom, during the lifetime of his wife, he had lived in adultery.

Per MIDDLETON J., and SAMPAYO, A.J. (*dissentiente* MONCREIFF, A.C.J.).—It is not illegal in Ceylon for a man who had lived in adultery with a woman during the lifetime of his wife to marry such woman after the death of his wife.

Previous to the Placaat of 1674, such marriages were not forbidden unless there had been a promise during the lifetime of the innocent spouse, or unless they had been guilty of an attempt against such spouse's life.

The Placaat of 1674 prohibited such marriages absolutely, but it was enacted subsequently to the settlement of the Dutch in Ceylon, and there is nothing to show that that law was ever recognized or acted in Ceylon; nor has it been proved in the present case that the parties came within the prohibitions of the earlier law.

Karonchihamy v. Angohamy, 2 N. L. R. 276, not followed.

THE facts of this case are as follows:—

One Sinno Appu was married in community of property to one Babunhamy. While this marriage was subsisting, he lived with one Angohami (the first defendant), and by her had two children, the second and third defendants.

After the death of his wife Babunhamy, which happened on the 20th January, 1883, he married the first defendant and had two more children by her, the fourth and fifth defendants.

He died on 24th November, 1887, intestate.

T—J. N. B 6920—500 (4/51)

1904.
October 18.

During the lifetime of the intestate he made a deed of gift, on 19th April, 1880, granting five allotments of land to the first and third defendants, describing them as " my wife and her child."

The consideration for the gift was expressed to be an agreement between the donors and donees " that the said Angohamy should be obedient to me and render me every necessary assistance."

The deed provided that Angohamy was to possess the land during her life, and after that the above-said child and any other children which she may bear after this, and their descendants and administrators were empowered to possess the said land. Angohamy accepted the gift.

The present action was raised by the first plaintiff, the only child of the intestate by his wife Babunhamy, and the second plaintiff, as her husband, to have the deed of gift set aside as illegal, and to have it declared that the intestate and Angohamy were not lawfully married.

Several issues were developed in the pleadings, and the District Judge (Mr. J. H. de Saram) decided ten of them and reserved his order on the rest. His judgment was delivered on 21st January, 1895. Against this the plaintiffs appealed, and the appeal came on for hearing on 7th October, 1896, before Bonser, C.J., Lawrie, J., and Withers, J. Their lordships by their judgments of 26th January, 1897, varied the decree of the Court below and declared as follows:—

(1) That the marriage between Sinno Appu and Angohamy (the first defendant) was null and void, and that she was not entitled to succeed *ab intestato* to any part of his estate.

(2) That the second, third, fourth, fifth, and sixth defendants were not the legitimate children of Sinno Appu, and not entitled to succeed *ab intestato* to any part of Sinno Appu's estate.

(3) That the donees under the deed of gift of 19th April. 1880, made by Sinno Appu, were lawfully entitled to the title thereby conveyed.

The judgments of their lordships will be found reported in *2 N. L. R. 276-285.*

On the case going back to the Court below, the District Judge heard evidence on some of the issues agreed to on 13th June, 1894, and delivered judgment on 25th September, 1899, which was affirmed on appeal by the Supreme Court on 10th May, 1900. Aggrieved by this judgment the defendant, Angohamy, preparatory to an appeal to Her Majesty in Council, brought up the judgment in review before a Full Bench of the Supreme Court.

The case came on for hearing on the 23rd June, 1904, and was re-argued on 23rd August, 1904, before Moncreiff, A.C.J., Middleton, J., and Sampayo, A.J.

1904.
October 18.

Van Langenberg (with him *H. Jayawardene* and *Prins*), for appellants.—The question is whether a man after the death of his wife can marry a woman with whom, during the lifetime of his wife, he has been living in adultery. It is conceded that by the later Roman-Dutch Law such marriages were forbidden, but the disability was created by a *Placaat* of the 18th July, 1674. It is contended that this law was never introduced into Ceylon at least, the onus is on the respondents to show that it was, all the more as the *Placaat* was promulgated after the Dutch had established themselves in Ceylon. In support of the proposition that the whole of the Roman-Dutch Law was not in force here reference may be made to the case of *Wijeyekoon v. Goonewardene*, *2 C. L. R., p. 59*, where Mr. Justice Dias says: " The whole of the Dutch Law as it prevailed in Holland more than a century ago was never bodily imported into Ceylon. " Even if it be held that the *Placaat* was law here, it is submitted that it has been repealed by Ordinance No. 6 of 1847. Section 31 of the Ordinance says that a legal marriage between any parties shall have the effect of rendering legitimate the birth of any children who may have been procreated between the same parties before marriage, unless such children shall have been procreated in adultery. The proviso is meaningless, unless the parents can legally marry each other. If there can be no legal marriage, then why should the section refer at all to children procreated in adultery? It cannot be argued that the proviso has no connection with the previous portion of the section, but merely declares what the old law is, for then it must be explained why the Ordinance makes no reference to children born of an incestuous union. It is submitted that the section contemplates a case like the present one: the second and third defendants were born as the result of an adulterous intercourse; then Babunhamy, the wife, dies; the parents marry, and thereafter the fourth and fifth defendants are born. It is admitted that under the section the marriage of the parents has not the effect of rendering legitimate the second and third defendants. As regards section 55 of the Ordinance, it was necessary to enact it as the Ordinance does not affect (for example) Kandyan and Mohammedan marriages.

Dornhorst, K.C., for plaintiffs, respondents, relied on the Full Court judgment reported in *2 N. L. R. 276.*

Cur. adv. vult.

1904. October 18.

18th October, 1904. MONCREIFF, A.C.J.—

This was an administration suit. The first defendant is administratrix of the estate of the late Sinno Appu. The first plaintiff is Sinno Appu's daughter by his lawful wife now dead; the second plaintiff is her husband. The second, third, fourth, and fifth defendants are children of the first defendant by Sinno Appu.

The plaint is dated 31st January, 1893. From a judgment in the case dated 21st January, 1895, an appeal was taken to this Court, and the decision of the District Judge was varied in certain particulars. That appeal was heard by three Judges, and is reported in *2 N. L. R. 276.*

The case then proceeded, and the District Judge entered a decree on the 25th September, 1899, which was affirmed on appeal to the Supreme Court on the 10th May, 1900. This decision, by which the first plaintiff is declared to be the sole heiress of Sinno Appu, has been brought before us by the defendants for review preparatory to appealing to His Majesty in Council.

The following facts are material:—

In 1859 the deceased Sinno Appu, a native of Ahangama in the Galle District, settled at Rikillegasgoda in the Kandyan Provinces.

On the 2nd October, 1865, he married Babunhamy in community of property, and by her had a daughter, Karonchyhamy, the first plaintiff. In the lifetime of his wife he lived with Angohamy, the first defendant (who was of the Karawe caste), and from that connection the second and third defendants were born.

On the 20th January, 1883, Babunhamy died.

On the 2nd July, 1883, Sinno Appu's marriage with Angohamy was registered, and from their union after registration were born the fourth and fifth defendants.

On the 24th November, 1887, Sinno Appu died intestate, and Angohamy was appointed administratrix of his estate.

The question is whether the marriage registered between Sinno Appu and Angohamy was valid. If it was, then Angohamy, being Sinno Appu's wife from the 2nd July, 1883, and the fourth and fifth defendants being legitimate, are entitled to inherit *ab intestato*. It is not now contended that, assuming the marriage to be valid, the second and third defendants, born before marriage, were rendered legitimate by the registration.

By Roman-Dutch Law marriage could not be contracted by persons who had lived together in adultery. Therefore the children procreated between such persons, either before or after a marriage entered into by them, are by that law not legitimate, and they cannot inherit.

Voet (*Commentary on the Pandects, 1698, bk. 23, 2, 27*) says, in speaking of the *Placaat of* 1674: *Satius postea Ordinibus Hollandiæ visum fuit, edicto suo matrimonia hujus-modi in universum damnare atque vetare; ac re ipsâ contracta pro nullis habere, si forte crimen, initio matrimonii ignoratum, postea manifestum fiat. (Placito Ordinum Hollandiæ, 18 Julii, 1674, vol. 3, placit. Holl., pag. 507.)*

The non-introduction of this law in Ceylon, and particularly among the low-country Sinhalese, was faintly suggested in argument; but I regret to have to refer to the subject at some length, because the view of my brothers Middleton and De Sampayo differs from that taken by this Court in 1897, and I am not prepared to say that the latter is wrong.

Voet introduces the subject by saying that Papinian (the most celebrated of Roman jurists) held that no marriage could take place "*inter adulterum et adulteram;*" but he adds that such marriages had been *comprobatæ* (confirmed) by the Canon Law, so long as there had been, during the lifetime of an innocent spouse, no *fides matrimonii contrahendi* between the adulterous persons; and those persons had done nothing towards compassing the death of innocent spouses.

This opinion, he says, recommended itself to certain jurisconsults and theologians who were not attached to the religon of Rome; it was followed by Carpzovius, and was not disapproved of by Dutch practitioners. He cites Paulus Voet, Groenewegen, and the *Responsa* of the Dutch jurisconsults. Groenewegen *(Codex IX., 9, 27, 3)* says: *Porro ex hac lege colligitur quod jure civili cuiquam liceat uxorem ducere eam quam antea per adulterium polluit. Et hoc jure nostrates et Galli utuntur;* referring to authorities in support of his view, and also to the authority of the canons and theologians. To most of those authorities I have no means of referring. But Voet says that the Placaat of the States of Holland of 1674 was adopted in spite of the opinion he cites. The opinion was disputed. The *Placaat* is of itself a proof that the law decreed by it represented the stronger party; and Voet adds that the same law had been decreed by the Edict of the States-General of the 18th March, 1656, and the *Placaat* of the States of Zeeland dated the 18th March, 1666. He refers also to his own grandfather.

Holland was the second Province of the United Netherlands. The Provinces were united in 1579 by the Union of Utrecht; the Dutch East India Company was established in 1602; but Ceylon was not wrested from the Portuguese until 1656, the year in which the States-General issued the Edict mentioned by Voet.

1904. *October 18.* MONCREIFF, A.C.J.

Now the Roman-Dutch Law in force in Ceylon was the law of the Netherlands. History shows that on many subjects the Provinces were, in spite of the Union of 1579, anything but united. There were rival opinions as to the Common Law on this question—the intermarriage of persons who have lived in adultery. The *Placaat* of 1674, following the Edict of the States-General and the *Placaat* of Zeeland, settled that question; and thus we have a declaration of the Roman-Dutch Common Law as we find it in *Van Leeuwen*, *Voet*, and *Van der Linden*. But, if I understand the objection, we are to consider the question as it stood before it was settled in Holland, and to accept as our Common Law a view which was expressly rejected by Holland in 1674 as not being the Roman-Dutch Law.

In any case, however, it is obvious that proof of *fides matrimonii contrahendi* must be drawn from the acts of the parties. That consideration was one of the motives of the *Placaat* of 1674. But, applying to this case the law which Voet says was at one time favoured by sundry practitioners, jurisconsults, and theologians, I should say that the marriage between Sinno Appu and Angohamy was prohibited even by that law, because, the parties having lived together for years and registered their marriage a few months after the death of Sinno Appu's wife, there was *fides matrimonii contrahendi* during the period of adultery.

Van der Linden (*Juta, 3rd Edition, 1897, pp. 19, 30, 58*), writing in 1806, says of marriage between those who have previously lived in adultery with each other: " Such marriages are not only void but are also criminal, nor are they allowed by dispensation ".

The Roman-Dutch Law followed the Canon Law and made no distinction in favour of an adulterous connection between a married man and an unmarried woman. See *Van Leeuwen (Kotze), Vol. II., 305.* Voet, quoting among other authorities the Political Ordinance of 1580, says: *Coeterum uti jure divino atque Canonico, ita et moribus hodiernis, ligati cum solutâ æque ac soluti cum ligatâ adulterium est* (*Pand. XLVIII. 5, 7*).

Van Leeuwen (*Kotze, 1, 51*), writing in 1678, explains that the reason why children procreated in adultery could not be legitimatized was that " according to the Ecclesiastical Law there can be no marriage with the woman with whom we have formerly lived in adultery; and no favour of legitimation is conceded by the Government to those who were begotten in such disgrace." He refers to the Emperor's Edict of 1541 (20th October) and to the Ordinance of 1544 (19th May), Act. 28. He deals further at pages 337 and 425 with the incapacity of adulterine children to inherit.

Such being the Roman-Dutch Law on this subject, I think it was *primâ facie* part of the law administered in this Island under the Government of the United Provinces. The first paragraph of the Proclamation of 23rd September, 1799, relates to the "administration of justice and police in the settlements of the Island of Ceylon, now in His Majesty's Dominion, and in the territories and dependencies thereof." And the second paragraph declares that such administration "in the said settlements and territories in the Island of Ceylon, with their dependencies, shall be henceforth and during His Majesty's pleasure exercised by all Courts of Judicature, civil and criminal, magistrates, and ministerial officers, according to the laws and institutions that subsisted under the ancient Government of the United Provinces," subject to deviations and alterations specified in the paragraph.

The suggestion of non-introduction seems to be made because our archives do not show a formal adoption of the *Placaat* of 1674. Unfortunately nobody seems to know what has become of our records, and the materials left are of the vaguest. The fact that the Batavian Statutes were operative in Ceylon does not show what the Roman-Dutch Law in force in Ceylon was; they certainly did not embody the whole of the Roman-Dutch Law administered in Ceylon. The same may be said of the Political Ordinance of Holland of 1580. Sir Hardinge Giffard, Chief Justice, said in 5,629 and 9,790, D. C., Galle (reported in *Vanderstraaten's Reports, Appendix, xxvi, 1822*), that he wished "he had been able to discover the mode of adoption of the Statutes of Batavia as the law of Ceylon, or the nature of the authority of the Council of Batavia in legislating for this Island, but on his directing the Keeper of the Dutch Records to search the Secretary's Office for information on this subject, he reported that the clerks of the office informed him that the like inquiry had been made by his predecessor Sir Alexander Johnston, but without success. The endeavours to discover from the records of the inferior Courts or the recollection of the practitioners what the prevailing law was on the point (a question of succession) have been equally unsuccessful."

As for the Political Ordinance of 1580, no less than three dates are given for its introduction in Ceylon—1594, 1661, and 1758; but I have no reason to think that it was not operative in Ceylon for what it was worth from the settlement of the Island by the Dutch. I think there was no formal introduction in 1594 or 1661. In pursuance of a resolution of the Council of Ceylon of 20th December, 1758 (see *Vanderstraaten's Reports, Appendix, p. 1*), it was issued to the Courts for their "guidance and due observation,"

1904.
October 18.
MONCREIFF, A.C.J.

together with other papers which were not all consistent. This step was taken because there had been in Ceylon, as in Holland, two rival systems of succession, and the Colony desired a settlement; that is to say, Ceylon had been making use of both systems without, so far as I know, any special adoption of Ordinance, Proclamation, or *Placaat* on which they depended. In order to put the matter shortly, I would refer to the Address to the Court of Justice of the Fort by some of its members on 31st March, 1773 (see *Vanderstraaten's Reports, Appendix, p. xxvii*). A perusal will show how little is to be gathered from reference to the Batavian Statutes and the Political Ordinance of 1580. In particular it would appear from the passages printed at page xxx (1) that the resolution of 1758, which is said to have introduced the Letters Patent of the East India Company of 1661, and the Political Ordinance of 1580, ignored the Statutes of Batavia; (2) that the Colombo Court in 1773 acted upon the Statutes of Batavia in spite of the resolution of 1758. The question was judicially considered again in 1822 and 1871, and settled by Ordinance in 1876.

I cannot find any proof that the law of the *Placaat* of 1674 was not in force here, and I should be disposed to infer, from the fact that down to 1897 the point in question was (apparently) never raised, that the law of the *Placaat* was presumed to apply in Ceylon. If marriages of the kind in question were put forward as legal, surely some cases could be adduced. If there were none, if this law has never been challenged, the respondents cannot be expected to prove that the law was enforced. There is nothing to show that there ever was such a case.

I think it has been generally accepted that the Common Law of Ceylon is the Roman-Dutch Law as it prevailed in the Netherlands at the date of the Capitulation (1796). No doubt of this is suggested in the judgments of Bonsor, C.J., and Withers, J., in this case (*2 N. L. R. 276*). The same may be said of many other judgments of this Court.

The 2nd volume of Mr. Pereira's *Laws of Ceylon*, published in 1904, begins thus: "The Common Law of Ceylon is the Roman-Dutch Law as it obtained in the Netherlands about the commencement of the last century." In Volume I. (at page 2), I find the following passage: "a system of laws which continued to be in force in the Maritime Provinces since the capitulation is, as is shown below, what is now known as the Roman-Dutch Law; but, as to this law, it must be noted that legislation in Holland since the Capitulation could not be taken as having extended to Ceylon."

There is no higher authority on this subject in Ceylon.

I may refer also to *Thomson's Institutes* (*vol. I., p. 7*, and *vol. II., p. 11*). The latter passage runs as follows:—

"The general or, as it is popularly termed, the Common Law of Ceylon is obtained from treatises on the Roman-Dutch Law; that is, the Roman Civil Law added to or abrogated by the feudal customs and Federal or State statutes of the United Provinces of Holland. These variations, additions, and abrogations appeared not only in the statute books of Holland, but in respect of Dutch customs in judicial decisions, and in learned treatises of jurisconsults which bear almost the authority of those decisions. From this Roman-Dutch Law Dutch Feudalism and local customs must be largely subtracted, as well as other institutions peculiarly Dutch; so that the Roman-Dutch Law, as accepted in Ceylon, re-approaches the Civil law." The author adds that this law modified by statute and English law "extends to every inhabitant of the Island," except in certain privileged instances.

If Ceylon had been a British Colony it might have been said that this question was subject to the principle stated by Lord Blackburn in the *Lauderdale Peerage Case* (*10 L. R. App. C. 745*). But I am not aware that Ceylon or other countries colonized by the Dutch remained unaffected by the legislation of the United Provinces unless such legislation was introduced in them, and I believe that this case is covered by the Roman-Dutch Law, which, according to Voet, was favoured by many persons in Holland before 1674.

I have a difficulty moreover in thinking that the burden of proving the introduction of this individual law rests on the respondents. If it does, the application of Roman-Dutch Law in Ceylon may be considerably unsettled. As to its application to the low-country Sinhalese, the Dutch left the natives of Ceylon for the most part to themselves, but I think that their law prevailed in fact or by fiction in the parts which they settled, and that the area of that law naturally expanded as the settlements were enlarged. If it was no matter to them whether the Sinhalese married, it does not follow that their law (as distinguished from ceremonial) was not binding. It is very late in the day to discuss this point, because the Roman-Dutch Law has (in spite of the Charter of 1801, section 32, which was repealed by the Charter of 1833) continued to be in force in the Maritime Provinces since the capitulation.

The answers given in 1830 to His Majesty's Commissioners of Inquiry by Sir Richard Ottley, Chief Justice of Ceylon, 1828-1833, indicate so chaotic a condition of judicial matters in the early years of the British occupation that little can be inferred from it

1904. *October 18.* MONCREIFF, A.C.J.

as to what was done by the Dutch (see answer to question 5). In his answer to question 8 he enumerates the Courts instituted by the Dutch. From question 9 and the following questions I take these extracts:—

"The Roman-Dutch Law that prevailed in Ceylon before its conquest by the British was continued by the Charter as the rule both in civil and criminal matters.

"The customs of the natives are likewise part of the law, and as far as the *Mohammedan* inhabitants are concerned those customs are found in Koran and other Mohammedan collections. As far as the *Malabar* inhabitants are concerned, a small collection of customs has been compiled and denominated the *Thesavalamai.*"

There are still exemptions in favour of the customs of Mohammedans and Kandyans, and in favour of the *Thesavalamai.*

"These laws therefore consist partly of the old Roman-Dutch Law, partly of the customs of the natives, partly of the local statutes or regulations enacted in the time of the Dutch and also of the British. The Criminal Law is founded on the Criminal Law of the Netherlands as it existed antecedently to the conquest of the Island by the British, but various modifications have been introduced."

He speaks of the "old" Roman-Dutch Law, because shortly after the capitulation the Dutch discarded their old law in favour of the Code Napoleon. Sir R. Ottley goes on to say (question 10) that there is a compilation of the laws in force at the time of the conquest of the Island; but it appears that difficulties were placed in the way of those wishing to consult records, and the compilation is no longer available.

"In ordinary cases, when we proceed according to the Common Law of the Island, we apply the rules and maxims of the Roman-Dutch Law; *Van Lecuwen's Commentaries*, *Grotius' Introduction* and *Voet on the Pandects* are most usually quoted, but all books of authority among the Dutch are admitted as authorities. (Question 13.)"

Question 15.—"Are the Statutes of Batavia and the proclamations and provisional regulations of the Dutch authorities in Ceylon considered to be in force when not superseded by the enactments of the British Government; and which of the two Batavian Codes is received—*Van Diemen's* or *Van der Para's*?

Answer.—"The Statutes of Batavia are necessarily admitted, because the Government of that Island, having been superior to the Government of Ceylon, had power to modify or disallow the regulations of the latter. *Van der Para's* collection is considered of the greatest value."

Question 16.—" Are they often referred to in the Courts, and are they enforced in cases where they deviate from the provisions of the Roman-Dutch Law as expounded by the Dutch commentators?"

Answer.—" They must necessarily be admitted as paramount to all authorities when applicable to the present state of the Island."

The last answer may refer to the Statutes of Batavia and the proclamations and provisional regulations of the Dutch; but it was possibly given in reference only to the Statutes of Batavia. I do not find that it refers to any manuscripts or compilations of the law.

" Where the native laws and customs have not been compiled, we refer, if the subject of dispute arise among *Mohammedans*, to the most learned and best informed among them. In disputes among *Malabars* we should pursue a course nearly similar. But in other cases we consider the Roman-Dutch Law as the rule by which causes ought to be decided; and whenever that is silent, we must refer to the laws of Rome. (Question 18.)"

The natives of the Maritime Provinces thus fall into the category of " other cases."

" The laws applicable to property are very multiplied in Ceylon. The British have one Code, the Dutch another, the Mohammedans a third, the Malabars or Tamil inhabitants a fourth. The Sinhalese generally abide by the Dutch Law. The Dutch Laws of property are always applied where no other Code is prescribed. (Questions 71 and 72.)"

It seems to me that the answers to questions 18, 71, and 72 settle generally the point as to the Maritime Provinces.

The argument for the appellants was chiefly directed to the terms of Ordinance No. 6 of 1847 (sections 27, 31, and 55).

Section 55 was naturally repealed by Ordinance No. 13 of 1863, which came into force in March, 1867, for that Ordinance and No. 13 of 1859 altered the law which existed in 1847. Sections 27 and 31 were read as one with No. 13 of 1863, and were therefore in force at the date of the impugned marriage and down to their repeal by Ordinance No. 2 of 1895.

Section 27 dealt with connections between persons within the degrees of relationship prohibited in the section, and section 31 enacted that a " legal marriage " should render legitimate the children procreated between the parties before marriage, " unless such children shall have been procreated in adultery. " The Ordinance does not profess to deal with all prohibited marriages, or to repeal the law by which marriages between persons who have lived in adultery were regarded as void. Section 55 shows that it did not treat of or declare the whole law of marriage, and that (except

1904.
October 18.
MONCREIFF, A.C.J.

as affected by the Ordinance) the law remained as it was in every part of the Island. Even *Van Leeuwen*, whose Commentaries were published in 1678, and who mentions the disability of persons who have lived in adultery, does not speaks of the subject in dealing generally with obstacles to marriage. On the other hand, it was urged that, because incest is not and adultery is introduced in section 31, it was intended that there might be a "legal" marriage between persons who have lived in adultery. Incest had been already discussed in section 27, but the Ordinance makes no other mention of adultery except in reference to divorce, and from that it is inferred that the Legislature assumed that marriages of this kind were legal.

It is urged for the appellants that, if the Roman-Dutch Law had been in force, there would be at least a redundancy in the words "unless such children shall have been procreated in adultery," and possibly a repeal of the Roman-Dutch Law (if it was ever operative in Ceylon).

It is true that all the section says on the matter is that the celebration of a marriage between two persons shall not have the effect of rendering legitimate their children procreated in adultery before marriage, but it is said that it raises certain implications. A "legal" marriage is strictly one which is not only celebrated in a manner sanctioned by the law, but is also not prohibited by the law on considerations (for example) of age, affinity, or previous adultery. We have therefore to choose between the following alternatives:—

1. That in enacting section 31 of the Ordinance it was the intention of the Legislature to remove the disability resting upon persons who have lived together in adultery; or

2. That that disability was never introduced in Ceylon by the United Provinces, or at least has fallen into desuetude; or

3. That the Legislature in using the words "legal marriage," never intended or contemplated the possible implication that there could be a legal marriage between persons who have lived together in adultery.

The exception is slender material upon which to found a presumption that this disability was never recognized in Ceylon. I reject the theory of repeal. The incapacity of the parents for marriage was the reason why the children could never be legitimatized; it would be strange to remove the disability of the parents and affirm the illegitimacy of the children. Then although the use of the word "legal" is unhappy, is the inconsistency between the exception and the Roman-Dutch Law such as should by itself lead us to think that the law never existed in Ceylon? I am not willing to think so.

On this view the marriage of Sinno Appu and Angohamy registered on the 2nd July, 1883, was void, the fourth and fifth defendants are not legitimate, and the defendants take nothing by inheritance *ab intestato* from the estate of Sinno Appu. I am not convinced that the opinion of the majority of the Court reported in *2 N. L. R. 276* is wrong. I think this appeal should be dismissed, but my brothers are of a different opinion, and consequently the first, fourth, and fifth defendants are entitled to judgment on the footing that Angohamy (the first defendant) was legally married to the intestate in 1883, after the death of his first wife.

MIDDLETON, J.—

I have had the advantage of reading not only the judgment of my Lord, but also that of my brother De Sampayo in this case, and I have also in another case delivered a judgment in which I rather presumed that the Roman-Dutch Law as to the invalidity of a marriage between parties who had committed adultery and the consequent illegitimacy of their children and the disability of the surviving party to inherit was of acknowledged force and effect in Ceylon.

Neither in the case I have alluded to nor in the present case was any serious effort made at the Bar to support by historical research or inquiry the theory that this part of the Roman-Dutch Law had never been applied in Ceylon.

It was true that it was mentioned that no reported case could be discovered of the application of the *Placaat* of the 18th July, 1674, in Ceylon, but no attempt was made to go into the early history of the law in force under the Dutch previously to the capitulation to the English on the 15th February, 1796, to show in fact what were " the laws and institutions that subsisted under the ancient Government of the United Provinces " which His Majesty's Proclamation of the 23rd September, 1799, declared, subject to certain deviations and alterations, the administration of justice should be in accordance with.

In my opinion it is for those who assert, and rely upon, the operation of a Roman-Dutch Law promulgated since the capitulation of the Portuguese in 1656, where there is doubt whether that law is extant in Ceylon or not, to show beyond all question that it operates and applies.

At the Cape it was laid down by Chief Justice Villiers in *Seaville v. Colly (1891), 9 Juta 39*, that any Dutch Law which is inconsistent with well established and reasonable custom, and has not, although relating to a matter of frequent occurrence, been

1904. *October 18.*

MIDDLETON, J.

distinctly recognized and acted upon by the Supreme Court, may fairly be held to have been abrogated by disuse.

This appears to me to be a sound test or rule which might very well be followed in Ceylon, where the same question arises.

From *Voet Comm. ad Pand. 23, 2, 27*, it may be gathered, as Chief Justice Bonser said in his judgment *2 N. L. R., p. 278*, that such a marriage as this was not forbidden except a promise of marriage had passed between the guilty parties during the lifetime of the innocent spouse, or unless they had been guilty of an attempt against such spouse's life.

These circumstances do not apply to the present case, and therefore unless the *Placaat* came into force in Ceylon this marriage would be unobjectionable.

The capitulation of the Portuguese to the Dutch was on 11th May, 1656, and the *Placaat* bears date 18th July, 1674, and there is no evidence to show it has ever been distinctly recognized or acted upon in Ceylon.

Assuming the Dutch rule to be the same as the English in regard to the force and effect of laws of the old country in the new Colony, the *Placaat* unless specifically promulgated to have effect in Ceylon, may be assumed never to have applied here.

Again, it is not unreasonable to presume that in the last hundred years many such marriages must have taken place in Ceylon, but there is no record of the application of the *Placaat* to any of them.

I think it will be accepted also as true that the trend of modern opinion and thought is opposed to such restrictions, and that consequently even if it had ever been introduced into Ceylon on the test laid down by Chief Justice Villiers it may fairly be held to have become obsolete.

"The *Placaat* does not seem to be found in the Statutes of Batavia," says my Brother De Sampayo; and Mr. Cleghorn in his Minute of 1st June, 1799, on the administration of justice and of the revenue under the Dutch Government, states that justice was formerly administered partly according to the Dutch Laws, partly according to the Statutes of Batavia and to the ancient usages and institutions of the natives.

According to an extract from the Resolution of Council of Ceylon, dated 20th December, 1758, to be found in the Appendix to *Vanderstraaten's Reports*, it was resolved that certain Letters Patent, Articles of Instruction, &c., therein set out, and including the Political Ordinance of Holland dated 1st April, 1580, should be caused to be observed throughout the Island.

This Political Ordinance, which had been applied to the Dutch West Indies on 13th October, 1629, by order of the States-General

of the Netherlands, contains in Articles 4 and 6-13 regulations prohibiting marriages within certain degrees of consanguinity as void and incestuous, but reserves the force of the *Placaat* issued by His Imperial Majesty in the year 1540 respecting the contracting of marriages of persons under age and the penalties therein stated. The Ordinance goes on, in Articles 14-18, to forbid and ordain punishment for adultery as an offence and a crime. There is nothing in the Ordinance declaring any prohibition of marriage between persons who may have committed adultery.

It is not unreasonable to assume then that the framers of that Ordinance did not even deem it desirable to declare any such prohibition to have the force of law where that Ordinance was to be promulgated.

The law as to incest and prohibited degrees was as much the common law as the prohibition in question, and the law on the two former points is duly declared, but not on the latter, although the Ordinance declares the punishments to be incurred for adultery.

By the Charter of 1801, section 22, their laws and usages in matters of inheritance and succession to land, &c., were conserved to the Sinhalese and Mussalmans, and by section 52 the Supreme Court was bound to administer justice in the case of matrimonial and testamentary causes towards and upon all the Dutch inhabitants, &c., according to the laws and usages in that behalf in force at the time the said Settlements, &c., came into our possession, and towards British and Europeans according to the ecclesiastical law as the same was then used and exercised in the Diocese of London. By section 54 matrimonial causes between natives were excluded from the jurisdiction of the Supreme Court. By the Proclamation of 10th November, 1802, jurisdiction in matrimonial causes in the case of natives was assigned to the Provincial Courts. By Regulation No. 4 of 1806 all marriages between persons of the Roman Catholic religion which had taken place since 26th August, 1795, according to the rites of that Church were declared to be valid. By Regulation No. 7 of 1815 marriages of Protestant natives celebrated by Protestant Missionaries were declared valid. By Regulation No. 9 of 1822 provision was made for the registration of the marriages of natives of the Maritime Settlements and natives of India residing here, and it was declared (section 14) that Christian natives should not marry within certain degrees of consanguinity, in accordance with the laws which have prevailed and have been published by the Government of the United Provinces as follows.....

1904.
October 18.
MIDDLETON, J.

It was apparently not intended to apply these laws to natives other than Christians, who no doubt were left to their customs and usages, and it is not perhaps unreasonable to infer that this portion of the Roman-Dutch Law as regards marriage having been thus specifically applied to native Christians, it was not intended to make other portions of the same law applicable to them.

The Charter of 1833 repealed the Charters of 1801, 1810, and 1811 and established District Courts (section 20), but gave them (s. 24) no matrimonial jurisdiction specifically.

By Ordinance No. 6 of 1847 the Regulation of 1815 was repealed, saving the validity of marriages contracted thereunder; an age limit was enacted (section 26); the prohibited degrees of consanguinity were laid down (section 27); bigamy was constituted, excepting Mohammedans, and made an offence (section 29); the legitimation of children born previous to marriage by a legal marriage unless procreated in adultery enacted (section 31); and after reciting (section 55) that the Ordinance does not profess to treat of or to declare the whole law of marriage, it declared the law of marriage to be the same in every part of the Island in which this Ordinance came into force as it was therein before such time, "except in so far as such law shall conflict with the provisions of this Ordinance."

This Ordinance, by section 5, was only to take effect in the parts of the Island in which it was proclaimed, and re-enacted the necessity for registration (section 6).

As the Ordinance applied apparently to all persons in Ceylon, the effect of section 55 was to conserve the marriage laws and customs of the Kandyans and Mohammedans, who formed no small part of the population of the Island, in so far as they did not conflict with the terms of the Ordinance which apparently thus was to override them.

It would no doubt also have conserved any part of the Roman-Dutch-Common Law which had hitherto been in force.

It enacted nothing to constitute illegal a marriage between parties who had previously committed adultery, but under section 31 the offspring of adultery were debarred from legitimation by the subsequent marriage of their parents. The wording of section 31 is as follows: "From and after the notification in the *Gazette* of the confirmation of this Ordinance by Her Majesty, a legal marriage between any parties shall have the effect of rendering legitimate the birth of any children who may have been procreated between the same parties before marriage, unless such children shall have been procreated in adultery."

It seems to me that this very declaration of disability to become legitimate might show that the Legislature contemplated that a legal marriage might occur between persons who had lived in adultery, but declined to allow the offspring of such connection to be legitimized in any event.

This appears to me a more reasonable inference than that the Legislature intended by section 31 to declare in a latent and obscure fashion the Roman-Dutch Law under the *Placaat* of 18th July, 1674, to be in existence, because it refused to legitimize children procreated in adultery.

If a " legal " marriage did not include such a case as that before us, why were the words " unless such children shall have been procreated in adultery " added to the section?

If such a marriage was not a legal marriage it would be on the same footing as an incestuous connection, which cannot be legalized, and the offspring would clearly be illegitimate, and the words " unless such children shall have been procreated in adultery " would be redundant and unnecessary.

Ordinance No. 13 of 1863, which repealed Regulation No. 9 of 1822 and the whole of Ordinance No. 6 of 1847, except sections 1, 7, 10, 11, 18, 23, 26, 27, 28, 29, 30, 31, 32 and 33, specifically declared itself to apply to all cases of marriage other than Kandyan marriages and those contracted between persons of the Mohammedan faith.

As this Ordinance repealed section 55 of Ordinance No. 6 of 1847 it is not unreasonable to assume that it, together with the unrepealed sections, was considered to declare the whole law as regards marriages between persons other than Mohammedans or Kandyans.

Ordinances Nos. 8 of 1865 and 15 of 1877 have no bearing on the point before us, but Ordinance No. 2 of 1895, which was enacted to consolidate and amend the laws relating to marriages in the Island other than the marriages of Kandyans and Mohammedans, repealed the remainder of Ordinance No. 6 of 1847 and the whole of Ordinance No. 13 of 1863, but re-enacted by section 22 the terms of section 31 of Ordinance No. 6 of 1847 as to the legitimation by marriage of illegitimate children except those procreated in adultery, to which I have already applied an argument to show that it does not purport to declare the Roman-Dutch Law under the *Placaat* of 1674.

This Ordinance also makes incest an offence, and re-enacts sections 26, 27, 28, and 29 of Ordinance No. 6 of 1847, and further, having a new provision under section 23 as to consent to a marriage of a minor, it might in fact purport to contain, now that section 55 of Ordinance No. 6 of 1847 is repealed, the whole law

1904. *October 18.*

MIDDLETON, J.

as to marriage between persons other than Kandyans or Mohammedans.

In my view, therefore, in the first place there is *prima facie* no evidence to show that the law in *Voet, 23, 2, 27,* which might be deemed the Roman-Dutch Common Law, or the *Placaat* of the 18th July, 1674, were ever recognized or acted upon in Ceylon; that even if the so-called Common Law on this point were in force it would not be applicable to this case, inasmuch as the inculpating circumstances are not present here.

I feel that I have not had access to, nor have I even knowledge of, all the possible Dutch or other authorities upon which to found my opinion, but so far as I am able to judge I would hold in this case that the Roman-Dutch Law does not apply, and that the marriage between Sinno Appu with the first defendant is a valid one, and that the fourth and fifth defendants are consequently his legitimate issue.

DE SAMPAYO, A.J.—

The defendants have brought before us the appellate judgment of this Court dated 10th May, 1900, by way of review preparatory to an appeal to the Privy Council. It was conceded that the second, third, and sixth defendants could not maintain their position, and the argument was confined to the case of the first, fourth, and fifth defendants. The question submitted for determination is whether the decision in the earlier judgment of this Court of date the 26th January, 1897, and reported in *2 N. L. R. 276,* on the footing of which the appellate judgment was given, is correct, viz., that the marriage of Sinno Appu and the first defendant on 2nd July, 1883, was invalid in consequence of adultery committed by them during the lifetime of Sinno Appu's first wife Babunhamy, and that therefore neither the first defendant nor the fourth and fifth defendants, who are the issue of that marriage, could succeed *ab intestato* to the property of Sinno Appu.

There can be no doubt that under the Roman-Dutch Law, as stated in the passages cited from *Voet* and *Vanderlinden* in the judgment of the Supreme Court of 26th January, 1897, a marriage between parties who had previously committed adultery with each other was forbidden, and, if contracted, was in law null and void. But the questions which appear to me necessary to consider are whether the law as so stated prevailed in Ceylon under the Dutch Government, and whether, even if it applied to the Dutch colonists, it was extended to the native inhabitants of the Island. For it was only laws and institutions that subsisted in Ceylon under the ancient Government of the United Provinces that are

conserved and declared to be of force by the Proclamation of 23rd September, 1799. These questions are not free from the difficulties natural to obscure points of legal history, but I think that we are not without materials upon which a fair judgment may be formed. If these questions are answered in the affirmative. there arises the third question as to what is the effect on this point of British local legislation on the subject of marriage.

It is of course true as a general proposition that the Roman-Dutch Law prevailed in Ceylon under the Dutch Government. But I think it is more correct to say that what so prevailed was not the whole body of Dutch Laws, including legislation due to the peculiar circumstances of time and place, but only what may be called the Common Law of Holland, or so much of it as was suitable to local needs and circumstances, while this was supplemented from time to time, as necessity arose, by local legislation. This is in accordance with the English principle applicable to new Settlements, for, as it is generally put, colonists carry with them only so much of the English Law as is applicable to their own situation and the condition of an infant colony, though it may be difficult in particular cases to determine what is so applicable and what not. It would seem also that whenever it was desired to introduce any special statute laws of Holland into the Dutch colonies, this was done either by Orders or Instructions of the States-General or by a local legislative act. In illustration of the fact that a question as to whether a particular portion of the Dutch Law prevailed in a Dutch colony will be entertained, I may instance the case of *Thurburn v. Steward* (*7 Moore P. C. 333*), where the question whether the 6th Article of the *Placaat* of 1540 relating to marriage settlements prevailed in Cape Colony was discussed, though it was ultimately determined, upon the material before the Court, that it did. It is important to bear in mind that this question was raised in regard to a statute which was passed in Holland over a century before the occupation of Cape Colony by the Dutch, and which therefore might have been supposed beyond any question to have been introduced with the occupation. But the case will not only be much stronger but entirely different when an Imperial statute passed since the settlement of a Dutch colony is concerned. The English principle undoubtedly is that " no act of Parliament made after a colony is planted is construed to extend to it without express words showing the intention of the Legislature to be that it should " (*Rex v. Vaughan, 4 Burr. 2500*). I have no reason to think that the Dutch acted on a different principle; on the contrary, there are many indications that they acted on just the same principle. Now, the law which absolutely

1904.
October 18.

SAMPAYO, A.J.

prohibited marriages between persons who had previously committed adultery with each other was not a part of the Common Law of Holland, but was an innovation effected by a *Placaat* of the States of Holland dated 18th July, 1674. Both Vanderlinden (*Henry's Translation, page 79*) and Voet (*23, 2, 27*) refer to this *Placaat* as their authority for the statement of the law on this point. Mr. Dornhorst for the plaintiff, however, cited *Van Leeuwen Cens. For. 5, 26, 1, Comm. 4, 17, 7,* and also *Comm. 1, 7, 7,* as showing that such marriages were invalid even before the *Placaat* of 1674, which he argued was merely a declaration of the Common Law. I do not think that these references bear out the contention. The first two passages deal with the punishment of adultery as a crime, and we know even otherwise that not only adultery but even simple fornication was punishable under the Roman-Dutch Law. Curiously, Van Leeuwen in the above passage from the *Censura* refers to the English Law during the time of King Edward VI., by which adulterers, both lay and cleric, were punishable not only by forfeiture of property but by exile or perpetual imprisonment, but I am not aware that by reason of this marriage between persons guilty of this crime was regarded as invalid at any period of the English Law. In the second passage from the *Commentaries* Van Leeuwen is dealing with the subject of legitimation of bastards by favour of the Sovereign, but he says (to quote from *Kotze's Trans., vol. I., p. 51*), " Children procreated in adultery or incest cannot be legitimatized, inasmuch as according to the Ecclesiastical Laws there can be no marriage with a woman with whom we have formerly lived in adultery." The expression used in the old (Ceylon) translation of Van Leeuwen is " spiritual laws," but, whatever the right expression, Van Leeuwen appears to me (especially from Kotze's note on this passage) only to say that the Sovereign will not grant the privilege because the marriage, though not prohibited by the Civil Law of the country, is still contrary to ecclesiastical rule. In any case, none of these passages is a direct authority for the proposition that the law as administered in the Civil Courts, with which alone we are concerned, prohibited such marriage. On the other hand, Voet in the passage already referred to expressly says that previous to the enactment of the *Placaat* of 1674 such marriages were not forbidden unless there had been a promise of marriage between the guilty parties during the lifetime of the innocent spouse, or unless they had been guilty of an attempt against such spouse's life. The law, then, which absolutely prohibited such marriages was a pure creature of legislation in Holland in 1674, which is a date subsequent to the settlement of the Dutch in Ceylon.

1904.
October 18.

SAMPAYO, A.J.

But there is no proof that this *Placaat* was applicable to or prevailed in the Dutch Indies. On the contrary, I find that Voet, in a later section of the same book and title, after treating of various matters relating to marriage, says (*23, 2, 97*) that, with regard to the marriages of those who contract them in the territories subject to the West India Company, the same are governed by the Edict of the States of Holland of the year 1580. The reference is to the great statute generally known as tho Political Ordinance of 1580, which among other things provided for the due solemnization of marriages, determined the prohibited degrees of kindred, and contained penalties for the crime of adultery. The Political Ordinance was introduced into the West Indies by the Order of Government of 1629, which by its 59th Article declared that " in matters of matrimony, of rights of husband and wife, in succession *ab intestato*, and execution of wills, and everything relative thereto " the Political Ordinance should govern all persons in the West Indies. It might perhaps be thought that, when in section 97 above referred to Voet spoke of the Political Ordinance governing marriages contracted in the West Indies, he was merely referring to the matters he had discussed in the immediately preceding sections, viz., as to the consequences on property flowing from marriage, and did not have in view any special law relating to competency to marry, such as the *Placaat* of 1674 in question; but this is not so, because the Political Ordinance does not at all treat of the consequences of marriage on property or any similar subject. It is true that the Political Ordinance punished adultery as a crime, but the punishment of adultery does not in principle vitiate the subsequent marriage, because otherwise it would not have been necessary to enact the *Placaat* of 1674, inasmuch as adultery as well as the lesser form of sexual immorality was a crime by the general law of Holland even before the enactment of the Political Ordinance of 1580 (*Voet, 48, 5,* and *Mathœus De Crim. 48, 3, 5*). If the special enactment of 1674 introducing such an important change in the rules regarding capacity to marry was applicable to the Dutch Indies, it is strange that Voet in the same book and title should content himself with merely saying that the Political Ordinance, which did provide for certain incapacities, governed the marriage contracted in the West Indies. In this connection it must be remembered that the Political Ordinance, though some of the States of North Holland obtained an exemption from the rule of intestate succession therein laid down by a special *Placaat* in 1599, was and remained a general statute so far as regards marriages, and yet it required, as we have seen, to be expressly introduced into the West Indies. This appears to me

1904. *October 18.*

SAMPAYO, A.J.

to support the opinion I have above ventured to express, that a statute of Holland did not of itself have operation in the Dutch Indies unless so expressly introduced by the Supreme Government or adopted by the local authority. The importance of this whole matter lies in this, that the Dutch Government of Ceylon, by a Resolution of Council dated the 20th December, 1758, adopted the Political Ordinance of 1580, together with the 59th Article of the Order of Government of 1629 above referred to. For a translation of the Political Ordinance and the 59th Article of the Instructions and the Resolution of Government, see *Vanderstraaten's Reports, App., p. 1 et seq.* At the date of the *Placaat* in question, viz., 1674, the Dutch Indies had been already long provided not only with settled government but with a legislative machinery, so that there is less reason on this account to think that the *Placaat* would have operation in these Dutch possessions without express introduction. Now, the *Placaats* of Netherlands India throughout the whole period of Dutch domination from 1602 to 1811 are extant, but, so far as I am able to ascertain, neither in these *Placaats* nor in the Statutes of Batavia, which I may have occasion to refer to again, is there any indication that the *Placaat* of 1674 or anything similar to its provision was in force in the Dutch Indies.

It is worth while to consider for a moment what the Statutes of Batavia were. They were a code of laws first promulgated in 1642 by the Government of Batavia. From the preamble we gather that this code is a compendium of the Ordinances and Statutes previously passed by the Government of Batavia, and also of such portions of the Roman-Dutch Common Law as were after modification and expungement adopted as suitable for the welfare of the country, set down in proper order, each subject under its separate title, and the code was issued for observance by the Court of Batavia and by all Courts subject to its jurisdiction. It further provided that these Statutes should be added to and supplemented by incorporating the substance of future legislative enactments under the respective titles and headings. Accordingly we find that the subsequent legislative enactments were so embodied, so far as the copy available in Ceylon indicates, till towards the end of the eighteenth century. In these statutes are found, among other subjects, laws relating to marriage with the various cases of incapacity. Among the later legislative enactments incorporated therein are one of 20th March, 1766, by which lepers were prohibited from marrying except among themselves, and another of 9th September, 1766, by which marriages between Christians and Heathens and Moors were prohibited. But the Imperial *Placaat* of 1674 with which we are concerned, or anything

similar to its provision, is nowhere to be found. I have mentioned the instances of the newer legislation relating to the incompetency arising out of leprosy and difference of religion, for the purpose of showing that the Roman-Dutch Law as it prevailed in Holland was not considered necessarily applicable in Netherlands India, inasmuch as the cases of incompetency referred to were already part of the Roman-Dutch Law (see *Voet, 23, 2, 26*, and *Voet, 23, 2, 28*), and yet those points of law were re-enacted by the legislative authority of Netherlands India. Now it appears that the Statutes of Batavia were formally adopted in Ceylon by resolution of the Governor in Council on 3rd March, 1666, as shown by a statement to that effect in a *memoir* written by Heer Zwardekrwon, once Commandeur of Jaffnapatam in Ceylon and afterwards Governor-General of Batavia. For this information and an explanation of some of the contents of the Statutes, as well as for an examination of the Index to the *Placaats* of Netherlands India, I am indebted to the well-known Dutch scholar and Government Archivist, Mr. R. G. Anthonisz. We know further that Ceylon was subordinate judicially and politically to the Government of Batavia, and as we shall afterwards find there was an appeal from the High Court of Justice in Ceylon to Batavia. Mr. Berwick, late District Judge of Colombo, and one of the most eminent Roman-Dutch lawyers of Ceylon, says: "There is no doubt that the Batavian Statutes did have both judicial and political authority in Ceylon, though the precise nature and extent of that authority is as yet somewhat obscure," and in proof of this he adduces an instance in which an article of the Statutes of Batavia was expressly repealed in Ceylon. See note to his judgment in the *Wolfendahl Church Case* at page 84 of part III. of *Grenier's Reports for 1873*. The authority of Mr. Cleghorn and Chief Justice Sir Richard Ottley, whom I shall hereafter refer to, is to the same effect. The upshot of all this appears to me to be that the *Placaat* of 1674 did not prevail in Ceylon, and a marriage between adulterous persons was not forbidden.

When we come to the question whether, even assuming that the law forbidding such marriages prevailed among the Dutch Burghers, it extended to the native inhabitants subject to the Dutch Government, we are, I think, on firmer ground. The Dutch East India Company was a trading company, and it is a well-known fact that the Dutch, whether from policy or from indifference, troubled themselves very little about the native inhabitants, except perhaps in the case of the small number of native Christians who were in the service of the Government or resided in the forts, and left them more or less contemptuously to themselves. The

1904.
October 18
SAMPAYO, A.J.

Dutch, therefore, were not likely to extend to the native population in their integrity the personal laws by which they governed themselves, and least of all their peculiar and strictly Christian views of the marriage relation. Accordingly we find that native customs and usages were recognized, and that, even when Roman-Dutch Law was in any degree applied, it was so applied with such modifications and qualifications as were suitable to the people.

The Statutes of Batavia above mentioned, according to Mr. Cleghorn and Chief Justice Sir Richard Ottley, were in operation in Ceylon under the Dutch Government. Mr. Cleghorn was Secretary to Government in the very early days of the British occupation, and appears to have been entrusted with the task of making an inquiry into the Dutch administration of the Island. He wrote a report known as "Cleghorn's Minute," dated 1st June, 1799. The full report appears now to be not forthcoming, but long notes from it are now extant, and an extract therefrom I find given in Pereira's *Institutes of the Laws of Ceylon, vol. I., p. 12.* (The date assigned in these *Institutes* to the Statutes of Batavia is 1749, which I think is a mistake for 1642, apparently due to the fact that the notes of the Minute erroneously make Cleghorn speak of the Statutes as having been issued "half a century ago," unless the reference is to a later edition of the Statutes.) For these notes from Mr. Cleghorn's Minute see the *Ceylon Literary Register, vol. VI., p. 43.* Now, Mr. Cleghorn's account of the Statutes is: "These statutes by altering and modifying the jurisprudence of Holland endeavoured to reconcile the Government of the Company to the spirit of the natives." This appears to me further to support the view that the Roman-Dutch Law in its original integrity was not applied to the natives of the Dutch Settlements in the East. Mr. Cleghorn is a valuable authority on this point, and as Secretary to Government not only signed the Proclamation of 23rd September, 1799, which conserved the law as administered under the former Government of the Dutch, but probably had much to do with the framing of it as well as of the Charter of 1801, which almost immediately followed.

Now, this Charter (clause 31) provided for the continuance of the jurisdiction hitherto exercised by the *landraad* in all suits, causes, and matters between natives, and further provided (clause 32) that in the case of the Sinhalese natives their inheritance and succession to property and all matters of contract between them should be determined by the laws and usages of the Sinhalese. This Charter was repealed by the Charter of 1833, but the above provision is important as indicative of the sparing application of the pure Roman-Dutch Law to the natives, for it is quite clear

that this recognition of native laws and usages was a continuation of the practice under the Dutch administration.

Sir Richard Ottley, Chief Justice of Ceylon, in his replies to the Royal Commission of Inquiry of 1830, after referring to various matters relating to the Courts and administration of law, states: "The customs of the natives are likewise part of the law," adding that as regards the Mohammedans and Malabars their customs are to be found in the Mohammedan collections and in the *Thesavalamai* respectively. He winds up the whole matter thus: "These laws therefore consist partly of the Roman-Dutch Law, partly of the customs of the natives, partly of the local Statutes or Regulations enacted in the time of the Dutch and also of the British." In answer to a further question Sir Richard Ottley said: "There is a compilation of the laws in force at the time of the conquest of the Island, and many manuscript laws are deposited with the Keeper of the Dutch Records." I am afraid these compilations and manuscripts are not now to be found, and they have at least not been available to me. The question No. 16 was significant, and was as follows: "Are they often referred to in the Courts, and are they enforced in cases where they deviate from the provisions of the Roman-Dutch Law as expounded by the Dutch commentators?" And his reply was: "They must necessarily be admitted as paramount to all authorities when applicable to the present state of the Island." Sir Charles Marshall, then Puisne Justice and afterwards Chief Justice, in his report to the same Commission of Inquiry, speaks of the native laws and usages in the same way. These references are sufficient, though there are others, to show that in endeavouring to find what are "the laws and institutions that subsisted under the ancient Government of the United Provinces" as regards the native inhabitants, we should not have recourse solely to the Roman-Dutch Common Law, and much less to the Legislation in Holland enacted since the occupation of Ceylon by the Dutch. As an illustration of the practical application of the native laws, even since the British occupation of Ceylon, I may refer to a case of 1835 reported in *Morgan's Digest, p. 57*, where the Supreme Court remitted the case to the District Court of Kalutara for further consideration of a point as to dowry and inheritance "after consultation with those best acquainted with the Sinhalese law of inheritance." If this were so in the case of such a subject as inheritance, much more would the Roman-Dutch Law give way to native laws and usages in matters relating to personal status, rights, and disabilities. Accordingly we find Sir Charles Marshall saying (see *Marshall's Judgments, p. 391*) that "on all questions

1904.
October 18.
SAMPAYO, A.J.

arising between natives on matters of property, inheritance, marriage, legitimacy, or any other civil rights, if there be no express legislative enactments on the point in dispute, the Court must decide according to the customary law, and for that purpose must inquire into the custom not only of the districts but also of the class to which the litigants belong"; and again he says (*p. 396*) that even as regards the maritime provinces "the native inhabitants are so far to be excepted from the operation of the Roman-Dutch Law that in questions of inheritance, marriage, and other subjects connected with national usages.....it is those customs and not the Law of Holland that ought to prevail." I do not say that from these authorities or any other source of information a particular native custom authorizing the marriage of adulterous persons can be shown to have existed, but I think they fairly lead to the conclusion that the peculiar and narrow view of the Dutch on this subject was unsuited to native ideas of the time; that the legislation of Holland was never applied to the native inhabitants, the vast bulk of whom were non-Christian; and that the burden of proof, if I may so put it, is on those who assert the contrary.

If such then was the distinction in the law as it was applied to the Dutch or Burghers themselves and the native inhabitants, we find a corresponding distinction in the constitution and jurisdiction of the Courts of Law. I take the following particulars from Cleghorn's Minute and Sir Richard Ottley's replies already mentioned. Under the Dutch Government there was first the *Hof van Justitie*, or the Court of Justice, which exercised jurisdiction over Europeans and their descendants and over the native Christians residing in the Forts, with an appeal from its decisions to Batavia, but as, according to Mr. Cleghorn, "a few individuals" only among the Sinhalese and Malabars were Christians, it may be said that this Court was intended practically for the Dutch and the Burghers alone. Then there was the *Landraad*, or Country Council, for the determination of suits where the natives were concerned, with an appeal to the *Hof van Justitie*. Besides these Courts there was a *Weeskamer*, or Orphan Chamber, for the administration of 'orphans' property for the Dutch and their descendants, and a separate *Boedelkamer* for the estates of the orphans of natives. Further, it is interesting to note that the *Landraads* were composed largely of native officials. For instance, the *Landraad* of Colombo consisted of the Dissawa (who was President), the Fiscal, the Chief of the Mahabedde, the Thombu Keeper, the Maha Mudaliyar, and the Mudaliyar of the Dissawa. These were the permanent judges, but it appears that sometimes a few other persons were selected from among the junior merchants

and bookkeepers to act as judges occasionally. The permanent judges, excepting the Dissawa and perhaps the Fiscal, were native officials, and without any professional knowledge of the law. It would be strange if this singular Court knew or were able to apply the intricacies and refinemets of the Roman-Dutch Law to the native inhabitants of the Island.

Assuming, however, that the prohibition of marriages between persons who have committed adultery extended to the natives under the Dutch rule, there remains the question whether it continued to have any operation under the British Government. To begin with, after the British occupation adultery ceased to be a crime. It has been held that, as the result of the early Proclamations and the Charter of 1801 the whole of the Dutch criminal jurisprudence was swept away. See *Regina v. John Mendis*, *5 S. C. C. 47*. The opinion of Chief Justice Sir Hardinge Giffard therein cited (*Ramanathan's Reports, 1820-1833, p. 80*) was based upon a principle which has a material bearing upon the present inquiry; for the eminent Chief Justice, who was dealing with the privilege of a witness from arrest, after referring to the Charter of 1801, which authorized " such deviations, expedients, and useful alterations (from the Roman-Dutch Law) as shall be either absolutely necessary and unavoidable or evidently beneficial and desirable," proceeded as follows: " Such deviations, expedients, and useful alterations have been introduced in a variety of ways, some by Regulation of Government, some by this Charter itself and the two later Charters. Some have become absolutely necessary and unavoidable, and others have been so evidently beneficial and desirable as to have been adopted as a matter of course." In this and other passages in the judgment the Chief Justice was defending the Supreme Court from the imputation that the Roman-Dutch Law was being disregarded and superseded by the decisions of the judges. He therefore appealed to the obvious intentions of the Charter and the early Proclamations, and he showed by examples that much of the Roman-Dutch Law was impliedly, though not expressly, repealed.

In the light of the principles enunciated in the above judgment it is important to notice the actual legislation on the subject of marriage. The Charter of 1801, which established the Supreme Court of Judicature, conferred jurisdiction on that Court over all testamentary and matrimonial causes (section 52), and provided that in regard to the Dutch inhabitants those causes should be determined according to the Dutch Law as it prevailed at the time of the British occupation, and in regard to the British and Europeans according to the Ecclesiastical Law exercised in the Diocese

1904. *October 18.*

SAMPAYO, A.J.

of London (section 58). It expressly prohibited the Supreme Court from exercising jurisdiction in matrimonial causes in respect of the natives of the Island, but it did not provide what law should be administered in the case of natives and by what Court. The omission was supplied by the Proclamation of 10th November, 1802, by which the jurisdiction in matrimonial causes in the case of natives was assigned to the Provincial Courts (corresponding to the old *Landraads*), and it was further provided that all such matrimonial causes, contests, suits, and business should be determined according to the laws and usages of the native sect or caste of the parties. The Charter and Proclamation above referred to were repealed by the Charter of 1833, but I do not think it is too much to say here that early British legislation followed closely the Dutch administration, and that here again we are furnished with an indication that the Roman-Dutch Law of Marriage was not extended to the native inhabitants.

I need not refer to the other legislative enactments prior to the Ordinance No. 6 of 1847 and the amending Ordinance No. 13 of 1863, which are the Ordinances applicable to the marriage between Sinno Appu and the first defendant. The sections most discussed at the argument were sections 31 and 55 of the former Ordinance. The grammatical construction of section 31 seems to me to involve the necessity of holding that the Legislature considered a marriage between persons who had previously committed adultery was "a legal marriage," and in this section "legal marriage," I think, means a valid marriage not only in respect of formalities, but also in respect of competency of the parties to the contract. It is noticeable that neither of these Ordinances expressly conserves the Roman-Dutch Law in matters not provided for, but much is made of section 55 of the Ordinance No. 6 of 1847, which declares that the Ordinance does not profess to declare the whole law of marriage, and enacts that "the law of marriage shall be deemed and taken to be the same in every part of the Island in which the Ordinance shall come into force as it was therein before such time, except in so far as such law shall conflict with the provisions of the Ordinance." It is argued that this section was intended to preserve the Roman-Dutch Law. If so, why did it not say so in so many words, and why was it necessary to provide for it in this round-about fashion? I think this section is capable of a simpler explanation. The Ordinance on the face of it is a general Ordinance applicable to all persons throughout the Island, and did not provide, as the later Marriage Ordinances did, that it should not apply, for instance, to Kandyans and Mohammedans, and it seems to me not unreasonable

to suppose that the section intended to conserve the special laws applicable to such persons. I am the more inclined to think so, because, when Ordinance No. 13 of 1863, which was to be read as one Ordinance with the Ordinance No. 6 of 1847, expressly excluded Kandyan and Mohammedan marriages from the operation of the Ordinance, section 55 of the Ordinance 6 of 1847 was found to be no longer necessary and was accordingly repealed. Otherwise, how is the repeal to be explained when the very argument is that this section was intended to preserve the Roman-Dutch Law? Further, if the argument is valid, then it seems to me to follow that the Roman-Dutch Law of Marriage was swept away in 1863 by the repeal of the section. The consequence of either view of section 55 of the Ordinance No. 6 of 1847 is that at the date of the marriage between Singho Appu and the first defendant the Roman-Dutch Law was no longer in force and that their marriage was therefore valid.

Moreover, if once you admit the incompetency arising from previous adultery to exist, it appears to me that you must admit much more. For you must admit that Christians cannot marry Jews, Mohammedans, or Heathens, and that lepers cannot marry healthy persons, inasmuch as these and other cases are mentioned by Voet and Vanderlinden as prohibited marriages. But I do not suppose that these marriages will be so regarded now under our law. It may however be said that the Roman-Dutch Law relating to these prohibited cases has been impliedly repealed or has fallen into desuetude. But if you once begin thus, I do not know where you can stop or why you should draw the line at the law prohibiting marriage between persons guilty of adultery.

In this connection it is worthy of notice that while, since the decision under consideration in 1897, several cases have been brought in our Courts on the footing of the law declared in that decision, there is no single discoverable case touching this point throughout the whole of the preceding century of British administration, and I think the doctrine of desuetude can be applied to this point of Roman-Dutch Law with as much force as to any other. Nor does the holding of the Privy Council in the *Le Mesurier Case* (*64 L. J. P. C. 97*), that the matrimonial law of European residents in Ceylon is the Roman-Dutch Law, militate against the suggestion that the Roman-Dutch Law on this particular point does not prevail in Ceylon. In the first place, the Privy Council judgment was concerned with the question of jurisdiction only, and in the next place, the Privy Council only decided generally that by reason of the Proclamation of 23rd September, 1799, the "laws and institutions" under the Dutch Government prevailed in Ceylon, but did

1904. *October 18.*

SAMPAYO, A.J.

not profess to lay down what those laws and institutions were or to deal with the question whether any of them has been impliedly or expressly repealed or has fallen into disuse.

I regret that I have dealt with this matter at such length, but I have considered that I should fully state the reasons for the opinion which I have formed. The reasons I have given lead me to the conclusion that the marriage between Sinno Appu and the first defendant was not invalid under our law, and that the first defendant and the fourth and fifth defendants are legitimate heirs of Sinno Appu and entitled to succeed to his estate along with the first plaintiff, and I am for setting aside the appellate judgment of 10th May, 1900, with costs in both Courts, and for sending the case back to be dealt with on that footing.