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RABÔT *et al v.* DE SILVA *et. al.*

D. C., Colombo 14,923.

Marriage between persons who had lived in adultery—Their capacity to take under each other's wills—Civil Procedure Code, s. 772—Right of respondents to support, in appeal, decree on grounds decided against them by District Judge—Presumption as to paternity of child of married woman—Impossibility of access.

Although under the Roman-Dutch Law persons who have lived in adultery with each other cannot take under each other's will, that disqualification is according to the law of Ceylon removed by the marriage of those parties, and thereafter they may, like other spouses, take from each other either by will or *ab intestato*.

Defendants A and B claimed certain shares of the estate of C under his will. The District Judge held that they were not entitled to these shares, inasmuch as they were children of C born to him in adultery, but that by the *jus accrescendi* these shares vested in defendant D, a co-devisee, and dismissed the plaintiff's claim. The plaintiff's appealed.

Held, that on this appeal it was competent to defendants A and B, notwithstanding that they themselves had not appealed, and notwithstanding that they had filed no objections under section 772 of the Civil Procedure Code, to challenge the District Judge's decision as to their paternity, and to contend that they were not adulterine bastards, and to support the decree appealed from by claiming the shares devised to them on that ground.

Sopi Nona v. Marsiyan (*6 N. L. R. 379*) followed on the question as to whether, in order to rebut the presumption that the father of a married woman's children is her husband, impossibility of access between husband and wife or impotency should be proved.

IN this case the paintiffs claimed an undivided fifth share of the estate of one Vincent Perera, who had made a will devising his whole estate to the first and second defendants to be

held in trust for the third, fourth, fifth, sixth, seventh, and eighth defendants. Vincent Perera had lived in adultery with the third defendant during the lifetime of her husband, Salman, and had subsequently gone through a ceremony of marriage with her. The fourth, fifth, and sixth defendants were born to the third defendant before such marriage. The eighth and ninth defendants were to be maintained by the third defendant out of the share that she was to get under the will.

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For the plaintiffs it was contended that the fourth, fifth, and sixth defendants being the issue of the adulterous intercourse between Vincent Perera and the third defendant, neither they nor the third defendant could legitimately take under his will, and that his property therefore devolved on his heirs *ab intestato*, of whom the second plaintiff was one.

The District Judge held that the third defendant had been living in adultery with Vincent Perera, and the two could not therefore contract a valid marriage, nor could the third defendant take under the will of Vincent Perera.

As to the fourth, fifth, and sixth defendants, it was at first contended for the defence that they were the children of Vincent Perera by the third defendant; that Salman was not the husband of the third defendant; and that the third defendant never lived in adultery with Vincent Perera, but subsequently the contention was that the third defendant was the wife of Salman, and that the fourth, fifth, and sixth defendants were the issue of the third defendant by Salman.

The District udge held that impossibility of access had not been shown between Salman and the third defendant before she conceived the fourth defendant, and that the fourth defendant was therefore to be presumed to be the child of salman, but as regards the fifth and sixth defendants he held that the evidence showed that they were the children of Vincent Perera born during his adulterous intercourse with the third defendant. On these grounds he held that the devise to the fourth defendant was valid, and that to the third, fifth, and sixth defendants invalid, but he further held that the shares devised to the third, fifth, and sixth defendants vested by the *jus accrescendi* in the fourth defendant, and dismissed the plaintiffs' claim.

The plaintiffs appealed.

The case was first argued before Wendt, J., and Middleton, J., by Walter Pereira, K.C., appearing with Dornhorst, K.C., for the appellants, and Sampayo, K.C., for the respondents, and their lordships delivered judgments in which they held that it was not open to the fifth and sixth defendants to contend that they

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were not the children of Vincent Perera, inasmuch as they had neither appealed against, nor taken objection, under section 772 of the Civil Procedure Code, to the ruling of the District Judge, on the evidence, that they were the children of Vincent Perera; that the shares devised to these defendants did not vest in the fourth defendant by the *jus accrescendi*, but that the will having provided that after the death of these devisees the shares devised to them should be the property of their children, the trustees were to hold these shares in trust for these children.

Counsel having pointed out that their lordships had dealt with a point that had not been argued in appeal, namely, whether a person, while he cannot make a valid devise of property to his children born in adultery, can make such a devise to the children of such children, these judgments were recalled, and the case set down for re-argument.

Walter Pereira, K.C. (appearing with *Dornhorst, K.C.*), for appellants.—On the question decided against the appellants in the recalled judgments, namely, whether a person can make a valid devise in favour of the children of his adulterine bastards, *Voet 28, 2, 14* is in point. Here he deals with the right of incestuous and adulterine children to take under the will of their parents. He says that while under the Roman Law they could take nothing, the Roman-Dutch Law gave them the right to take only so much as was necessary for their maintenance. He then goes on to say that what is stated as to incestuous children extends to grandchildren "proceeding from a tainted root", whether they were legitimate children of an incestuous child or incestuous children of a legitimate child. No doubt that in these latter remarks he does not expressly refer to children whose birth is tainted by an adulterous union, but it is clear from the context that Voet is dealing throughout the title with children of a union condemned by law, and that he intends that what he says about incestuous children should apply to adulterine bastards as well. This is practically the only point decided in the recalled judgments against the appellants, but he (Mr. Pereira) took it that the whole case had to be re-argued, and he would proceed to the other points argued before. It is not open to the defendants to attack the District Judge's decision that the fifth and sixth defendants were the children of Vincent Perera. They had not appealed from it, and no objection had been taken to it under section 772 of the Civil Procedure Code, and he (counsel) submitted that the point had been fully considered and decided against the respondents in the recalled judgments.

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Then, as regards all three children of the third defendant, the evidence shows that Salman had no access to her after she began to live with Vincent Perera. It is not absolutely necessary to prove impossibility of access. Our law does not require it, nor is it a requirement under the English Law. Our law on the subject is contained in section 112 of the Evidence Ordinance. That section provides that a person born during the continuance of a valid marriage between his mother and any man is conclusive proof that he is the child of that man, unless it can be shown that that man had no access to the mother at any time when such person could have been begotten; and as it has been held by the Indian Courts (see *The Law of Evidence* by Ameer Ali and Woodroffe, p. 670), the fact that there was no such access may be proved by means of such legal evidence as is admissible in every other case in which it is necessary to prove a physical fact. Under the English Law, as laid down in the *Bambury Peerage Case* (*1 Sim. & S. 153.* See *Morris v. Davies*, *5 Cl. & Fin. 248*), the presumption referred to above may be rebutted by evidence of impotency and non-access. It may also be rebutted by all those circumstances which may have the effect of raising a presumption that the child is not the issue of the husband. The expression " non-access " here was, no doubt, given by Lord Redesdale the meaning impossibility of access, but that was in view of what followed so as to distinguish the evidence of " non-access " first referred to from the evidence of the " circumstances " referred to later. There is thus no reason to take over the definition of " non-access " given by Lord Redesdale and assume that, when our Evidence Ordinance required that it should be shown there was no access, it meant that impossibility of access should be shown. The case of *Sopi Nona v. Marsiyan* (*6 N. L. R. 379*), is, however, against the appellants. Anyway, it is contended that as regards the fifth and sixth defendants impossibility of access has been established and as regards the fourth defendant it is clear that the circumstances show that access to the third defendant on the part of Salman was highly improbable. If, then, the fourth, fifth, and sixth defendants were adulterine bastards of Vincent Perera and the third defendant had lived with him in adullery, none of them could take under the will of Vincent Perera either directly or indirectly through trustees. Counsel cited *Van Leeuwen's Com., Kotze's Trans, vol. I., 337 ; Maas. Grot. 133 ; Grot. 2, 17, 6 ; Vander Linden, 1, 9, 4 ; Van Leeuwen's Com., Kotze's Trans, vol. I., p. 338 ; Morice on English and Roman-Dutch Law, p. 259.*

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Then as to the *jus accrescendi* which the District Judge speaks of, that has been practically abolished by section 20 of Ordinance No. 21 of 1844. Even under the Roman-Dutch Law, inasmuch as the third, fourth, fifth, and sixth defendants were given separate shares, that is to say, a specific one-fifth share each, there could be no *jus accrescendi* (see *Morice, p. 287, citing Voet, 30, 1, 59—62*).

Then, the District Judge has held that the present action was one in the nature of a *querela de inofficioso testamento*, and it was competent to only such as were entitled to a legitimate portion, and the plaintiffs were not such persons. It is submitted that the present action is not in the nature of a *querela*. The right to legitimate portions was abolished by section 1 of Ordinance No. 21 of 1844, and the proceeding known as the *querela de inofficioso testamento* is not now open to anybody. This action is not such a proceeding. It is merely an action for declaration of title as against the devisees under the will on the ground that, the devises being invalid, the plaintiffs have become entitled to a share of the estate by intestate succession.

Van Langenberg (with him *E. W. Jayawardene*), for respondents.—In the passage cited from *Voet* by Mr. Pereira (*28, 2, 14*), at the place relied upon, Voet speaks of incestuous and not adulterine grandchildren. As to the necessity of showing impossibility of access to rebut the presumption that the husband is the father of the wife's offspring, it is submitted that the case of *Sopi Nona v. Marsiyan* is in point, and, being a judgment of the Collective Court, is binding until reversed by the Privy Council. The evidence showed that not only in the case of the fourth defendant, but in the case of the fifth and sixth defendants as well, Salman had no means of access to his wife, the third defendant. It was competent to the respondents to raise this question as regards the fourth and fifth defendants in appeal under section 772 of the Civil Procedure Code. True, no appeal has been taken from the District Judge's finding that as regards the fourth and fifth defendants a case of impossibility of access had been made out, but it is competent to the respondents to urge that the evidence showed that there was no impossibility of access, and that on that ground the decree could be sustained. Since the first argument of this appeal the Supreme Court has held in 291, D. C., Kandy, 6,563 (*8 N. L. R. 1*), that a man can contract a valid marriage with a woman with whom he had lived in adultery. If then the third defendant and Vincent Perera were to be regarded as wife and husband, they could succeed to each other *ab intestato* under Ordinance No. 15 of 1876, and *a fortiori* they could take under each other's wills.

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Pereira, K.C., in reply.—The judgment in the Kandy case cited by the other side is still open to revision by the Privy Council. Anyway, all that was decided there was that a valid marriage could be contracted by persons who had lived in adultery. *Non constat* that they can take under each other's wills. The provision of the Roman-Dutch Law that persons who had lived with each other in adultery could not take under each other's wills was intended as a punishment to them, and to discourage illicit intercourse of that sort. So that, even if marriage between such parties has been legalized, there is no reason to assume that the disability to take under will or by succession *ab intestato* has been removed.

Cur. adv. vult.

25th January, 1905. MIDDLETON, J.—

In this case the second plaintiff was the wife of the first plaintiff, and niece and heir-at-law to one-fifth of the estate of Vincent W. Perera, who died on 28th July, 1900. The first and second defendants were executors under the will of Vincent Perera, and husbands of the fourth and fifth defendants, who, together with the sixth defendant, were children of Justina, the third defendant, who was the widow of Vincent Perera. The seventh defendant was the husband of the sixth defendant, and the eight and ninth defendants were the adopted children of the deceased Vincent Perera.

The action was brought to vindicate the second plaintiff's right, as a daughter of one of the deceased's five brothers, to an undivided one-fifth of the estate of Vincent Perera as against the third; fourth, fifth, sixth, eight, and ninth defendants, and for a declaration that the bequest to his widow under the will of Vincent Perera, dated 14th November, 1899, should be declared null and void on the ground that the third defendant before marrying deceased had lived in adultery with him, and that the fourth, fifth, and sixth defendants were begotten in adultery.

It was at first denied by the defendants, but subsequently admitted by them, that the third defendant was married to Salman Appu on the 26th December, 1859; that Salman Appu died on the 13th April, 1889; that fourth, fifth, and sixth defendants were born in the lifetime of Salman Appu; and that Vincent Perera's marriage with Justina was registered on the 13th July, 1889.

It was alleged by the plaintiffs, and denied by the defendants, but held proved by the District Judge, that in the lifetime of Salman the third defendant lived in adultery with the deceased Vincent Perera; that Salman was the father of the fourth defendant and that Vincent Perera was the father of the fifth and sixth defendants born to the third defendant before his marriage with her.

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The eighth and ninth defendants were children of one Siman, a deceased child of the third defendant and Salman Appu.

The will of the deceased bequeathed all his movable property to the third defendant described as his wife, and devised all his immovable property to the first and second defendants in trust for the use and benefit of his wife the third, and so-called daughters, the fourth, fifth, and sixth defendants.

The trustees were directed to pay one-fifth of the rents, income and profits to the wife and each of the said daughters, and the remaining one-fifth was to form a fund, which, after paying for repairs and taxes, was to be invested in land and the income divided equally among the wife and said daughters. The third defendant was required out of her share to to maintain the testator's adopted daughters, the eight and ninth defendants. After the death of the last survivor of the wife and three daughters the trust property was to devolve upon the descendants of those daughters and the two adopted daughters, these latter taking one-fifth between them, which, after their death, was to pass to the descendant of the three daughters.

The learned District Judge held that the devises to the third and fourth defendants and to the trustees, except any in favour of the fifth and sixth defendants, were good; that the plaintiffs could not maintain the action even in respect of the shares of the fifth and sixth defendants, as even if it were considered an action *querela de inofficioso testamento* it was not open to a niece; that the shares of the fifth and sixth defendants would go by *jus accrescendi* to the other devisees; that it was not proved that the fifth and sixth defendants were entitled to take under the will, and dismissed the action.

The plaintiffs appealed, and the case was argued before me and my brother Wendt, and we delivered judgments, but recalled them upon representations made by counsel for the appellants.

Since those judgments it has been decided by a majority of the Full Court in 291, D. C., Kandy, 6,563, that the marriage of a man to a woman, with whom he has previously lived in adultery, after the death of her husband is a valid one, and the question left for our decision in this case are:—

(1) Can the children born of such a connection before the marriage and the widow take under the will of the husband ?

(2) Does the incapacity, if it exists, extend to the grandchildren ?

(3) Does the *jus accrescendi* apply here ?

(4) What are the respondent's rights under section 772 of the Civil Procedure Code, there being no cross appeal ?

(5) Whether this was an action by way of *querela de inofficioso testamento?*

I propose to consider the fourth point first and to examine what is the respondent's position under section 772, which runs as follows:—

"Any respondent, though he may not have appealed against any part of the decree, may, upon the hearing, not only support the decree on any of the grounds decided against him in the Court below, but take any objection to the decree which he could have taken by way of appeal, provided he has given to the appellant or his proctor seven days' notice in writing of such objection.

"Such objection shall be in the form prescribed under head (E) of section 758."

On the former argument of this case it was held that respondents had no right of appeal other than against costs upon the notice given. The section to my mind divides itself into two parts, comprising *support of* and *objection to* the decree. No notice is required except upon an objection to the decree. Here there is no objection to the decree, but it is desired by the respondent to support it. The construction of the first part of the section appears to me to depend upon the meaning given to the word "grounds." For the appellants it is contended that "grounds" means "ruling," and for the respondents that it means the basis of the ruling. By giving seven days' notice the respondent may take any objection to the decree which he could have taken by way of appeal, but without notice he may not only support the decree on grounds decided in his favour in the Court below, which goes without saying, but also on the grounds decided against him. The respondents have given a notice, but they cannot take advantage of the latter part of the section, as the notice is confined to an objection to the order as to costs.

The respondents, however, desire to support the decree, but in so far as the decree is based on a finding that the fifth and sixth defendants are the children of Vincent Perera, they say that if the District Judge had held them to be the children of Salman Appu the decree could equally be supported by them.

In fact, the respondents would support the decree on the grounds that the fifth and sixth defendants are the children of Salman Appu, which grounds the District Court decided against them.

It seems to me that the intention of the Legislature was to enable a respondent to say the Court took a wrong view of the facts or of law, although the decree was right, and to empower him to support the view he took in the lower Court and to show the Appeal Court

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that that view would support the decree and would be the right and proper view for it to take under the circumstances of the case.

It hardly seems reasonable that it should be obligatory on the Appeal Court to confirm a judgment on grounds which appear to be manifestly wrong, and this would be the effect of upholding the contention of the learned counsel for the appellant. If I am right, then in my view of the meaning of this section it is open to the respondents to contend that the learned District Judge was wrong in finding that the fifth and sixth defendants were the children of Vincent Perera.

Upon the evidence given by the third defendant alone there is quite as much probability that they were the children of Salman Appu as of Vincent Perera on account of the possibility of access and the ruling of the Full Court in *Sopi Nona v. Marsiyan* (*6 N. L. R. 379*) applies. I therefore hold that the learned District Judge was wrong in his finding as to the parentage of the fifth and sixth defendants, and I must hold that the presumption is that they are the children of Salman Appu and not the issue of an adulterous intercourse.

This ruling would enable them to take indisputably under the will of Vincent Perera.

It is, however, necessary to consider the case of the widow under the first question, and it will be convenient to include the case of the fifth and sixth defendants.

I incline to the view adopted by Bonser, C.J., as reported in *2 N. L. R. 278*, which seems to be founded on the opinion of *Voet 23, 2, 27*, "that according to the old Roman-Dutch Law following the Common Law, such a marriage was not forbidden unless 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," until the Placaat of the 18th July, 1674, took effect. In the case before us no suggestion of any attempt on the life of Salman Appu is made, and I fail to see why any promise of future marriage is to be necessarily presumed from such a connection as existed between Vincent Perera and the third defendant.

If such a connection was not *prohibitus concubitus* till the Placaat of 18th July, 1674, and that Placaat, as I have already held in the case of D. C., Kandy, 6,563 (*8 N. L. R. 1-30*), does not have force in Ceylon, then the third defendant will not be disentitled to take under the will of Vincent Perera.

Assuming that the learned District Judge was right in his conclusion that the fifth and sixth defendants were the children of Vincent Perera, it would be difficult to resist the weight of authority from Van der Linden (*Juta, p. 58*), and Van Leeuwen

(*Kotze's Translation, vol I., p. 338*), adduced by the learned counsel for the appellants, pointing to the incapacity of children procreated in adultery to take under the will of their parents, unless it could be held that those jurists were writing on the strength of the Placaat of 18th July, 1674, which I have held does not apply in Ceylon.

Grotius (*Introduction, 2, 16, 6;* and *Maasdorp's Translation, p. 133*) speaks of children born *ex prohibito concubitu*, but if I am right in my opinion derived from *Voet 23, 2, 27*, the connection here was not *prohibitus concubitus*, and Grotius' opinion does not help the appellants.

So far as I can ascertain from the translation by Herbert of '*Grotius' Introduction to Dutch Jurisprudence*, which appears to have been written in 1620, there is no reference to any prohibition of a marriage between persons who have lived previously in adultery, nor can I find any such prohibition in *Van Leeuwen*. Taking the view I do of the law, it is not necessary to consider whether incapacity attaches to the grandchildren, or if the *jus accrescendi* applies, or if this is an action of the nature of *querela de inofficioso testamento*. I would hold, therefore, that the third, fifth, and sixth defendants are not incapacitated from taking under the will of Vincent Perera.

As regards the fourth defendant, there is no reason to question the finding of the learned District Judge that she was the daughter of Salman Appu, and I cannot think it could be seriously contended that she was estopped from asserting this by the fact that Vincent Perera called her his daughter in the will. She is specifically named and described as the wife of Walter Clement de Silva, and I cannot see how the testator's belief that she was his daughter can affect her position as a legatee under his will.

In my opinion the judgment of the District Court should be varied only by ordering that the fifth and sixth defendants do take under the will and through the trustees, and that their shares do not go to the other devisees by the *jus accrescendi*. In all other respects the judgment will stand and the decree be affirmed, and this appeal will be dismissed with costs.

GRENIER, A.J.—

Vincent William Perera, with whose last will we have to deal in this case, died on the 28th July, 1900. The last will was dated the 14th November, 1899. On the 13th July, 1889, the testator married the third defendant, who had been previously married to one Salman, and who predeceased her on the 13th April, 1889. The fourth defendant has been found by the District Judge to be the child of

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Salman and third defendant, and was born in 1872. It was alleged that the fifth and sixth defendants were the adulterine issue of testator and third defendant. The fifth defendant was born in 1878 and the sixth defendant in 1883. The eighth and ninth defendants are described in the will as the adopted daughters of the testator. The first and second defendants are the trustees to whom the property belonging to the testator was devised to be held in trust for the use and benefit of the third, fourth, fifth, and sixth defendants. The seventh defendant is the husband of the sixth defendant. The fourth defendant is the wife of the first defendant, the fifth defendant is the wife of the second defendant. The plaintiffs are husband and wife, the second plaintiff being a niece of the testator and the only child of John Henry Perera, one of the brothers of the testator. The testator had five brothers and sisters, who had predeceased him; and the plaintiffs alleged that at the death of the testator they became entitled to a fifth share of his estate, including the lands and premises in the schedule marked A annexed to the plaint. The plaintiffs base their claim in the present action against the defendants on the ground that the fourth, fifth and sixth defendants are the adulterine issue of the testator and the third defendant, and that they, together with the third defendant, were incapacitated from receiving by will directly or indirectly from the testator, and by receiving by succession directly or indirectly from the testator, any part or share of his estate or any benefit or advantage thereof, except so much as is necessary for the personal maintenance of the fourth, fifth, and sixth defendants. The plaintiffs also alleged that the bequest, except as to personal maintenance, is illegal and absolutely void, and that the will has no effect, except to the extent of vesting a right in the fourth, fifth, and sixth defendants to derive such maintenance. The plaintiffs prayed for a declaration of title to an undivided one-fifth share of the testator's lands and premises and for a declaration that the bequest in the will of the share so claimed by the plaintiffs be declared null and void.

Several objections were taken by the defendants in their answer to the form of action adopted by the plaintiffs, but ultimately the case appears to have gone to trial upon two issues of fact, one of them being whether the third defendant was the lawfully married wife of Halkege Samuel *alias* Salman Appu. During the course of the trial it was, however, admitted that the third defendant was married to Salman Appu on the 26th December, 1859; that Salman Appu died on the 13th April, 1889; that fourth, fifth, and sixth defendants were born in the lifetime of Salman Appu; and that Vincent Perera's marriage with Justina was registered on the 13th

July, 1889. Evidence then appears to have been led by the plaintiffs to show that the fourth, fifth, and sixth defendants were the adulterine issue of the testator and the third defendant; and at a subsquent stage counsel agreed that the case should be decided on certain issues which practically depended upon two questions—(1) whether or not the fourth, fifth, and sixth defendants were the adulterine issue of the testator and the third defendant, and (2) whether the third defendant in the lifetime of her husband lived in adultery with the testator.

The learned District Judge found as a fact that the third defendant in the lifetime of her husband did live in adultery with the testator, and that the fifth and sixth defendants were the issue of such adulterous intercourse, but that the fourth defendant was the son of the third defendant by her husband Salman. The District Judge held that the devise to the third and fourth defendants was good, but the devise to the trustees, so far as the fifth and sixth defendants were concerned, was bad. His ground for finding in favour of the third defendant was that at the date of the will the third defendant was not living in adultery with the testator, that her position was that of a concubine, and that concubines are not legally incapacitated from taking under a will, except on certain grounds which did not exist here. He further held that the "ceremony of marriage," to adopt the language used by him, which the third defendant and the testator went through did not legitimize the fifth and sixth defendants, as it was not a lawful marriage, but was one prohibited by law, because it was between persons who had previously committed adultery.

The first question that arises for determination upon the appeal in this case is whether the marriage of the third defendant with the testator was void, for the reason given by the District Judge. There can be no doubt whatever that under the Roman-Dutch Law a marriage like the one that the testator contracted with the third defendant would be absolutely void, as that law penalized adultery and regarded it as a crime. Such a marriage was not even permitted by dispensation. (*Van der Linden, Henry's Translation, p. 80*). The point, therefore, is whether we are still governed by the Roman-Dutch Law in this respect. Now, the testator contracted this marriage on the 13th July, 1889, when Ordinance No. 6 of 1847 was in operation. There is provision made in section 27 of that Ordinance against the marriage of parties within certain degrees of relationship. That section enacts that any marriage or cohabitation between such parties shall be deemed to be an act of incest and punishable with imprisonment; but there is no provision against a marriage like

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the one under consideration. But section 31 enacts 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." Was this section intended to conserve the Roman-Dutch Law only to the extent that children born in adultery could not be legitimized by the marriage of their parents, or was it intended to go further, and, by implication, render a marriage between parties who had committed adultery void? The obvious meaning of section 27 is that an incestuous marriage is not only absolutely void, but the parties to it are criminally liable when they contract one. Incestuous marriages and marriages between persons who had committed adultery were probably regarded in the same light by the Roman-Dutch Law, although there appear to have been frequent departures from the law by dispensations to persons within the prohibited degrees. Now, section 31 clearly contemplates the case of a marriage between persons who had committed adultery. It brands the issue of an adulterous connection as illegitimate; but does it render a subsequent marriage between the man and the woman not a *legal marriage*, to use the words employed in section 31? Adultery is not a crime amongst us, and never was under our local Criminal Law since the British occupation, but incest was always a crime and is so still. There is express provision made against incestuous marriages in section 27. There is no such provision made against a marriage between persons who had committed adultery. Is it unreasonable to conclude from this that the Legislature drew a distinction between these two kinds of marriages? We find that children procreated in adultery were affected with certain disabilities consequent on their being regarded as illegitimate; but there is not a word in the whole of the Ordinances relating to marriage from which it may be gathered that the Legislature intended that the marriage of persons who had committed adultery should *ipso facto* be void as in the case of an incestuous marriage, nor that children born of such a marriage should be considered otherwise than legitimate. If the Legislature intended to place such a marriage in the same category as an incestuous marriage, I thnk that it would have said in unmistakable terms what it intended to say instead of leaving such a vital part of the law of marriages to mere inference and implication. But beyond enacting that the subsequent marriage of persons who had committed adultery did not legitimize the children procreated during the adulterous union, our statute law says not a word about the marriage itself being null and void. The reason is

obvious, for incest is a crime, and therefore there can be no marriage, whereas adultery was never punishable as a crime in this country after the British occupation, but was only good ground for a divorce *a vinculo matrimonii*. Very often the only reparation that a man can make to the woman, whether married or unmarried, whom he has seduced, is marriage. The English Law permits a marriage between persons who have committed adultery, after the first marriage has been dissolved by death or by the Divorce Court; but while in Ceylon the subsequent marriage of persons who have procreated children, provided they were not procreated in adultery, serves to legitimize them, it is not so in England, where they are regarded as bastards. And children procreated in adultery are not legitimized in England, as they are not in Ceylon, by the subsequent marriage of the parents. The provisions of section 31 thus brought our law into harmony with the English Law as regards the capacity of parents who had committed adultery to marry, and when we consider that our marriage laws affect Europeans to the same extent that they affect certain other sections of the community, it seems abundantly clear that the object of section 31 was to render marriages between persons who had committed adultery legal and valid.

I had written thus far when I had the advantage of reading the judgments of my brother Middleton and of Mr. Acting Justice de Sampayo in case No. 291, D. C., Kandy, 6,563 (*8 N. L. R. 1-30*). At the argument of this appeal I formed the same opinion which I have now stated in writing, and I need hardly say that I agree with the statement of the law laid down in that case so far as regards the question as to whether persons who had committed adultery could contract a legal marriage.

As I have already said, the marriage of Vincent Perera with the third defendant took place on the 13th July, 1889, and, such being the case, the marriage must be governed by Ordinance No. 15 of 1876, which amended the law relating to the matrimonial rights of married persons with regard to property and the law of inheritance. As is well known, this Ordinance abolished community of property, and in case of intestacy gave the surviving spouse the right to inherit one-half of the property of the intestate. The expression "matrimonial rights" in this Ordinance has been defined to mean the respective rights and powers of married parties in and about the management, control, disposition, and alienation of property belonging to either party or to which either party may be entitled during marriage. The third defendant in this case, the marriage being a legal one, as I have already held,

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became vested with all the rights and privileges of a wife so far as her matrimonial status was concerned, and is distinctly capable therefore of taking, like any other wife, under her husband's will. I cannot accede to the contention that her wifehood, so to speak, was in any way affected or limited by reason of the fact that she had committed adultery with Vincent Perera during the lifetime of her husband Salman. If the law gave her on her marriage with Vincent Perera all the rights of a wife, she is entitled to the enjoyment of those rights. On this part of the case I am of opinion that the bequest to the third defendant is a good one, and that she is not incapacitated from taking under the will of the testator.

Then, as regards the question as to whether the respondents had any right of appeal other than as against costs upon the notice given, I agree with my brother Middleton in the construction he has placed upon the meaning and effect of section 758 (*e*). The Supreme Court, when sitting in appeal, has large powers given it by law; and I would endorse the observations of my brother Moncreiff in D. C., Kalutara, 2,794 (*Supreme Court Minutes*, 23rd November, 1904), as to the extent of those powers. It was, in my opinion, competent for the respondents to support the decree of the Court below on the ground that the fifth and sixth defendants were the children of Salman Appu, although that ground was decided against them by the District Judge. During the pendency of this action the Full Court had held in *Sopi Nona v. Marsiyan* (*6 N. L. R. 379*) that unless impossibility of access or impotency could be proved, conclusive proof was afforded that a person born during the continuance of a valid marriage or within 280 days after its dissolution, the mother remaining unmarried, was legitimate. In the case before me no such impossibility was attempted to be proved, and there was no suggestion of impotency. The fifth and sixth defendants must therefore be held to be the children of Salman and the third defendant. I am the less reluctant to hold this, because the third defendant herself swears that the fifth and sixth defendants were born to Salman, and not to Vincent Perera. This finding, as well as the finding in regard to the third defendant, renders it unnecessary to deal with the other questions raised on this appeal. The fourth defendant has been found by the District Judge to be the daughter of Salman, and she is precisely in the same position as the fifth and sixth defendants.

In the result I agree with my brother Middleton that the judgment of the District Court should be varied to the extent specified by him in his judgment, and that in other respects the judgment will stand and this appeal be dismissed with costs.