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## KARONCHIHAMI *v.* ANGOHAMI *et al.*

*D. C., Kandy, 6,563.*

*Marriage of persons living in adultery—Illegitimate children—Donation —Gift to concubine—Ordinances Nos. 6 of 1847 and 21 of 1844.*

A man after the death of his wife cannot lawfully marry a woman with whom he had been living in adultery during the lifetime of his wife ; and children procreated in adultery do not become legitimate by the subsequent marriage of their father and mother.

A gift to a concubine as such and in contemplation of the continuance of the concubinage may be set aside.

Bastards not begotten in adultery or incest are not prohibited from taking under their parents' will or deed ; and since the passing of Ordinance No. 21 of 1844 a father may leave all his property to such illegitimate children either by will or act *inter vivos* to the exclusion of his legitimate ones.

*Held* by BONSER, C.J., and WITHERS, J., *dissentiente* LAWRIE, J., that Ordinance No. 6 of 1847 does not contain the whole law of marriage in force in Ceylon, and that the Roman-Dutch Law is still in force in certain respects.

An action to set aside a deed of gift on the complaint of its being *inofficiosa* is barred after the lapse of three years under section 11 of Ordinance No. 22 of 1871.

THE facts of the case are stated in the judgment of his Lordship the Chief Justice.

*Dornhorst*, for appellants.

*Wendt*, for respondents.

*Cur. adv. vult.*

26th January, 1897. BONSER, C.J.—

The facts are shortly these. One Sinho Appu, who was married in community of property to one Babahamy, contracted an illicit connection with the first defendant, and by her had during the lifetime of his wife two children, the second and third defendants. After his wife's death, which happened on the 20th January, 1883, he went through the form of marriage with the first defendant and subsequently to this had two more children by her, the fourth and fifth defendants. He died on the 24th November, 1887, intestate, and the first defendant gave birth to the sixth defendant on the 2nd October, 1888, that is to say, 313 days after Sinho Appu's death.

Sinho Appu on the 19th of April, 1880, his wife Babahami being then alive, by a deed of donation gave five parcels of land valued at Rs. 4,980 to the first and third defendants, describing them as " my

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" wife and her child." The consideration for the gift is expressed to be an agreement by the donees " that the said Angohami should " be obedient to me and render me every necessary assistance."

Angohami 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 heirs, descendants, and administrators " are empowered to possess the said land." The deed contained a statement by Angohami that she accepted the gift.

The first plaintiff is the only child of Sinho Appu by his wife Babahami, and the second plaintiff is her husband. They seek to have the deed of donation set aside as illegal, and to have it declared that the intestate and Angohami were not lawfully married.

On this state of facts the two questions arise, which were argued before us :—(1) Do the defendants or any of them take anything under the intestacy of Sinho Appu ? (2) Is the deed of donation invalid to any, and what, extent ? As regards the sixth defendant, her birth occurred at such a distance of time after the death of the intestate that it would be little short of a miracle if she were his child. I am of opinion that the District Judge rightly held her not to be his child. As regards the second and third defendants, it is clear that being " procreated in adultery " the subsequent marriage of their father and mother, even if legal, could not avail to render them legitimate (see Ordinance No. 6 of 1847, section 31). As regards the first, fourth, and fifth defendants, their rights in respect of the intestate's estate depend on whether the marriage of the intestate with the first defendant was a valid and legal one or not. This raises this important question : Can a man after the death of his wife marry a woman with whom during the lifetime of his wife he has been living in adultery ? For an answer to this question we must have recourse to the Roman-Dutch Law, which was stated by the Privy Council in the Le Mesurier case (*1 N. L. R. p. 160*) to be undoubtedly the matrimonial law applicable to British or European residents in Ceylon. The reasoning of the Privy Council shows that in this matter there is no distinction between British and European residents and the other residents in Ceylon, for when there is no special matrimonial legislation, if the Roman-Dutch Law appplies to European residents it must so apply, in the absence of special legislation, to other residents. I had at one time thought that inasmuch as Appu Sinho was a resident in the Kandyan district and the first defendant was a Kandyan, the marriage might have been celebrated under the Kandyan Marriage Act, in which case it would have been valid ; and the second and third defendants, although

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born in adultery, might have been legitimatized by the subsequent marriage. But it appears that the marriage was not in fact celebrated under the Kandyan Marriage Act, but was celebrated under the general marriage law of the Colony.

It would appear that according to the old Roman-Dutch Law, following the Canon 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. Subsequently, however, by a Placaat of the 18th of July, 1674, such marriages were altogether forbidden, and even if contracted were to be null and void, should it subsequently appear that the parties had been guilty of adultery with one another during the lifetime of the deceased spouse. Voet thus forcibly states the reasons for, and the object of, this law: *Cum et ipsa adulteria latebras quærant, et clandestina soleat esse inter adulteros fidei matrimonialis interpositio insidiæque ac machinationes in conjugis insontis perniciem structæ ignotæ sæpe, sæpius difficilis probationis, satius postea ordinibus Holandiæ visum fuit, edicto suo matrimonia hujuscemodi in universum damnare atque vetare, ac re ipsâ contracta pro nullis habere, si forte crimen (i.e., adulterii) initio matrimonii ignoratum, postea manifestum fiat; ut ita in adulterii crimen prolapsi deterreantur ab insdiis insonti struendis nullum post hanc legem triumphum habituris; aut, si maxime desint insidiæ, careant saltem dilecti mœchi mœchæve consortio, nec libere licenterque illis fruantur amoribus qui suum non honestati sed sceleri initium debent.* (*Comm. ad Pand. 23, 2, 27.*)

The annals of crime unfortunately afford many instances which illustrate the policy of such an enactment. This law did not become obsolete, for Vanderlinden, in his *Institutes of Holland* published in 1806 (Juta's translation, p. 19), states that marriages between persons who had previously committed adultery were void, and that no dispensation could be granted. It was suggested that this part of the Roman-Dutch Law of marriage had been impliedly repealed by Ordinance No. 6 of 1847, and reference was made to the case of *Abeyeratne v. Perera and three others* (*3 Lor. 235*), where this Court held that 'the marriage of a widower with his deceased wife's sister, which was illegal by Roman-Dutch Law, was lawful since the passing of that Ordinance. But that decision went on the ground that the 27th section was "introduced to establish the entire law as to the prohibited "degrees of relationship," and that therefore the omission of relations by affinity in the enumeration of the prohibited degrees showed that the Legislature intended to remove the previously

existing prohibitions against intermarriage between persons related to one another by affinity, and to render such marriages legal.

That case is no authority for the proposition that every marriage not expressly forbidden by the Ordinance is allowed, but rather points the other way. It cannot be assumed that the Legislature intended *tacitly* to abolish a provision so well calculated to protect the lives of innocent spouses and to discourage immorality. Nor can it be successfully contended that that Ordinance was intended to comprise the whole law of marriage in the face of express declaration in section 54 that "this Ordinance does not profess to "treat of or declare the whole law of marriage."

Nor does the fact that section 31—which declares that children are legitimatized by the subsequent marriage of their parents—commences with the words "from and after the notification in the "*Gazette* of the confirmation of this Ordinance by Her Majesty," lead me, as it does my brother Lawrie, to the conclusion that the Legislature were of opinion that the Roman-Dutch Law of legitimation *per subsequens matrimonium* was not in force in this Colony, when I observed that the prohibition of incestuous marriages between fathers and daughters and of bigamous marriages are also made dependent on the confirmation by Her Majesty of the Ordinance, for I cannot conclude that the Legislature thought that such marriages were then legal. I am therefore of opinion that the so-called marriage between Sinho Appu and Angohami was altogether null and void, and that neither she nor the fourth and fifth defendants, who were born during that marriage, are entitled to any share of the intestate's estate.

I now come to the second question.

It is quite true, as pointed out by this Court in *Parasattyummah. v. Sathopulle* (*Ram. 1872, p. 67*), that by the old Roman Law the prohibition of gifts by husbands to their wives did not extend to gifts by a man to his concubine. But this freedom was restrained by the later Emperors.

Constantine appears to have prohibited all gifts or bequests to concubines and natural children.

Justinian relaxed this rule, with the result that if a man had legitimate children he could not give his natural children or concubine more than one-twelfth of his property, but if he had neither children ascendents he could give all his property to them.

The Roman-Dutch Law did not acknowledge the condition of concubinage, and placed concubines and other abandoned women on the same footing (*Grotius, Intro. 1, 12, 5*), and whatever the

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Roman Law may have been, by the Roman-Dutch Law, according to *Van Leeuwen* (*Cens. For. 4, 12, 11*), *quicquid concubinis qua talibus, inter vivos donatur, aut per ultimam voluntatem relinquitur, ab eis tanquam a personis turpibus atque indignis auferri et revocari potest.* The words "*qua talibus*" are emphatic. It is not every gift to a concubine that can be taken from her, but only such gifts as are made to her in her capacity as a concubine and in contemplation of the continuance of the relationship.

In the present case the gift is made on the express condition of the continuance of the connection, and is thus differentiated from the case of *Parasatteummah v. Sathopulle.* At the same time I must confess that I do not understand that case, which seems to have been decided not on the Roman-Dutch Law or the later Roman Law, but on the Roman Law as it existed before Christianity became the established religion of the Roman Empires.

I am therefore of opinion that the gift to the first defendant is one that could be set aside and recalled. As regards the second and third defendants, although by Roman-Dutch Law illegitimate children born *ex prohibito concubitu* were prohibited from taking any benefit under their parents' will beyond bare maintenance (*Grotius, Intro. 2, 16, 6*, and *Vanderlinden*, Juta, *p. 58*), yet, according to Van Leeuwen, *pro adulterinis et ex damnato legibus coitu natis non habentur qui ex conjugato et soluta nati sunt*, and the prohibition did not extend to them (*Cens. For. 3, 4, 39*). The second and third defendants are therefore in the same position as the fourth and fifth defendants. What then is the law with regard to the power of a father to make provision for his illegitimate children ?

By the Roman-Dutch Law if a parent disinherited his legitimate children they were entitled to a *querela inofficiosi testamenti*, but Ordinance No. 21 of 1844 abolished that right and gave a testator full power of disposition in favour of "such person or persons not "legally incapacitated from taking the same as he shall see fit."

By the words "legally incapacitated from taking the same" I understand to be meant incapable of taking by bequest from the testator in any circumstances. Now, *Vanderlinden*, Juta, *p. 58*, states the law thus : "Bastards begotten in adultery or incest may "not be benefited (*i.e.*, by the parents' will) with more than that "which is required for their necessary maintenance. One may "leave to other illegitimate children as much as one pleases, "unless one has at the same time legitimate children, in which "case only a one-twelfth part may be left to the former." It would appear from this that ordinary bastards were not legally

incapacitated from taking under their parents' will, whereas adulterine or incestuous bastards were.

The effect therefore of the Ordinance No. 21 of 1844 is to give the father the full power to leave all or any part of his property to the former class at all events.

Then, is there any difference between a will and a *donatio inter vivos?*

According to *Vanderlinden*, Juta, *p. 125*, a donation could be impeached " when the donation is so excessive that the children " are thereby prejudiced in their legitimate portion, in which case " the whole gift is not annulled, but only the *pars inofficiosa*," and *Grotius, Intro. 3, 2, 19*, thus states the law on this head :— " But if a person makes a donation to one of his children or a " stranger whereby his estate is so reduced that his children will " not receive the legitimate portion to which they are entitled from " their father's estate in spite of the last will, the children who are " thereby prejudiced may have the donation set aside in the same " way as they might have the will set aside, and no further."

The remedy given by law to the children was the *querela inofficiosæ donationis*, of which Voet says, *In plerisque cum inofficiosi testamenti quœrela pari passu ambulat, adeo ut ab interpretibus traditum sit statuta de inofficiosis testamentis quid definientia, etiam ad inofficiosas donationes in dubio producenda esse et merito ; cum enim ad intervertendam inofficiosi testamenti querelam nonenelli patrimonia sua donationibus exinanirent, deinde ejus, quod restabat, hortionem legitimam relinquerent* (*Comm. ad Pand. 39, 5, 36*). This shows the close connection between the two remedies, and that they were both based on one and the same right, viz., the right of the children to have their legitimate share of their parents' property. Indeed, the father, instead of being regarded as the absolute owner of his property, was considered in some sort as a joint owner with his children, who might assert their rights after his death by the *querela inofficiosi testamenti*, and even in his lifetime by the *querela inofficiosæ donationis* if these rights were endangered by improper donations. Now that Ordinance No. 21 of 1844 has abolished the right of the children to a legitimate portion, and with it the *querela inofficiosi testamenti*, must not the corresponding *querela inofficiosæ donationis* be denied to have been impliedly repealed? In my opinion the maxim *cessante ratione cessat lex* applies, and there is nothing now to prevent a father from making provision either by will or act *inter vivos* for his ordinary illegitimate children, even to the extent of leaving his legitimate children penniless and dependent on charity for

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their daily bread. Whether this liberty extends to adulterine and incestuous bastards (*adulterini et ex damnato legibus coitu nati*) it is not necessary now to decide.

As regards the sixth defendant no law prevents her from receiving a benefit from the intestate, who was not her father. But whether I am right or not in holding that the *querela inofficiosi testamenti* no longer exists, it is clear that it would not be available in the present case. By the Roman-Dutch Law the *querela* must have been instituted within five years from the death of the donor. That period under our present law of prescription would be three years. This action was not commenced till the 31st January, 1893, and the donor died on the 24th November, 1887. I am therefore of opinion that the deed of donation cannot be set aside, and the defendants are entitled to the property comprised therein.

LAWRIE, J.—

An important question is raised by the eighth issue, whether the marriage between Sinho Appu and the defendant was a valid marriage, cohabitation having commenced during the lifetime of Babahamy (that is, during the lifetime of Sinho Appu's wife).

It is my opinion that the law as to the constitution of marriage between natives of Ceylon marrying in the Island is regulated by Ordinances which contain the whole law on the subject.

There are three legal disabilities which render sane parties incapable of forming the contract of marriage. These are: (1) a prior existing marriage; (2) want of age; (3) being within the prohibited degrees of consanguinity. The Ordinances deal expressly with these three disabilities. It was argued that there was a fourth disability, which is not mentioned in the Ordinances.

I may support my refusal to approve of this addition to our statute by pointing out how necessary it is that this branch of the law should be expressly declared in enactments accessible to and known by all. Other parts of the law may be left to experts, but it should be within the power of every man to ascertain for himself whether he may or may not lawfully marry the woman on whom he has fixed his regard. The Ordinances profess to tell him a great deal. It is natural to assume that they contain all the law on the subject, because there is no reservation or reference to some other unexpressed law.

I would not add a disability to those expressly declared by Ordinance, and in this I follow the reasoning and the ruling of this Court in the case of *Abeyeratne v. Perera and three others* (*July 21, 1859, 3 Lor. 235*).

I do not need to rest my judgment on a denial that the Dutch

Law of marriage errs. I am of the opinion that the Dutch did not impose their Christian views or law of marriage on the native population. There are abundant proofs in the history and law of the Island to show that natives, whether Siṇhalese or Tamil, were permitted the exercise of their peculiar customs and laws. The Dutch and Burgher inhabitants who were Christians could marry only those whom the Law of Holland permitted them to marry, but the natives were left to their own ceremonies and to their own customs. Even with regard to Dutchmen and their descendants in Ceylon the statute which prohibited the marriage of those who had lived in adultery was not part of the common Law of Holland: it was a change in the law made after the Dutch took the sea-board of Ceylon. We were not referred to any authority for the proposition that changes by statute in the Dutch Law after the Colony was established affected the Colony. Certainly it is the rule in Colonies, that though they have the English Law, as it existed when the Colony was formed, subsequent Acts of Parliament do not affect the Colonies unless they are specially named.

In this case the parties to the marriage were not only Siṇhalese Buddhists, but they resided, and the marriage took place, in the Kandyan Province, within which Dutch men and Dutch Law had never any hold or footing, until by an unhappy Ordinance in 1852 it was declared that the law of the maritime provinces was to be the law of the Kandyan Provinces wherever the Kandyan Law was silent.

The Kandyan Law was not silent. As to the capacity to marry in that direction it was liberal, and knew but few restrictions, and the fact that the man and woman had lived together before marriage, so far from being a disqualification, would I think by the Kandyans have been thought a good reason for making the woman an honest woman as soon as possible—an opinion I heartily hold, notwithstanding the later Puritan legislation of the Hollanders.

I rest my judgment on this proposition that the whole law as to ability and disability to marry applicable to natives of Ceylon is to be found in our statute law; that the old common law, whether Dutch or English, or Tamil or Kandyan, or of any place or race in the Island, has been repealed and abolished.

These Ordinances permit an unmarried man of full age and understanding to marry an unmarried woman of full age and understanding, who does not stand to the man within the prohibited degrees enumerated in the Ordinance.

Appu Sinho and the defendant fulfilled these conditions. My opinion is that the marriage contracted by them was a valid marriage, and I would so answer the question put in the eighth issue.

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I am of the opinion that the two children born in the lifetime of Babahamy are illegitimate, and that the child born after Appu Sinho's death cannot be regarded as his.

I am of the opinion that that part of this action which seeks to set aside the donation of 1880 is barred by the 11th section of the Prescription Ordinance.

The plaintiff, both in the Court below and in the petition of appeal, urged that the deed of 1880 was a last will. If it be, then certainly it must receive full effect, unless by that will Appu Sinho dealt with more than his half of the goods in communion. The Ordinance of 1844 gives full powers of testing, and as a will speaks as at the testator's death, there can be no objection to the defendant and her children taking under it. She was not at that date living in adultery. Babahamy was then dead.

In appeal the appellant abandoned the contention that the deed of 1880 was a will. He maintained that it was a donation void *ob turpem causam*.

It is trite law that a contract tending to promote fornication or prostitution is absolutely null and void, and if the donor in this case instead of making an irrevocable donation had given a bond, a promissory note, or a security for the payment of money, the woman could not have maintained an action on it ; but a completed donation is a different thing.

I am of the opinion that the donation to the illegitimate children mentioned in the deed is good, and that they are entitled to the share of land gifted to them. With respect to the defendant, I think she must bring the land then given to her into hotchpotch. If she prefers to keep that land she must treat it as part of the half of the goods of her husband to which she, as widow, is entitled.

It seems to me that advances made to a wife and children before the husband's death must be treated as an advance, an instalment of part of the share of that to which they succeed in the event of intestacy.

This defendant cannot object to being placed in the same position as a widow to whom an advance has, by deed, been made.

I would give to the plaintiff as her mother's sole heir half of the estate, in which I would include the lands dealt with by the donation, after taking from that land the share given to the illegitimate children.

Then I would divide the other half in two : half to go to the defendant as widow, half to the plaintiff and the children born after the marriage of Appu Sinho and the defendant (excluding the posthumous child).

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WITHERS, J.—

Two questions come up for decision in this case: one relating to an act of donation by the late Sinho Appu, the other relating to rights of succession and inheritance to his property.

The first cause of action depends on the validity of the said act of donation.

Is it invalid in whole or in part, or not at all?

The action, so far as this question is concerned, is of a kind known to the old law as *querela inofficiosæ donationis*. This cause of action arose on the death of the donor, and was given to the legitimate heir, whose right had been affected by the disposition of the donor.

The remedy was open to the injured party for five years after the death of the donor. It seems to me unnecessary to discuss the interesting points of law which this matter involves, for it is clear that the remedy under this head is barred by our Ordinance relating to the limitations of actions, No. 22 of 1871.

The next question is, Can the first defendant and the other children or any of them take anything of Sinho Appu's estate which he left undisposed of?

Sinho Appu was a low-countryman by origin. What the defendants' domicile of origin was does not appear. Though residents at the time of their alleged marriage in the Central Province, they were not married in manner and form required by our law in Kandyan marriages. There was the form prescribed by law for natives of the maritime settlements. Their status is governed by the law of those settlements.

The two children born in adultery certainly cannot take anything, for the alleged subsequent marriage of their father and mother cannot operate to legitimate them (see section 31 of Ordinance No. 6 of 1847).

Was the second so-called marriage one that the law recognizes? Our local statutes do not help us. The Ordinance No. 7 of 1840 deals only with prohibited degrees. It does not touch this case.

We must therefore have recourse to the Roman-Dutch Law. According to *Vanderlinden, p. 19*, a marriage between those who have previously lived in adultery is absolutely void. Sinho Appu was living in adultery with first defendant before their so-called marriage. It is therefore void. The children of that marriage being bastards, they can take nothing *ab intestato* from their father's estate.

In the result I am of opinion that the defendants are entitled to the property comprised in the donation. The cost of the trial of the above question and of the appeal to be borne out of the estate of the late Sinho Appu.