1907.
February 8.

Present : Mr. Justice Wendt and Mr. Justice Middleton.

DINGIRI MENIKA *et al.* *v.* APPUHAMY.

D. C., Kandy, 2,313.

Kandyan Law—Intestate succession—Rights of diga *father and uterine half-sisters of intestate's mother—Property inherited from the mother.*

Where a Kandyan, whose parents were married in *diga*, died intestate and without issue, leaving him surviving his father, his mother's mother, and two uterine half-sisters of his mother, and where the intestate's estate consisted exclusively of lands inherited by him from his mother, who had inherited them from her father,—

Held, that the intestate's father was sole heir to his estate, and that the uterine half-sisters of the intestate's mother were not entitled to any share thereof.

D. C., Kandy, 23,620 (1), followed.

THE respondent Appuhamy was the administrator of the estate of his son Punchi Banda, who died intestate. Appuhamy was married to his wife, the mother of the deceased, in *diga*. The deceased left him surviving his father (the administrator), his mother's mother, Ukku Menika, and the appellants, who were his mother's uterine half-sisters, being issue of Ukku Menika by a second marriage. The estate of the intestate consisted exclusively of lands inherited by him from his mother, who in turn inherited them from her father, Punchirala, the first husband of Ukku Menika.

The appellants, who were the intestate's mother's uterine half-sisters, applied for the judicial settlement of the estate of the intestate on the footing that they were his sole next of kin and heirs-at-law of the intestate.

(1) (1852) *Austin* 155.

1907. *February* 8.

The District Judge (J. H. de Saram, Esq.) disallowed the application, holding that the intestate's father (the administrator) was the sole heir.

In appeal.

Walter Pereira, *K.C.*, *S.-G.*, for the appellants (applicants).

H. J. C. Pereira, for the respondent (administrator).

Cur. adv. vult.

8th February, 1907. WENDT J.—

This is a petition for the judicial settlement of the administrator's account on the footing that the petitioners are the sole next of kin and heirs of the intestate. The deceased, Punchi Banda, was a Kandyan, and he died intestate and without issue. He left no brothers and sisters or their issue, but was survived by his father (the respondent), by his mother's mother, Ukku Menika, and by the petitioners, who are his mother's uterine half-sisters, being issue of Ukku Menika by a second marriage. His estate apparently consisted exclusively of lands inherited from his mother, Punchi Menika, which she had in turn inherited from her father, Punchirala, the first husband of Ukku Menika. The marriage of respondent and Punchi Menika was in *diga*. Letters of administration were granted to the respondent (who, as *diga*-married father, claimed to be the sole heir), in preference to Ukku Menika and a brother of the present appellants, who were counter-applicants.

The present petition was dismissed by the learned District Judge, who held that the father was the sole heir, and appellants have appealed. The District Judge followed the case D. C., Kandy, No. 23,620 (1). There the District Court had held that the father was heir-at-law of his child in respect of land which the child had inherited from her mother, in preference to the issue of the mother's paternal aunt. The unsuccessful parties appealed (admitting, however, in the petition of appeal, as the District Judge informs us, that the marriage was a *diga* one), but the Supreme Court affirmed the decision of the Court below. No reasons for the judgment of this Court are recorded.

Admittedly it has often been decided that the father is not the heir of his child born in a *binna* marriage in respect of property inherited from the mother. But the learned Solicitor-General argued that the *binna* marriage in the cases so decided was a mere accident, and that the *ratio decidendi* applied equally to *diga* marriages. We cannot assent to that contention. The institutional writers on Kandyan Law, who are our ultimate written authorities, appear to draw a distinction on this point between the two kinds of marriages. *Sawer*, at page 8 of the first printed edition, says:

(1) (1852) *Austin* 155.

1907.
February 8.
WENDT J.

" Failing immediate descendants, that is, issue of his own body by a wife of his own or a higher caste, a man's next heir to his landed property is his father, and if the father be demised the mother, but this (*i.e.*, in the case of the mother) for a life interest only."

He does not expressly state that it is a condition precedent to the father's inheriting that he should have been married in *diga*, but we know that the *diga* was the most common form of marriage (see page 34), and it would be a safe construction to understand this dictum as implying that form. Moreover, he states expressly on page 14: " The father is not the heir of the property of his children born in a *binna* marriage, which they have acquired through their mother." He adds: " The maternal uncles or next of kin on the mother's side are the heirs to such children," relations whom the *diga*-married father apparently excludes. Remembering that in the *binna* form of marriage the husband (with little or no property of his own, the wife having a large estate) lives in the wife's house and is maintained by her, whereas in the *diga* marriage the wife becomes a member of her husband's family, and forfeits in favour of her brothers all claim to inherit her father's property, there appears to be reason for the distinction between the husband's rights as derived from the two forms of marriages [see *Naide Appu v. Palingurala* (1)].

An undoubted difficulty, however, in ascertaining the rule of inheritance is introduced by the passage at page 9 of *Sawer:* " A wife dying intestate, leaving a son who inherits her property, and that son dying without issue, the father has only a life interest in the property which the son derived or inherited from or through his mother; at the father's death such property goes to the son's uterine brothers or sisters, if he have any, and failing them, to the son's nearest heirs of his mother's family." Sir Charles Marshall (*Judgments, pp.* 338, 340) transcribes the passages I have quoted from pages 8 and 9 of *Sawer*, merely noticing that the limitation of the mother's right to a life interest is opposed to the author's later statement at page 9, that the mother is absolute heiress-at-law of her children dying without issue, and that she has the power of disposal of the father's *paraveni* estate which she inherits through them. The later authority *Armour*, however, lays down (*first edition, p.* 124; *Perera's edition, p.* 76 that " the father (by *jaateke uruma*) is entitled to inherit the lands and other property which his deceased infant child had inherited from the mother, in preference to the relations of the person from whom that property had been derived to the said child's mother." He puts a case in which a mother having (presumably owing to the father's having predeceased) inherited her child's *paraveni* property has a son by a second marriage (in *binna*) who inherits the property from her. This son dying in his father's care, that father will inherit the property in preference to the

(1) (1879) 2 *S. C. C.* 176.

representatives of the original owner from whom it had descended to the first child, provided there is no other child of the mother living. Where the *binna* father, not being the mother's *ewessa* cousin, had after her death deserted his child and left it entirely to the care of the mother's family, the child's property would devolve on the next of kin on the mother's side, in preference to the father. Where, however, the father had looked after the child until its death he would succeed in preference to the child's "distant maternal relations (mother's granduncle's son, for instance), and that whether he was or was not the *ewessa* cousin of the mother." These passages are an amplification with exceptions of the rule quoted from p. 14 of *Sawer*.

In this unsatisfactory state of the authorities, the learned District Judge, whose long administration of the Kandyan Law in the District Courts of Kandy and Kurunegala entitles his opinion on a controverted point to very great weight, has accepted the view adopted in the case in *Austin*. No decided case distinctly negativing the father's right, which was there recognized, has been brought to our notice, and I think the judgment of the Court below should be affirmed.

I may add that at the argument, when counsel agreed that Ukku Menika was alive, I felt a difficulty in holding that her children, the applicants, were nearer of kin than herself to the issue of her deceased daughter—in other words, that the half-sisters were nearer of kin than the common mother. It is, however, unnecessary to decide this point, or another point (which was dealt with in our judgment on a former appeal), viz., whether, if the principle of the property going back to the source whence it came is adopted, the appellants are in the line of succession at all, being strangers in blood to Punchi Menika's father, from whom she had inherited.

MIDDLETON J.—

I agree that in view of the conflicting character of the original authorities that we should affirm the learned District Judge's judgment following the case reported in *Austin*, *p*. 155, and hold that a *diga*-married father of an intestate dying without issue is entitled to inherit, before the uterine half-sisters and brother of his deceased mother, the property derived from his mother which she, in turn, had inherited from her father.