JAYASINGHE
v.
KIRIBINDU AND OTHERS

SUPREME COURT.
FERNANDO, J.,
AMERASINGHE, J,
DHEERARATNE, J,
WADUGODAPITIYA, J. AND
WIJETUNGA, J.
S.C. APPEAL 14/95
C.A. 118/87
D.C. KEGALLE 22403/P,
OCTOBER 16, 24 AND NOVEMBER 9, 15, 1995.

Kandyan Law – Diga and Binna marriage – Four essentials of a valid Kandyan marriage – Continued residence in Mulgedera of Diga married daughter – Succession – Partition action – Interest rei-publicae ut sit fines litium – Nemo debet bis vexari pro una et eadem causa – Res Judicata – Section 9 of the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938 – Ordinance, No. 3 of 1870 Section 39 – Kandyan Marriage and Divorce Act. No. 44 of 1952 Section 28.

One Ukkuwa had two children: a daughter named Kiribindu and a son named Rana. Kiribindu married one Piyasena on 27.7.1939. The marriage was registered as a *diga* marriage. Shortly before Kiribindu's marriage her brother Rana's wife had died leaving her husband Rana and their three children Jayasinghe (1st defendant – appellant) Mathupala (3rd defendant – respondent) and Somawathie (4th defendant – respondent). Kiribindu though married in *diga* did not leave the *mulgedera* but stayed on and looked after her brother Rana's three children. Piyasena died in 1946 but Kiribindu did not re-marry. She continued to live in the Mulgedera. Her father Ukkuwa died in 1957. Rana died in 1971 leaving as heirs his three children aforesaid. In an earlier action D.C. Kegalle L/16312 in respect of another land between Rana and Kiribindu (reported in 1979 (2) N.L.R. 73) it had been held by the Supreme Court on a construction of section 9 of the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938 that after dissolution of a marriage of a *diga* married woman she can re-acquire her lost right to succeed to her paternal inheritance by change of her residence to the *mulgedera*. The decision in L/16312 was by the District Judge held to be *res judicata* in the present action which Kiribindu filed for partition of six lands on the basis of inheritance from Ukkuwa. The other questions were whether Kiribindu was in fact a *binna* – married daughter or alternatively whether she had regained rights of succession appropriate to that of a *binna* – married daughter by continuously residing in the *mulgedera* and/or by maintaining a close connection with it by staying there to look after the children of her brother Rana.

Held: (Wadugodapitiya, J. dissenting)

(1) Since a *diga* marriage is one in which the wife is treated as a member of the husband's family, she would usually leave her parental home and take up residence with her husband and she then forfeited her rights of inheritance to her father's properties. Although place of residence is an important indicator of the character of the marriage, yet severance from her family by joining her husband's family is the test and not the place of residence. Forfeiture of rights of succession depends on the fact that a marriage was a *diga* marriage and not on whether it was a registered marriage. The registered entry is not conclusive on the character of the marriage and could be rebutted by evidence to the contrary.

Remaining in or returning to the *mulgedera* does not necessarily result in a retention or re-acquisition of rights. If a *diga* married woman is remarried in *binna* or readmitted into her father's family by a *binna* settlement clearly showing that a *binna* connection was intended, she regains the rights of a *binna* married daughter to inherit her intestate father's properties.

Section 9(1) of the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938 provides that a *binna* or *diga* marriage shall be, and until dissolved continue to be, for all purposes of the law governing the succession to the estate of the deceased persons a *binna* or *diga* marriage, as the case may be. The relevant period commences from the time the parties began to treat themselves as married persons and to live as married persons.

Kiribindu and her husband and her father intended the marriage to be in *diga* and told the Registrar so at the time of marriage. The certificate of marriage was in terms of Section 39 of Ordinance, No. 3 of 1870 and section 2 of the Kandyan Marriage and Divorce Act No. 44 of 1932 the best evidence of the character of the marriages. The best evidence rule was introduced by section 39 of Ordinance No. 3 of 1870. Section 28 of the Kandyan Marriage and Divorce Act, No. 44 of 1952 re-enacted the provisions of section 39 of the 1870 Ordinance. The rule has continued to serve the useful purposes for which it was intended.

A daughter married in *diga* who resided in the *mulgedera* to play the role of a guardian to minor children at the *mulgedera* does not thereby acquire the rights of a daughter married in *binna*.

There was nothing except for the mere fact of residence to suggest that the daughter Kiribindu was allowed to settle in *binna*. On the other hand there was the contemporaneous recording by the Registrar of Marriages of the intention of the parties that the marriage was a *diga* marriage despite the fact that it was known that the residence of the daughter and her husband would be at the *mulgedera*. The effect of her *diga* marriage was that she lost her right of succession to the estate of her father and she had no right, title or interest in the lands she seeks to partition.

The right to contract another marriage after the dissolution of a marriage is an important right and the character of the second marriage is not determined by the character of the first marriage. On the death of Piyasena, Kiribindu's father could have arranged a *binna* marriage for her but he did not. Nor did he do anything after Piyasena's death to manifest his intention that a *binna* settlement was intended.

The essentials of a legal marriage were:

(1) The parties must have had a connubium.
(2) They must have not been within the prohibited degrees of relationship.
(3) They must have cohabited with the intention of forming a definite alliance.

It was also requisite:

(4) That the consent of parents and relations should be given; and
(5) In the case of chief of high rank, the consent of the king.

The absence of approval of parents and relations though ordinarily stated to be one of the conditions, the question was not free from doubt whether the absence of such approval would make the marriage null and void.

***Per* Amerasinghe, J:**

"Undoubtedly the place of residence is an important indicator of the character of a marriage. Ordinarily, in the absence of contrary evidence we ought to be entitled to presume that the common course of usual events consistent with the ordinary practices of Kandyan Society followed. And so, a woman who after marriage lived in her *mulgedera* with her husband may be supposed to have been settled in *binna*. On the other hand, it would be expected that a woman married in *diga* would have been led away from her parental home. It was a symbolic manifestation of the departure of the woman to join another family and bear children who will belong to a different genes.

Such a person would live in her husband's home or upon the property of her new family. However, if it was agreed that the marriage was a *diga* marriage, it would be a diga marriage, irrespective of the fact that the bride took up residence in her father's house ... The determination of the character is, perhaps unfortunately, but nevertheless, somewhat more complex than seeking a response to the simple question: Where did she live?"

***Per* Dheeraratne, J:**

An erroneous decision on a pure question of law will operate as *res judicata* quoad the subject-matter of the suit in which it is given, and no further. Unlike a decision on a question of fact or of mixed law and fact, an erroneous decision on the law does not prevent the Court from deciding the same question arising between the same parties in a subsequent suit according to law. Further the

subject-matter of the previous action was different from that of the present. Hence the decision in *Rana v. Kiribindu* 79 (2) N.L.R. 56 is not *res judicata* to bar the present suit.

Cases referred to:

1. *Ranhotidewayalage Rana v. Ranhotidewayalage Kiribindu* (1978) 79 (2) N.L.R. 73, 79.
2. *Ukkoo Hamy v. Appu* (1851) (1843-55) Ramanathan 56.
3. *Herathhamy v. Podihamy* (1909) 3 Leader L.R. 58.
4. *Herathgedera Malhamy v. Belikotoowe Punchyralle* 14 February 1828: Hayley Appendix II, p. 48.
5. *Herathgedera v. Belikotoowe*, 14 February 1828, Hayley: Appendix II p. 49.
6. *Palleywatte Nandoowa v. Kaluwa Dureya*, 8 September 1825 Hayley: Appendix II P. 49.
7. *Yattewerragedera Rammela v. Kowralle* 2 August 1822, Hayley: Appendix II PP. 49, 50, 97.
8. *Chelliah v. Kuttapitiya Tea and Rubber Co.*, (1932) 34 N.L.R. 89, 93.
9. *Mampitiya v. Wegodapela* (1922) 24 N.L.R. 129. 130, 131, 132, 133.
10. *James v. Medduma Kumarihamy* (1957) 58 N.L.R. 560.
11. *Menikhamy v. Appuhamy*, C.R. Ratnapura 12653 S.C. Civ. Min. 10 June 1913: Modder 430, 431, (1913) 5 Bal. N. 38.
12. *Kalu v. Howwa Kiri* (1892) 2 L.R. 54; 1 S.C.R. 140.
13. *Punchi Menike v. Appuhamy et al* (1917) 19 N.L.R. 353, 354, 358.
14. *Fernando v. Bandi Silva* (1917) 4 CWR 9, 12.
15. *Kuma v. Banda* (1920) 21 N.L.R. 294.
16. *Podinona v. Herat Banda* (1985) 2 Sri L.R. 237.
17. *Dingiri Amma v. Ratnatilaka* (1961) 64 N.L.R. 163, 166, 167.
18. *Punchimahatmaya v. Charlis* (1908) A.C.R. 89.
19. *Kotmale v. Duraya* (1907) 3 Bal. 122.
20. *Ukku v. Kirihonda* (1902) 6 N.L.R. 104, 106.
21. *Dingirihamy v. Mudalihamy et al*: D.C. Kurunegala 4402 – S.C. Civ. Min. of 15 October 1912; 16 N.L.R. 61.
22. *Dissanayake v. Punchi Menike* (1953) 55 N.L.R. 198.
23. *Tennakoon Mudiyanselage Ukku Amma and Others v. Vidanagamage Beeta Nona* S.C. Appeal No. 32/94, S.C. Minutes 13 September 1994.
24. *Bindi Menika v. Mudianse* C.R. Kegalle 2394 S.C. Civ. Min. of 22 March 1898.
25. *Dingiri Amma v. Ukku Amma* (1905) 1 Bal. 193.
26. *Gonigoda v. Dunuwila* 9 July 1827: Hayley Appendix II p. 70.
27. *Doratiyawe v. Ukku Banda Korale* (1909) 1 Current L.R. 259.
28. *Re Mahara Ratemahatmaya* (1859) 2 Lorensz 287.
29. *Dissanekgedera Sirimal Etena v. Her brother Kooderalle*, 28 February 1828: Hayley Appendix II p. 42.
30. *Wettaewa Bandi Appu and Kirry Menike v. Ismail Naide:* Hayley: Appendix II p. 43.
31. *Kattikande Menikhamy v. Baala Etana* 10 November 1826 Hayley: Appendix II p. 45.

32. *Galagamegedera Alenso Naide v. Heykeladeniya Etenec*, 25 February 1828 Hayley: Appendix II p. 43.
33. *Udurawela Polwattegedera Punchyralle v. Do. (V.P.) Dukgannaralle.* 30 January 1824; 13 March 1826 Hayley: Appendix II p. 57.
34. *Ambaliyadde Case*, 03 December 1824: Hayley: Appendix II pp. 43-44.
35. *Boombure Kalu Etena v. Punchyhamy*; 22 November 1823, 01 July 1825: Hayley: Appendix II p. 44.
36. *Mahengedera Baale Etena v. Riditotuwegedera Ukkuralle,* 8 July 1823; 03 May 1825 Hayley: Appendix II pp. 42, 43.
37. *Tikiri Kumarihamy v. Loku Menika* (1857) (1872-76) Ramanathan 106.
38. *Babanissa v. Kaluhami* (1909) 12 N.L.R. 103, 105.
39. *Bandy Ettene v. Bandy Ettene* (1873) 2 Grenier 115.
40. *Samerakongedera Punchyralle v. Punchi Menika* 01 April 1829, Hayley: Appendix II pp. 44, 45.
41. *No. 590 Madawelatenne Case* 03 May 1834: Marshall's Judgments p. 329, 331.
42. *Batterangedera Horatale v. Her full brother Kalua* 5 May 1828 Hayley Appendix II 45 – 46.
43. *Meera Saibo v. Punchirala* (1910) 13 N.L.R. 176.
44. *Ram Etana v. Nekappu* (1911) 14 N.L.R. 289.
45. *Appuhamy v. Kiri Menika* (1912) 16 N.L.R. 238, 239, 240.
46. *Ukku v. Pingo* (1907) 1 Leader 53.
47. *Tikiri Kumarihami v. Loku Menika and Others* (1875) (1872-76) Ramanathan 106.
48. *Siripaly v. Kirihame* (1917) 4 C.W.R. 157.
49. *Banda v. Angurala* (1922) 50 N.L.R. 276, 277, 278 to 280.
50. *Gunasena and Others v. Ukkumenika and Others* (1976) 78 N.L.R. 529, 531, 534, 535, 536.
51. *Appu Naide v. Heen Menika* (1948) 51 N.L.R. 63, 64, 65.
52. *Alice Nona v. G. Sugathapala* (1967) 71 N.L.R. 24.
53. *Yaso Menika v. Biso Menika* (1963) 67 N.L.R. 71.
54. *Sinno v. Appuhamy* (1913) Bal. N.C. Vol. 1 p. 80.
55. *Regina v. Opalangu, Modder* 260 – 261.
56. *Kiri Banda v. Silva* (1913) 1 Bal. N.C. 83.
57. *Dullewe v. Dullewe* (1913) 1 Bal. N.C. 85.
58. *Seneviratne v. Halangoda* (1912) 22 N.L.R. 472, 473.
59. *H. P. James v. Medduma Kimarihamy* (1957) 58 N.L.R. 560.
60. *Waring Westminster Bank Ltd., v. Burton Butler and Others* (1948) 1 All ER 257.
61. *Dingiri Menika v. Punchi Mahatmaya* (1910) 13 N.L.R. 59.
62. *Appuhamy v. Punchihamy* (1914) 17 N.L.R. 271.
63. *Morais v. Victoria* (1968) 73 N.L.R. 409, 413, 417.
64. *Krishnan v. Thurairajah* (1969) 62 N.L.R. 511.
65. *Katiritamby v. Parupathi Pillai* (1921) 23 N.L.R. 209.
66. *Guneratne v. Punchibanda* (1927) 29 N.L.R. 249.
67. *K. Subramaniam v. Kumaraswamy* (1955) 57 N.L.R. 130, 131.
68. *Marassenagedera Kaloomenika v. Udagedera Punchymenika*, 19th March 1824; Hayley, Appendix II p. 44.

APPEAL from judgment of the Court of Appeal.

Tilak Marapone, P.C. with *N. Ladduwahetti and Sarath Weerakoon* for 1st defendant-appellant.
R. K. W. Goonesekera with *G. L. Geethananda* for plaintiff-respondent.
Rohan Sahabandu for 2nd defendant-respondent.
Manohara de Silva for 4th defendant-respondent.
No appearance for 3rd defendant-respondent.

Cur. adv. vult.

April 4, 1996.
AMERASINGHE, J.

I am in agreement with my brother Dheeraratne that the decision reported sub. nom. *Ranhotidewayalage Rana v. Ranhotidewayalage Kiribindu*[1] does not operate as *res judicata*. I agree with my brother Dheeraratne that the appeal should be allowed and that the judgments of both courts below should be set aside and that judgment shall be given and order made and entered dismissing the plaintiff's action.

Ukkuwa had two children: a daughter, named Kiribindu, and a son, named Rana. Ukkuwa died in 1957. The matter in issue is whether Kiribindu (the plaintiff-respondent) was entitled to inherit a moiety of her father's intestate estate and thereby acquired an interest in the lands sought to be partitioned in the action instituted by her.

The 1st defendant-appellant, and the 3rd and 4th defendant-respondents, who are the children of Rana, maintain that Kiribindu was married in *diga* and thereby lost her right of succession to her father's estate.

Kiribindu's position is that, although her marriage was registered as a *diga* marriage, she never left her *mulgedera,* after her marriage to Piyasena. She had continued to live there with her husband, Piyasena, until his death and ever afterwards. A *diga* married woman lives in her husband's home, whereas a *binna* married daughter lives in her father's home or properties. She had never lived in any place other than in her father's house. In the circumstances, Kiribindu was in fact a *binna* – married daughter or, alternatively, she had regained

rights of succession appropriate to that of *binna* – married daughter by continuously residing in the *mulgedera* and/ or by maintaining a close connection with it by staying there to look after the children of her brother Rana, whose wife had died shortly before Kiribindu's marriage to Piyasena.

Both parties rely on section 9 (1) of the Kandyan Law Declaration and Amendment Ordinance which refers to *diga* and *binna* marriages. The Ordinance does not define what these terms mean, and therefore it is necessary to try to ascertain what these terms mean, for the decision in the matter before us rests entirely upon the question whether the marriage of the plaintiff-respondent, Kiribindu, was a *diga* marriage or a *binna* marriage.

BINNA MARRIAGE AND *DIGA* MARRIAGE

J. Armour, *Niti Nighanduwa or Grammar of (Kandyan) Law,* (1842) (Perera's Edition) (p. 10), and Sawers (*Memoranda of the Laws of Inheritance & C., and notes on Sir John D'Oyly's exposition of the Kandyan Law by Simon Sawers, Judicial Commissioner (1821-1826), Kandyan Provinces, Ceylon, commonly called Sawers' Digest of the Kandyan Law* Ed. by Earle Modder (1921), (p. 31), (p. 31), stated that marriage among the Kandyans may be considered as of two descriptions: (1) marriage in *diga*; and (2) marriage in *binna.* This position is accepted by Frank Modder, *The Principles of Kandyan Law,* 2nd Ed. (in collaboration with Earle Modder), (1914), paragraph 126, p. 229, as well as by F. A. Hayley, in his *Treatise on the Laws and Customs of the Sinhalese including the Portions still surviving under the name Kandyan Law* (1923) at p. 193.

In paragraph 127 at p. 229 Modder states that "A marriage in *diga* is when a woman is given away, and is, according to the terms of the contract, removed from her parents' abode, and is settled in the house of the husband."

In his "Comment" to paragraph 127, Modder states as follows:

Armour, 5, – The word *diga* from *di,* root, *da,* to give, is, according to some scholars a derivative from *dirga,* long, the bride being sent away to a distance, that is to her husband's house – The

conducting of a wife to, and the living in the husband's house or in any family residence of his, or if he does not own house and lands, the taking her as his wife and the conducting away from her family to a place of lodging, constitutes a *diga* marriage. – The predominant idea is the departure or removal from the family or ancestral home. This is of the same nature as marriages among Europeans and is the more common of the two marriages. A plurality of daughters in a family necessitates this mode of marriage with regard to the majority of them, the common property being too limited in extent to be enjoyed by a numerous family. The marriage of the daughters and their departure from the parental residence generally operate a forfeiture of the inheritance and thereby reduce the number of shareholders ...

Later, in paragraph 128 at p. 232, Modder states that "A marriage in *binna* is where the bridegroom is received into the house of the bride, and according to certain stipulations, abides therein." In his "Comment" to that section, Modder (232-235) makes the following explanation:

Armour 5; Sawers, 34, – The word *binna* seems to be derived from the fact of the husband coming or entering (*ba*, to come or descend) into the wife's family. The term is invariably connected with the word *bahinawa*, going down. Other derivations make *binna* a contraction of *bihini,* which again is derived from *bhagini* (root *bhag*) to divide, to take oneself, possess, enjoy carnally); or make it equivalent to *bhinna*, broken split. merged, united. – This form of marriage occurs only in cases where the bride is an heiress or the daughter of a wealthy family in which there are few or no sons. The bridegroom does not, by such a union, acquire any right to his wife's property, which remains her own, and subject to her sole control ... In a *binna* connection, the wife is the head of the family, and she alone can regulate the management of the household. The whole property, movable and immovable is subject to her will, while the husband has no control over any portion of it during her lifetime. He is, besides, bound to obey her, and is subject to all her whims and caprices; she may even order him out of her house at any time he happens to incur either the displeasure of her parents, or, which is more frequent, the jealousy of herself.

> The right of expulsion was also exercised by the brothers, and at times, by the children of the wife by a former bed. The position of a *binna* husband was, under all the circumstances, a precarious one; whence had arisen the old Kandyan adage that a husband settling in *binna* should always have ready at the door-way his walking-stick, a torch, and talipot, articles of travel, indispensable to an emergency, for he may be unceremoniously turned out at any moment, no matter at what time of the day, and in what weather, he would have to depart and find his way out. On the death of the wife intestate, her children and their issue, and failing them, her ascendants and collaterals, succeed to her property in preference to her *binna* husband ...

Modder (p. 232) quotes Chambers' *Encyclopaedia Britannica* as stating that:

> "A marriage in *beenah* is especially interesting because of the disclosure of it which is given in the book of Genesis. In *beenah* marriage, (the word is taken from Ceylon), the man goes to live with his wife's family usually paying for his footing in it by service, he is, in general an unimportant person in the family, *and the children are not his, – they belong to the family, and the kindred of his wife."*
>
> The emphasis is mine.

At p. 233 Modder quotes Genesis xxiv, 1-8 as stating: "Now Jacob made a *beenah* marriage" and considers other Biblical cases. He also points out at p. 234 that "Among the semites of Arabia, *beenah* marriage was maintained for women down to a comparatively late period ... Marriage by purchase ultimately supplanted the *beenah* marriage among the Hebrews and became the prevailing marriage among the Arabs ..."

The subordinate position of a husband married in *binna* in relation to rights of succession to the properties of his wife does not explain why his wife was entitled to succeed to her father's properties, whereas if she had been married in *diga,* she would have forfeited her rights to inherit her paternal properties, her brothers and *binna* – married sister's, as Sawers (1), very significantly, puts it "or rather

their children" (See also Hayley: 372), alone becoming entitled to such properties. (See *Ukkoo Hamy v. Appu*[2], *Herathhamy v. Podihamy*[3]).

A *diga* marriage was not a device to get rid of surplus daughters; nor was a *binna* marriage a device to find some compliant male who was willing to endure the "whims and caprices" of an "heiress". Usually, a daughter who was married in *diga* was given her dowry, which was ordinarily a matter of arrangement between the bride's parents and the bridegroom and his family. There have always been women, including Kandyan women, who preferred to do what they wished rather than conforming with traditional arrangements. Where a woman married of her own accord, her marriage would, as we shall see, be a *diga* marriage. A *diga* married woman became a member of her husband's family and ceased to be a member of her parental family for purposes of succession to her father. She was excluded from the succession to her father's estate "chiefly due to her separation from the father's house and union with a different family to bear children who will belong to a different *gens*." (See Hayley at 331 and 333).

On the other hand, if the daughter had been married in *binna,* she remained a member of the father's family for the purposes of succession and shared her father's estate equally with her brothers (D.C. Kandy 706 1834 Austin 10), and while her own title was, in some cases, defeasible, she transmitted an absolute interest to her issue. (Hayley 370, 378). Attention is drawn to the words I emphasized in the passage quoted by Modder from Chambers' *Encyclopaedia* and to Sawer's observation "or rather their children", quoted above, in referring to a *binna* – married daughter's rights of succession to her father's property: These observations indicate the reason why a *Binna* – married daughter inherited her father's property and why her children inherited her father's property: They were members of the daughter's father's family."

Hayley (p. 167) explains the *binna* form of marriage in the following words:

"The *binna* marriage is a device similar in effect, and probably akin to, the Indian method of raising up by "an appointed daughter" a

son who shall perform the religious rites necessary for the salvation of the grandfather's soul. "Since from the hell called put the son preserves the father, therefore *putra* was he called."

After citing Manu IX. 138 in support of the above proposition, and stating that "We find the term *bhinna-gotra sapindas* in Bengal applied to kinsmen sprung from a different family in the male line, such as a daughter's son: Mayne, *Hindu Law and Usage*, 7th Ed: pp. 680, 787", Hayley (167) states as follows:

"In a Buddhist Community the necessity of obtaining a *putra* for the maintenance of prosperity in the future life did not exist; but the advantage of recognizing a daughter's son as heir, on the failure of sons, is obvious, when the desire of keeping property in the family is borne in mind. The religious foundation for the usage becomes a secular one. Although this may be its later history, the *binna* marriage has probably come down from a time when descent was traced through females."

Although if a daughter was married in *diga* she lost her rights of inheritance to her father's lands, yet a *diga* married daughter was never abandoned by her family. Her rights of succession to her father's properties was another matter. If she returned to her parents home, e.g. on account of the dissolution of the marriage by death or divorce, or because of ill-treatment or because she had been reduced to penury by her husband's misfortune or bad conduct, although she did not ordinarily recover any right to inherit (Armour 65-66; Niti. 62, 65, 66), she was entitled to live in the *mulgedera* and receive support. (See Sawers P. 5; Hayley 384, 388). Moreover, a *diga* – married daughter was excluded from inheriting her father's property only if there were sons, *binna* – married daughters, or unmarried daughters, by the same wife or issue of any of them, in her father's family. (Hayley, 370, 389). Thus in *Herathgedera Malhamy v. Belikotoowe Punchyralle*[4], Heratralle, the proprietor, died leaving two sons and a grandson, who was the only child of the proprietor's daughter who had been married in *binna* (after having previously lived in *diga* with the same husband) and had predeceased her father. One third of Heratralle's estate was adjudged to the grandson by right of his mother.

In *Herathgedera v. Belikotoowe*[5], Bajooralle having died, his widow and two children (both daughters) quitted the deceased's family house, leaving the estate in possession of Bajooralle's mother and his deceased *binna* sister's son. These two daughters were given away in *diga* by their mother, but were notwithstanding declared to be his lawful heirs, in preference to his nephew (his *binna* sister's son) and to his mother. One of the daughters died in *diga*.

In *Palleywatte Nandoowa v. Kaluwa Dureya*[6], the deceased's only daughter was preferred to his brother's son.

In *Yattewerragedera Rammela v. Kowralle*[7], it was held that it is not according to Kandyan custom that a brother has a right to a share of a deceased brother's property in the event of the deceased brother leaving but female issue. On the contrary an only daughter has a right to inherit the whole of her father's share of the parveny property.

Being a matter that determined rights of succession, it must be expected that what the character of a marriage was going to be would be carefully considered by the parties to the marriage and their parents and not left to be casually determined. As Garvin, SPJ explained in *Chelliah v. Kuttapitiya Tea and Rubber Co.*[8] (*supra*) at p. 94 "Whether a marriage is to be *diga* or *binna* would naturally be determined by the negotiations which precede the marriage." Hayley (p. 194) said that "Whether any particular alliance is of the nature of *binna* or *diga* is a question of fact, not dependent on any particular form or ceremony, but on the intention of the parties and their parents." The intention of the parties and their families was stressed by Bertram, C.J. in *Mampitiya v. Wegodapela*[9].

In that case, at p. 130, Bertram, CJ. said:

"A marriage is a consensual contract. If there is any question as to whether any particular marriage has a particular character, that is a question of the intention of the parties."

At p. 131 Bertram, C.J. said:

"We start, therefore, with the conclusion that the marriage actually celebrated, according to the intention of the parties, and those connected with them, was a *diga* marriage."

Later, at p. 132, the Chief Justice said:

"I think ... that we must take it to be the law that what works the forfeiture is not the ceremony, but the severance. No doubt by contracting a marriage in *diga,* in which the bride's family participated, the parties bound themselves to each other and the family that the bride should be conducted in accordance with custom, and should settle in the house of her husband."

USUAL PLACE OF RESIDENCE ACCORDING TO CUSTOM

Since a *diga* marriage was one in which the wife was treated as a member of the husband's family, it would be usually agreed that the bride would leave her parental home and live with her husband and become a part of his family. And so, after the celebration of such a marriage, the bride would be expected to be conducted in procession to the home of her husband. And if the woman went away to become a member of her husband's family, she forfeited her rights of inheritance to her father's properties. As L. W. de Silva, AJ said at p. 565 in *James v. Medduma Kumarihamy* [10], we should apply section 114 of the Evidence Ordinance and hold that:

"In the absence of evidence to the contrary, we are entitled to presume that, according to the terms of the marriage contract, the common course of natural events followed consistent with the ordinary habits of Kandyan society, resulting in a severance of the *diga* woman from her father's house. This involved a forfeiture of her right to the paternal inheritance."

SEVERANCE FROM HER FAMILY BY JOINING ANOTHER FAMILY AND NOT THE PLACE OF RESIDENCE IS THE TEST

Ordinarily, if there was a "conducting away" after the celebration of a marriage, it was indicative of the fact that the daughter was married in *diga.* Consequently, her rights of succession would be determined

by reference to her status as a *diga* married daughter. The fact that a *diga* married daughter usually lived in her husband's house, and that a *binna* married daughter usually lived in her father's house, however, did not necessarily mean that the test of the character of a marriage was the place of her residence. The mere fact that a daughter went away from the *mulgedera* and was physically separated from it did not mean that she thereby contracted a *diga* marriage and consequently forfeited her rights of inheritance to her father's properties. That would have been the case if what brought about the forfeiture was physical severance from the *mulgedera*. However, that was not the law. The crucial question is not her physical separation from the *mulgedera*, even to live with a man, but whether the woman went to live with the man as his wife and became a member of his family. In *Menikhamy v. Appuhamy*[11], the daughter left home, taking service as a cook and thereafter becoming the mistress of a man called Muniandy.

De Sampayo, J. said:

"It is the going out in *diga* that works the forfeiture: that is to say, the woman should be conducted by, or go out to live with a man as his wife. ... Now the plaintiff did not leave her home with any such intention. She left for the purpose of employment in the first instance, and her subsequent relations with the Tamil man did not, in my opinion, constitute a case of going out in *diga*. The commissioner thought that the reason for forfeiture in her case was stronger because she brought disgrace on her family. But the forfeiture under the Kandyan law, was not based upon any circumstance of disgrace to the family, **but rather upon the primitive idea of severance of family ties involved in a woman going out and becoming as it were a member of the husband's family. ...**"

The emphasis is mine.

In *Kalu v. Howwa Kiri*[12], Lawrie, J observed that:

"... the old disability still attaches to the act of being conducted from a father's house by a man and the going with him to live as his wife in his house."

The emphasis is mine.

In that case, Lawrie, J. said that a woman married in *diga* "ceased to be a member of her father's family and she did not regain her full rights even though she returned."

The emphasis is mine.

In *Punchi Menike v. Appuhamy et al.*[13], Wood Renton, J. at p. 354 said:

"The general rule undoubtedly is that when a woman marries in *diga*, that is to say, when she is given away, **and is, according to the terms of the contract**, conducted from the family house, or *mulgedera, and settled in that of her husband*, she forfeits her right to inherit any portion of her father's estate. But this forfeiture was an incident, not so much of the marriage, as of the quitting by the daughter of the parental roof to *enter another family* ..."

The emphasis is mine.

In the same case, De Sampayo, J. said at p. 358:

"The point to be kept in view in all cases, I think, is that the essence of a *diga* marriage is the severance of the daughter from the father's family, **and her entry into that of her husband** and her consequent forfeiture of any share of the family property."

The emphasis is mine.

In *Fernando v. Bandi Silva*[14], Wood Renton, C.J. said that in the case of a daughter married in *diga*:

"... forfeiture is due not so much to the marriage as to the severance, effected by the marriage, of the daughter's connection with her father's house. ..."

The emphasis is mine.

In *Dingiri Amma v. Ratnatilaka*[17], Tambiah, J. said:

"It is going out in *diga* and severance from the *mulgedera* during the lifetime of the father which brings about forfeiture and not merely a temporary departure."

The question whether a marriage is to be treated as *diga* or *binna*, with great respect, does not depend on whether there was a 'temporary' departure from or, conversely, a permanent residence in, the *mulgedera*, but whether, in the circumstances, it could be held that there was a severance from the *mulgedera*, not in the sense of physically leaving her anscestral home, but in the sense, as it were of the destruction, of "the daughter's connection with her father's house", as Wood Renton J. explained in *Fernando v. Bandi Silva*[14], ceasing "to be a member of the father's family", as Lawrie, J. put it in *Kalu v. Howwa Kiri*[12], or as Wood Renton, J. explained in *Punchi Menike v. Appuhamy*[13] (*supra*), quitting the parental roof "to enter another family" or as de Sampayo, J. explained in *Menikhamy v. Appuhamy*[11], (*supra*), the daughter had gone out "becoming as it were a member of the husband's family".

CHIEF JUSTICE BERTRAM'S ERRONEOUS *OBITER DICTUM* IN *MAMPITIYA V. WEGODAPELA*

Bertram, C.J. in *Mampitiya v. Wegodapela*[9] said:

"... we must take it to be the law that what works the forfeiture is not the ceremony, but the severance. No doubt by contracting a marriage in *diga*, in which the bride's family participated, the parties bound themselves to each other and the family that the bride should be conducted in accordance with custom, and should settle in the home of her husband."

There is no difficulty in accepting that as an accurate statement of the law. However, with great respect, the following observations of the Chief Justice are misleading:

"But if this, for whatever reason, was not done, and, if with the acquiescence of her family the bride remained in the *mulgedera*, then the forfeiture was never consummated."

In the case before Bertram, C.J., although the certificate of marriage showed that the daughter had been married in *diga,* it was established that she had not been formally conducted to her husband's house; that she continued to live in the *mulgedera*, where her first two children were born and brought up; that she did not go to her husband's home, except, possibly for a visit, during the early days of her married life, and also for a few months at a later date, during a period in which there was a family estrangement, and in which her third child was born at her husband's old home. During this absence, the other children of the marriage remained with the wife's family. Apart from this, though her husband was from time to time living away from her in the discharge of official duties, she lived at first at the *mulgedera* of the family, subsequently, at a neighbouring *walauwa* purchased by her brother, and afterwards again at the *mulgedera*, and (apart from the period of estrangement above referred to) she never at any time cut herself off from the family. Moreover, there was the fact that the daughter and her husband had sold a part of the *walauwa* "inherited by her brother" to a Colombo proctor, without any "effective step" being ever taken "to bring about a forfeiture of the (woman's) interest." In the circumstances, it was held that, although the woman had been married in *diga,* no forfeiture of her rights had been incurred and that she had retained her rights of inheritance. There was, therefore, not merely acquiescence in her residence but a recognition of her rights of ownership in her anscestral properties.

With great respect, neither the *dicta* cited by the Chief Justice from the decisions in *Kalu v. Howwa Kiri*[12], *Menikhamy v. Appuhamy*[11], *Punchi Menike v. Appuhamy*[13], nor the decision in *Fernando v. Bandi Silva*[14], referred to by the Chief Justice support the conclusion that if "for whatever reason" the daughter remained in the *mulgedera* with the "acquiescence of her family", then the "forfeiture was never consummated". "Consummation of the forfeiture", had never been referred to in any earlier case. The essence of a *diga* marriage was not the physical severance (of which it might have been evidence), but the leaving of her family for the purpose of entry into the husband's family. The reason for being in the *mulgedera* is always an important consideration, for upon it may depend the character of the marriage. Was her presence due to her being settled in *binna* or

because of some other reason, such as destitution or a family arrangement? Moreover, mere acquiescence on the part of her family in her living in the *mulgedera* did not *per se* convert her *diga* marriage into a *binna* marriage: The acceptance of the daughter, notwithstanding her earlier marriage in *diga*, **as a *binna* – married daughter**, either married to the same man or to another man, is quite a different matter.

Bertram, C.J. said that his view of the law was "confirmed by two circumstances". "The first is this: If a woman, without any legal marriage, leaves her *mulgedera* and settles in the home of a man, in a relationship of the same nature as a *diga* marriage, she thereby forfeits her right of inheritance. (See Modder p. 244, *Kalu v. Howwa Kiri*[12]) (*supra*) and the other cases cited in the same paragraph."

In *Kalu v. Howwa Kiri*[12], the question was whether a woman whose marriage was not registered was thereby deprived of her rights of inheritance, for there was no valid marriage in terms of the law which makes registration a *sine qua non* for a valid marriage. (Cf. *Kuma v. Banda*[15]; *Podi Nona v. Herat Banda*[16]. Lawrie, J. held that, notwithstanding the law relating to registration, "the old disability still attaches to the act of being conducted from a father's house by a man and the going with him to live as his wife in his house." The relevant fact was that the woman had not merely departed from her parental home to live with a man, but departed to live with him in *diga marriage.*

Bertram, C.J. drew attention to "other cases" cited by Modder at p. 244 (p. 255 2nd Ed.). I shall now examine those cases.

In *Punchimahatmaya v. Charlis*[18], Hutchinson, C.J. and Middleton, J. held that under Kandyan Law a woman who leaves her parental house and makes her husband's house her abode and lives in *diga* with him, although she contracts no legal marriage, forfeits her right to her paternal inheritance.

In *Kotmale v. Duraya*[19] Wendt, J. held that under Kandyan Law a woman going out in *diga* would not be entitled to claim a share of her

paternal inheritance although she may not have contracted a legal marriage.

In *Ukku v. Kirihonda*[20], a Kandyan woman, having for two years cohabited with a Kandyan man in the *mulgedera* of her father, went with that man to his house and lived in it for some years, and their marriage was then registered. The marriage certificate described the marriage to be a *binna* marriage. Moncrief, A.C.J. held that "the evidence of the register, good as it is *prima facie*, may be rebutted by evidence. The Commissioner had accepted the fact that the woman had many years ago left the parental house and married in *diga.* Moncrief, A.C.J. upheld that view. It was argued in that case that the date of marriage was the date of its registration, 1894, and that the parties had at that time declared their marriage to be a *binna* marriage. The question was, it was submitted by counsel, therefore, settled by the declaration of the parties. Moncrief, A.C.J. said as follows (at p. 106):

> "If (learned counsel, Mr. Bawa) is right with regard to the date of the marriage, I think it is possible that his argument would hold, because if the parties married in 1894 and at the time declared they were marrying in *binna,* and the date given was the real date of the marriage, I am not aware of any reason to prevent them from doing what they intended to do, i.e., to contract a marriage in *binna*; so that the argument put forward on the other side to the effect that, as the parties were living together in 1894 in the husband's house, a marriage in *binna* could not be set up, would probably fail. But Mr. Pereira further urged that the date of the marriage given in the register does not conclude the parties, and that the real date of the marriage is clearly shown from the terms of the Ordinance to mean the date at which the parties began to treat themselves as married persons and to live as married persons.
>
> Reference on that point was made to section 11, according to which "no marriage contracted since the Ordinance No. 13 of 1895 came into operation, or to be hereafter contracted, shall be valid unless registered in the manner and form" as therein provided.

The question is what the word "marriage" means there. Mr. Pereira suggested, and with some reason I think, that it means any connection instituted by rites or ceremonies which, according to custom, would be considered a valid marriage but for the special provisions of the statute law. If that interpretation of the word is correct, I am inclined to think his argument to the effect that subsequent registration dates back to the institution of their irregular marriage is correct, because the provision is to the effect that something shall be valid upon registration, and that something is an irregular marriage, which is void for want of registration, and possibly took place some years before.

With some diffidence I am inclined to think that subsequent registration dates back to the original beginning of the connection between the parties. ... I think the appeal should be dismissed, inasmuch as the question comes ultimately to be, what the conduct of the parties was when they came to live together."

After referring to the decision of Moncrief, J, Modder (p. 255) refers to a decision in *Dingirihamy v. Mudalihamy et al*[21]. That decision was later reported in 16 NLR 61. In that case Pereira, J. agreed with the decision of Moncrief, J. in *Ukku v. Kiri Honda*[20] and held that "the registration dates back to the actual native ceremonies performed for the purpose of constituting the marriage."

In *Kalu v. Howwa Kiri*[12], *Punchimahatmaya v. Charlis*[18], *Kotmale v. Duraya*[19], *Ukku v. Kirihonda*[20] and *Dingirihamy v. Mudalihamy*[21], (see also *Dissanayake v. Punchi Menike*[22]; and *Tennakoon Mudiyanselage Ukku Amma and Others v. Vidanagamage Beeta Nona*[23]), there were marriages. They were at the time they were entered into not registered, but the man and woman in each of those cases had contracted marriages according to the laws, institutions and customs in force, and were *diga* or *binna* marriages. Foreiture depends on the fact that a marriage was a *diga* marriage and not on whether it was a registered marriage.

A word of explanation about the registration of marriages would perhaps clarify the matter. There being no written law to regulate the subject of matrimonial alliances, with a view to preventing or

minimizing what were regarded as "loose and casual connections and fitful cohabitations of the sexes, with the paternity of the offspring resulting from such pernicious intercourse, ever enveloped in a cloud of doubt and uncertainty" (Modder p. 222), "a number of very aged Kandyan Chiefs, to whom, in the course of nature, marriage must be of very little concern, waited upon Sir Henry Ward [the Governor] and asked that all marriages in the Kandyan Provinces might be restricted and registered. This was gravely cited as an expression of opinion in favour of an Ordinance. No wonder the late Lord Lytton [Secretary of State for the Colonies] was amazed and sceptical. Experience had shown that there was at that time, not only no widespread desire among the Kandyans for the change, but that in many outlying districts at some little distance from the central capital, the people had never heard of the proposal, until after the passing of the Ordinance No. 13 of 1859." (Digby, **Life of Sir Richard Morgan**).

Instead of confining itself to the introduction of a system of voluntary registration, the Ordinance attempted at regulating the status of all existing unions contracted according to the customs of the country. Further, it provided that future registered marriages could only be dissolved by the tedious and expensive process of a legal suit for divorce on grounds similar to those prescribed by English Law. As Modder pointed out (pp. 223-225), the Ordinance did not work very well. Indeed, the District Judge of Kandy, Mr. Berwick, said that "the effect of the new law was to bastardize and disinherit multitudes of the generation then being born, who would otherwise have had under the old law the status of legitimacy ... They were unsettling the rights of the property of the next two generations, and must foresee an immense flood of litigation and discontent and of grievous moral hardship in the future."

Despite all the tinkering which the main enactment received from the amending Ordinances No. 4 of 1860, 8 of 1861 and 14 of 1866, Sir Hercules Robinson (afterwards Lord Rosmead), then Governor, wrote as follows in 1898:

> "It is probably within the mark to assume that two-third of the existing unions are illegal, and that four-fifths of the rising generation, born within the last eight or nine years, are illegitimate.

> The oldest child born since the bringing into operation of Ordinance No. 13 of 1859 cannot now be more than nine years of age; but fifteen or twenty years hence, or sooner, if matters be left as they are, a state of antagonism must arise between the natural and legal claimants to property which it is impossible to contemplate without dismay."

The Ordinance was not repealed, but amendments were made in enacting Ordinance No. 3 of 1870, as Sir Hercules Robinson explained in his opening speech in the Legislative Council in 1869, to provide "relief for those, who under the mistaken supposition that they were complying with its provisions had committed bigamy, and by affording greater facilities for the dissolution of registered marriages in cases in which the parties to them were unable, from an incompatibility of temper, or any other cause, to live happily together." Sir Hercules observed that "It was not forgotten that it was hopeless to force European usages and opinions in regard to such domestic concernments upon an Eastern people, until they were themselves prepared for the adoption of Western views of morality by an actual change of habits..."

Indeed, the Kandyan population had been wholly unprepared for the radical changes introduced in 1859. The strange provisions regarding registration were largely disregarded. As Modder explained (pp. 255-256):

> "Villagers do not comply with the provisions of the Ordinance, not because they are immoral, or that they prefer to form illicit connections, but simply because they will not take the trouble to register what they and all their neighbours regard as an honourable union without registration. It is well-known that there exists no real objection on their part to the formality prescribed by law, and they are quite ready to recognize and appreciate the provision as a necessary safeguard of the interests of the wife, as of the children. Still, the absence of registration carries no stigma, as it does among western nations, and since a thing which may be done on any day is done on no day, it has come about that the ceremony of registration is largely neglected. "

Marriages continued, despite the Ordinance, to be contracted according to custom; and as we have seen, rights of inheritance were determined by reference to the character of such marriages as being *binna* or *diga,* notwithstanding the fact that the marriages were not valid for want of registration. As Lawrie, J. after noting the freedom of a *diga* – married wife to leave her husband as well as her precarious position on account of her liability to be "turned out whenever her husband got tired of her" in olden times, observed in *Kalu v. Howwa Kiri*[12] (*supra*):

> "A woman who lives in *diga,* but whose marriage is not registered, is in very much the same legal position as a *diga* married woman was before the Kandyan Marriage Ordinance was passed. Her position is equally free and equally precarious."
>
> "The Ordinance now gives privileges to those who register their marriages, and especially to their children, *but the law as to the rights of daughters married in binna or in diga has not been changed, and the old disability still attaches to the act of being conducted from a father's house by a man* **and the going with him to live as his wife in his house.**"
>
> The emphasis is mine.

If Bertram, C.J. was suggesting on the basis of decisions like *Kalu v. Howwa Kiri*[12] that forfeiture resulted from mere physical separation and co-habitation, with great respect, that is a position that cannot be supported. Forfeiture was the consequence of a *diga* **marriage**.

We have seen that in *Menikhamy v. Appuhamy*[11] (*supra*) – the case in which the woman left her home to take up duties as a cook and later lived with a man named Muniandy – the Court held that in the circumstances there was no marriage in *diga* and, therefore, no forfeiture. "*diga*" and "*binna*" do not describe a married woman's place of residence. They describe the nature of her **marriage** whatsoever her place of habitation may be.

There must be a *diga* **marriage** for the forfeiture to come into operation. Modder, at p. 232 and at p. 430, reports the decision of Withers, J. in *Bindi Menika v. Mudianse*[24], as follows:

"A woman, leaving home to live with a man in *diga* does not thereby form a *diga* marriage, if this man was found to have a wife at the time."

Modder (paragraph 241 at p. 429) states that "Unless a daughter has been formally married away in *diga*, or unless she obtains a settlement in the house of an acknowledged husband, she will not lose her right of sharing in the estate of her parents." In his Comment at p. 430, he explains that if the parents had neglected to have their daughter married, and the daughter contracted clandestine intimacies and at times absented herself from home and lived elsewhere in concubinage, yet if she returned and her parents received her again into the family, and if she afterwards remained in the father's house, she will not be regarded as a daughter who had been disposed in *diga*, and she will, therefore, in the event of her parent dying intestate, be entitled to a share of the said parent's landed property equally with her brother.

Modder cites a case reported in Armour: 61 in which it had been decided that "A daughter, whom her father had consigned to the care and protection of some relation, being afterwards married in the said relation's house to a person of another family, if the husband did not conduct her thence to his own house, that marriage will not be a reckoned one in *diga*, and the daughter will, therefore, continue to have a claim on her father's estate. ..."

Modder also cites *Punchimahatmaya v. Charlis*[18], (*supra*) *Kotmale v. Duraya*[19], (*supra*), and *Kalu v. Howwa Kiri*[12], (*supra*), and quotes Mr. Justice De Sampayo's words in *Menikhamy v. Appuhamy*[11] and refers to De Sampayo, J.'s observation in that case that it is "the going out in *diga* that works the forfeiture; **that is to say the woman should be conducted by, or go out to live with a man as his wife.**

Admittedly, the contracting of a *diga* marriage resulted in the forfeiture of a daughter's rights of inheritance to her father's properties. The fact that a marriage was invalid because it was unregistered did not mean that there was no marriage; for there may have been a customary marriage; and if such a marriage was a *diga* marriage, the forfeiture would come into operation even though the

marriage was not registered. Bertram, C.J., it seems, supposed that where a marriage was not registered, there was no marriage. Therefore, if there was a forfeiture, it was due to the mere departure from the *mulgedera* and not on account of marriage. And therefore where the woman remained in her father's house, there was no departure and therefore there was no forfeiture. With great respect, the Chief Justice was mistaken, for the cases show that the forfeiture was brought into operation by the woman joining another family by contracting a *diga* marriage. Where no such marriage is contracted, the departure of a daughter from the *mulgedera* does not result in the forfeiture of her rights of inheritance to her father's properties.

REMAINING IN OR RETURNING TO THE MULGEDERA DOES NOT NECESSARILY RESULT IN A RETENTION OR RE-ACQUISITION OF RIGHTS.

The view that a woman married in *diga* who for "whatever reason" remains in the *mulgedera* does not forfeit her rights or if she returns to the *mulgedera* she regains her rights, if there has been 'the acquiescence of her family', because in such a case, there has been no "severance" from the *mulgedera,* is untenable. The acceptance of the daughter back into the household as a member of the family, in the sense relevant to the concept of *binna* marriage, is the decisive matter. On the other hand, in the words of Modder (paragraph 251 p. 466) "The return of a *diga* married daughter to the family house, either before or after the father's death does not necessarily vest her with *binna* rights."

There is no doubt that in certain circumstances, a *diga* – married daughter may acquire the rights of inheritance appropriate to that of a *binna* – married daughter. Hayley at p. 389 summarizes the position as follows:

"3. If the *diga* – married daughter returns during her father's lifetime, **and is allowed to settle on the estate in *binna* with her former husband or a new husband**, she acquires all the rights of a *binna* – married daughter.

4. If the *diga* – married daughter returns after her father's death, she does not recover her right to succeed, **unless the other heirs**

themselves give her in *binna* marriage, or expressly consent to her marriage with either her former husband or a new husband being considered a *binna* marriage."

The emphasis is mine.

As it was in *Mampitiya v. Wegodapela*[9], there was no question of a **return** of the daughter to her *mulgedera*: in the matter before us, Kiribindu, the plaintiff-respondent, never left her parental home. However, as Bertram, C.J. observed (p. 133) in *Mampitiya v. Wegodapela*[9], if in certain circumstances after celebrating a *diga* marriage, a daughter may regain *binna* rights, "surely a *fortiori* **under appropriate conditions** she may also retain them."

The emphasis is mine.

There is no dispute that Kiribindu, the plaintiff-respondent, never left her parental home and lived in it before and after the death of her father. However, was **she allowed to settle in** *binna* in the *mulgedera*? Living in the *mulgedera* (or on ancestral properties e.g. see D.C. Kurunegala 19107 (1873) III Grenier 115; *Dingiri Amma v. Ukku Amma*[25], having a *binna* connection: cf. *Gonigoda v. Dunuwila*[26], cf. also *Doratiyawe v. Ukku Banda Korale*[27], did not automatically confer rights of inheritance on a daughter who had been married in *diga*. Her rights would depend on whether her residence could be regarded as a **settlement in** *binna* in the house or property of the father. Whether there was a settlement in *binna* would depend on the establishment of that fact established by the evidence in a particular case. In *Re Mahara Ratemahatmaya*[28], where a man lived for some years in the family house of a woman with the intention of forming a marital connection, it was held by Rowe, C.J. and Morgan J. that, unless there be some substantial proof to the contrary arising from a proved disparity of rank or other legal obstacle, that would amount to a marriage in *binna.*

On the other hand, as we have seen, if a daughter who had gone out in *diga* be divorced, or left a widow, or ill-treated or reduced to penury by her husband's misfortune or bad conduct, she is entitled, on returning to her parents, **to live with them** and be supported.

However, although there was **residence**, that alone did not confer the rights of a *binna* married daughter on such a person.

Sawers (Chapter I, paragraph 3 p. 2) states as follows:

"Daughters, while they remain in their father's house, have a temporary joint interest with their brothers in the landed property of their parents; but this they lose when given out in what is called a *diga* marriage, either by their parents, or brothers, after the death of the parents. It is, however, reserved for the daughters, in the event of their being divorced from their *diga* husbands, or becoming widows destitute of the means of support, that they have a right to return to the house of their parents and there to have lodging and support and clothing from their parent's estate; but the children born to a *deega* husband have no right of inheritance in the estate of their mother's parents."

Armour (p. 66) gave the following illustration:

"A daughter, whom the father had disposed of in *diga* having been afterwards divorced from her husband and reduced to destitution, and having therefore returned to her father's house and remained there until her father's death, will not have thereby become invested with the right of sharing in her father's estate; the whole thereof will devolve to the son and to the *binna* daughter."

Indeed, a daughter in want may be allotted lands for cultivation in lieu of maintenance (e.g. see *Dissanekgedera Sirimal Etena v. Her brother Kooderalle*[29], but in that event she was merely a tenant at will and acquired no vested, permanent interest. (see Hayley p. 388 and p. 390 and *Wettaewe Bandi Appu and Kirry Menike v. Ismail Naide*[30].

Armour (p. 67) gives the following illustrations:

"But, if the *diga* married daughter did not return to the house of her father until after his demise, if she came back destitute, after the death of her father, and if her brother did then not only allow her a lodging in the house, and supply her with the necessaries of life, but if he even permitted her to have a second husband in the said

house, and moreover, allowed her son, born under the *diga* coverture, to cultivate a portion of the deceased father's lands, – all those circumstances will not invest her with the rights of (a) *binna* married daughter, and she will not have thereby acquired a permanent title to a portion of her father's lands – it being here premised that the said son and daughter were issue of the same bed.

And if a *diga* married sister returned along with her husband, and her brother gave them a lodging in the deceased father's house, and assigned to them a portion of the paternal estate for their maintenance, temporarily, that portion will not eventually devolve to the said sister's issue, but will at the death of the said sister, revert to the brother, or he being dead, to his issue.

If a daughter, who had been married out in *diga,* did, after the death of her husband, and subsequent to the demise of her father also, return to her deceased father's house, and remain there in the state of widowhood, and if she and her children, who were born under the *diga* coverture, were even allowed by her brother to possess a portion of the father's lands, yet such possession will not invest her with a permanent right to that portion, and therefore, the same will not, at her death, devolve to her said children."

In *Kattikande Menikhamy v. Baala Etana*[31], it was stated as follows: " According to the only system the assessors are acquainted with, being that which was followed by the Maha Nadoo, and which they believe was enforced in all cases in every part of the Kandyan country, the whole of the property in question should be adjudged to the 1st plaintiff in parveny, reserving only a certain life interest therein to her father's widow, the defendant, and recognizing also the right of Kirry Etana, the eldest daughter, to be subsisted on the estate in case of her being reduced to destitution. But neither the defendant as widow of the proprietor, **nor Kirry Etana their daughter, on the ground of having returned to and dwelt on the estate, would be entitled to a permanent hereditary interest. From this she, Kirry Etena, was cut off according to universal custom of these Provinces by being given out in *diga* marriage by her father**."

In *Galgamegedera Alenso Naide v. Heykeladeniya Etenec*[32], it was decided that Loku Naide's three sisters having been disposed of in *diga* thereby forfeited their right to inherit their father's lands, and although the 2nd and 3rd sisters had afterwards returned through necessity **and dwelt on the estate and had possession of part of the lands,** neither they nor their children were allowed to have recovered the right of inheritance.

In *Udurawela Polwattegedera Punchyralle v. Do. (V.P.) Dukgannaralle*[33], there were five sons and four daughters. The father had divided all his lands (except a small portion) amongst his sons. All four daughters were disposed of in *diga,* but subsequently the 1st daughter **returned and died in the father's family house,** leaving a daughter. The 2nd daughter died in her husband's house, leaving a daughter. The 3rd daughter returned destitute from her husband's house **and lived in her native village.** The 4th daughter died without issue. By the decree of court, **the allotment of the father's lands were confirmed to the sons** and the reserved portion thereof was adjudged to the surviving daughter and the child of the 1st daughter. No portion of the father's lands was allowed to the 2nd daughter's child.

Even where there was no destitution, the return to the family home or lands did not necessarily convert a *diga* marriage into a *binna* marriage.

In the *Ambaliyadde case*[34], two brothers had four children by a joint wife, viz., one son and three daughters. Owing to domestic discord, the two brothers separated and divided the children between them, one taking the son and a daughter, and the other taking the two other daughters under his care. One of the latter daughters, who as well as her two sisters had been given away in *diga,* **returned to the parent's house after her husband's death and in the lifetime of her father, and there lived ever since, enjoying also the produce of the garden. Her son born in *diga* was also brought up in her father's house. It was decided that the son was the sole heir to both the fathers and the whole of their estate was adjudged to the son's children. The litigating**

daughter was only permitted by the terms of the decree to have occupancy of part of the house during her natural life.

In *Boombure Kalu Etena v. Punchyhamy*[35], the proprietor left three sons and a daughter. The latter was first married out in *diga* but **returned with her husband after the death of their parents, and her brother allowed her husband to possess a portion of the family estate. The daughter obtained no permanent settlement on the estate after her return.** The 1st son died without issue. The 2nd son left a daughter. The 3rd son left a son. The estate was adjudged to be **equally divided between the 2nd son's daughter and the 3rd son's son. The claim of the daughter (who had several husbands successively in her parent's house) was dismissed.**

In *Marassenagedera Kaloomenika v. Udagedera Punchymenika*[68], the proprietor had left a son and an infant daughter. The latter was given away in *diga* in the same village, after her father's death, but had no possession of any part of her father's lands from the time of her marriage until after her brother's death, **when she recovered a share of the lands by a decision of the chief. However, by the Judicial Commissioner's decree, the award of the chief was annulled and the whole of the lands were adjudged to the brother's children,** who were all daughters.

As we have seen, Modder (p. 323) quoting Chambers' *Encyclopaedia Brittanica*, pointed out that in a *binna* marriage "the man goes to live with his wife's family usually paying for his footing in it by service". What was **usual**, in that regard, however, as in the matter of residence, was not an absolute test of the character of a marriage. The mere fact that services were rendered on occupied paternal properties does not alter the status of a *diga* married daughter. In *Mahenegedera Baale Etena v. Riditotuwegedera Ukkuralle*[36], the proprietor died leaving one son and four daughters. One of the daughters had been disposed of in *diga* in the father's lifetime, and another was subsequently given away in *diga* by her brother; she, however, came back and **lived in her father's house with her husband, who cultivated a portion of the land, doing service for the same.** It was decided that neither the widow nor any

of the daughters had a right to inherit, and the whole estate was adjudged to the proprietor's son.

The position that the change of residence of a *diga* married daughter does not alter the character of her marriage was recognized by the Supreme Court in *Kalu v. Howwa Kiri*[12], Lawrie, J. explained the law as follows:

> "In olden times, a Kandyan woman, married in *diga,* could leave her husband's house whenever she chose, and was liable to be turned out whenever her husband got tired of her; but, though she thus gained only a precarious position by being conducted from her father's house, the legal consequences of such a conducting were fixed. She ceased to be a member of her father's family, **and she did not regain her full rights, even though she returned or was sent back in a few days**."

The emphasis is mine.

Perera, AJ in *Dingiri Amma v. Ukku Amma*[25], affirmed the general validity of the principle. His Lordship said:

> "The case of *Kalu v. Howwa Kiri* ... was cited to me in which Justice Lawrie has held that disabilities in the case of *diga* married daughters resulted from the "act of being conducted from the father's house by a man and the going with him to live as his wife in his house", and it was argued that, in that view, where once the event took place, the disabilities remained unchanged. **That is so, no doubt, as a general rule, and it may also be that generally speaking, a *diga* married daughter did not regain her full rights even though she returned to her father**, or was sent back in a few days... ."

The reference to regaining "full interests" is misleading. Every daughter, including one married in *diga*, is under the law entitled as a matter of right to support if she is in need of it. She does not **regain** any rights or interests. It is always there. As far as the rights of inheritance are concerned, if a woman is married in *diga*, her return

to the *mulgedera* does not automatically restore to her the rights she lost when she married, and in the words of Lawrie, J, "ceased to be a member of her father's family".

IF A *DIGA* MARRIED WOMAN IS REMARRIED IN *BINNA* OR READMITTED INTO HER FATHER'S FAMILY BY A *BINNA* SETTLEMENT CLEARLY SHOWING THAT A *BINNA* CONNECTION WAS INTENDED, SHE REGAINS THE RIGHTS OF A *BINNA* MARRIED DAUGHTER TO INHERIT HER INTESTATE FATHER'S PROPERTIES.

Where a *diga* married daughter returns to her parents' home after the dissolution of her marriage by the death of her husband or by divorce, she does not ordinarily recover any right to inherit her father's property, whether she returns before or after her father's death. (*Kalu v. Howwa Kiri*[12]; *Punchimahatmaya v. Charlis*[18]; *Kotmale v. Duraya*[19]; *The Ambaliyadde Case*[34]).

If, however, **with the consent of her parents** she marries again in *binna,* then her previous marriage is disregarded and the full rights of a *binna* – married daughter accrue to her. (D.C. Kandy 18457 (1894) Austin's Appeal Reps. 96; *Tikiri Kumarihamy v. Loku Menika*[37], *Babanissa v. Kaluhami*[38], states as follows:

> "A daughter, however, who may have been given out in *deega,* should she after her return to the house of her parents, with the consent of her family, get a *beena* husband in the house of her parents with the consent of her family, the issue of this connexion will have the same right of inheritance in their maternal grandfather's or grandmother's estate as the issue of her uterine brothers."

If a daughter returns to her *mulgedera* with the man to whom she had been married in *diga,* during her father's lifetime and **is allowed to settle on the estate in** *binna* by her father, she acquires all the rights of a *binna*-married daughter (Hayley 389).

Armour (p. 65) states that if a daughter who had been married in *diga* returned with her husband and obtained a *binna* settlement in

her father's house, died before her father, leaving issue, a son, that son will succeed to his mother's interests in his maternal grandfather's estate.

Armour (p. 66) states that a daughter who had been married out in *diga*, but had afterwards returned to her father's house with her husband and dwelt there in *binna*; a daughter who settled in *diga* and who received her father into her house and rendered him assistance until his demise; and a grand-daughter, the child of a son, who died before his father, have equal rights and the ancestor's lands will, therefore be divided equally amongst them in equal shares.

Admittedly, when he gave her away in *diga* the daughter would have been given her dowry (see Hayley 331-336). However, the other children have no vested interest in the paternal property during their father's life, so that he is not prevented from disregarding the dowry already advanced and reinstating his daughter in the family. He must manifest his intention of reinstating the daughter in the family. Such an intention may (not must) be inferred from his permitting the daughter to dwell in the *mulgedera* or some portion of his estate **in *binna* marriage**. (See Hayley 385; Modder 464).

In *Bandy Ettene v. Bandy Ettene*[39], Cayley, J. observed as follows:

"It appears to the Supreme Court that the case is substantially one in which a *diga* married daughter returns with her husband to her father's house and in which the father assigns them a part of his house, and puts them in possession of a specific share of lands. In cases of this kind, the *diga* married daughter regains her *binna* rights."

for, as Armour 64, explains, "such arrangement will be equivalent to a *binna* settlement, and, therefore, in the event of the father's death, the said daughter will be entitled, as well as her brother, to inherit a share of their father's landed property."

At p. 387, Hayley explains that:

"It makes no difference whether the daughter returns and contracts a second marriage, or brings back to the paternal abode

the husband with whom she previously departed in *diga*. If the return was before the father's death, the marriage may be converted into a *binna* one, with full effect in respect of inheritance, **but it must clearly appear that a proper *binna* connection was intended.** In D. C. *Kurunegala* 19107, (1873) Grenier 111, where a *diga* married daughter returned to her father's house with her husband and was given a portion of the paternal estate on which she built a house and resided permanently, it was held that she had recovered the rights of a daughter married in *binna*. So too if the return is after her father's death, there is nothing to prevent the heirs from recognizing the conversion of the marriage into *binna*, but stronger proof would presumably be required than in the case of a new marriage."

The emphasis is mine.

In *Dingiri Amma v. Ratnatilaka*[17], one of the daughters who had married, after the dissolution of the marriage, had returned to the *mulgedera* and with the acquiescence of the father, had contracted a *binna* marriage. Tambiah, J (Sinnetamby, J agreeing) said (at pp. 166-167) that in considering whether the two other daughters who had married in *diga* "re-acquired *binna* rights, it must be shown that they were not only received by [the father] and those who were entitled to the inheritance at the mulgedera **but further that they had acquiesced in their acquiring *binna* rights and agreed to share the inheritance.**"

The emphasis is mine.

In *Samerakongedera Punchyralle v. Punchi Menika*[40], the plaintiff's paternal grandfather and grandmother both possessed lands. They had two daughters and a son. The son at first had his wife in *diga*, but afterwards removed with her to her parents' house and there cohabited in *binna*. The two daughters were both married out in *diga*, but one of them (the defendant) afterwards came back to her father's house in her father's lifetime, accompanied by her husband and "lived there ever since as in *beena*". The son died in his wife's house leaving two children, the plaintiff and his sister. The father died next

"having received assistance from the ***beena*** daughter for many years (just before his death he granted a scratched ola to his said daughter, but it was set aside as invalid by the terms of the Proclamation,) DECIDED, waiving the question of the talipot, that defendant has a right to inherit equally with her brother as it was proved that she resided with her husband in her house for many years previous to the latter's death. Plaintiff's claim therefore is dismissed, he being already in possession of one-half of his grandfather and grandmother's estate."

It is perhaps not unreasonable to assume that the talipot, if admitted, might have shown that a grateful father bequeathed property to the daughter. In any event in accordance with the recognized principles of Sinhala laws and customs, the decision that the defendant had a right in the event of intestacy to inherit with her brother was based not on the fact of residence, but rather on the fact that the father had permitted the daughter and her husband to live in his house "*as in beena*". he had attempted to reward his dutiful daughter who is, not without great significance, described in the report as a "*beena daughter*", notwithstanding the fact that she had earlier been married in *diga.*

Modder (paragraph 250 (3) at p. 456) states that a *diga* married daughter acquires *binna* rights "On returning home along with her husband, and attending on, and rendering her father assistance until his death. "In his "Comment" on that paragraph, he states as follows:

> "If the daughter who had been married in *diga,* returned along with her husband and attended on her father and rendered him assistance until his death, and if the son had been settled away in *binna* elsewhere, and died before his father, leaving issue a son, in such case, the rights of the said daughter will be equal to those of the son's son, and they will accordingly be entitled to equal shares of the inheritance. (Armour 64; Marshall 329, x.57 D. C. Madawalatenna 590, (1834 Morgan, 12 s.73.))."

Modder (paragraph 250 (4) at p. 456) states that a *diga* married daughter acquires *binna* rights "On coming back and attending on,

and assisting her father during his last illness, and the father on his death-bed expressing his will that she should have a share of his land." In his "Comment" on that paragraph, he states at pp. 465-466 as follows:

> "If the father left a son and a daughter, minors, by one wife, and a son and a *diga* married daughter by another wife, if that *diga* married daughter came back and assisted her father during his last illness, and if the father had, therefore, on his death-bed, expressed his will that his *diga* daughter should have a share of his lands, notwithstanding her being settled in *diga,* in that case, the *diga* daughter will be entitled by virtue of such nuncupative will to participate equally with her uterine brother, and their paternal half-brother and half-sister, in the father's estate; the father's landed property will thus be divided equally between the two families, one moiety to the *diga* daughter and the other moiety to the other son and daughter. (Armour, 65). Ord. No. 7 of 1840, section 2, does not recognize a nuncupative will of this nature."

I shall deal with the *Madawelatenne case*[41] referred to by Modder later on. I shall also deal with the question of a woman married in *binna* leaving a child in the *mulgedera* when she subsequently departed from her father's house. What I should like to point out here is that in a "note" to the discussion of that matter, Sawers (Chapter I paragraph 9 pp. 3-4) refers to the case of the daughter previously married in *binna* but later living in *diga* acquiring *binna* rights by

> "visiting [her father] frequently and administering to his comfort, and especially by being present, nursing and rendering him assistance in his last illness; and this would especially be the case where there were two daughters and no sons either in re-establishing the right of one to the entire estate against the other daughter married in *deega,* or for a half of the estate should the other daughter be married in *beena;* but should there be a son, besides these two daughters, under such circumstances, and he living at home, in that case, the son or his heirs would get the half of the estate, and the other moiety would be divided between the two daughters of their heirs; but should the son have been living out in *beena,* and the parent have been depending on his

daughters and their husbands for assistance and support, in that case, he would only be entitled to one-third and the daughters and their children to one-third."

It hardly comes as a surprise that in such circumstances a father would, as a matter of reciprocity, wish to re-admit his *diga* – married daughter into his family and thereby recognize the discharge of her filial duties notwithstanding the fact that she had earlier gone away to become a part of, and to serve the purposes and interests of, another family.

The decision in *Batterangedera Horatala v. Her full brother Kalua*[42], also underlines the importance of the father's permission to readmit a *diga*-married daughter upon return with her husband to his family. The report of that decision is in Hayley, Appendix II, at pp. 45-46. It is as follows, except for the emphasis, which is mine:

"Ukkuwa was proprietor of an estate of 5 pelahs. He had a son, the defendant, and three daughters. One of the latter was married in *beena*, the other two, of whom plaintiff is one, were given out in *deega*. Plaintiff had two *deega* husbands, but after the death of one of the husbands, plaintiff and the surviving husband returned to her father's house. Ukkuwa died nine months ago intestate, but it was stated that he had settled on his first mentioned *beena* daughter 2 pelahs of his land, and at his death bequeathed 5 lahas to plaintiff, leaving the remainder 2 1/2 pelahs to defendant. The other daughter who continued in *deega* was left nothing. **As defendant distinctly acknowledges that plaintiff returned to her father's house with of course his permission**, 25 years ago, and continued to reside in it with her husband up till her father's death, **this readmission into the family house** restores to her all the rights of a *beena* marriage ..."

In *Punchi Menike v. Appuhamy*[13], de Sampayo, J. said:

"The point to be kept in view in all cases, I think, is that the essence of a *diga* marriage is the severance of the daughter from the father's family and her entry into that of the husband, and her consequent forfeiture of any share of the family property; and the

principle underlying the acquisition of *binna* rights, as I understand it, is that the daughter is readmitted into the father's family and restored to her natural rights of inheritance. **This of course is not a one-sided process; the father's family must intend or at least recognize the result."**

A WOMAN MARRIED IN *BINNA* MAY WITHOUT A CHANGE IN REGISTRATION OR A SPECIAL CEREMONY CONVERT THE CHARACTER OF HER MARRIAGE.

The second circumstance adduced by Bertram, C.J. for his view that if parties who had been married in *diga,* contrary to what was agreed, did not conduct the bride to the husband's home, then, for "whatever reason [this] was not done, and, if with the acquiescence of her family the bride remained in the *mulgedera,* ... the forfeiture was never consummated", was as follows: "The circumstance that if a woman, duly married in *binna* subsequently without any formal ceremony, or change in the registration, leaves her *mulgedera* and settles in the home of her husband, this of itself works a forfeiture. (See Modder, p. 247, and the *Madawalatenna Case*[41])."

I shall deal with the *Madawelatenne Case*[41] later on in considering the so-called "close-connection with the *mulgedera*" theory.

Modder (paragraph 247 p. 442) states that "A *binna* marriage is sometimes converted into a *diga* one, in which event it is subject to all the incidents of that form of marriage." In his "Comment", Modder explains as follows:

"A daughter married in *binna,* quitting her parents' house with her children to go and live in *diga* with her husband, before her parents' death, forfeits for herself and her children the right to inherit any share of her father's estate, she having at the time a brother or *binna* married sister." (Sawers 3; Marshall 329; Armour, 59).

But if a daughter, who had been settled in *binna* was childless, and if after her father's death, she quitted his house and went away and settled in *diga,* in that case she will have no permanent right to a portion of her father's landed property, the whole whereof

will then remain to her full brother or full brothers and their issue. (Armour, 60). ..."

Where a woman married in *binna* left the home of her father and settled in *diga* in the home of her husband, she could, without a ceremony, have converted her marriage into a *diga* marriage, and thereby deprived herself of her rights of paternal inheritance. In Bertram, C.J.'s words in *Mampitiya v. Wegodapela*[9], (*supra*), (p.132): "What works the forfeiture is not the ceremony, but the severance". One might have added, "Nor is it the direction in which the bridal procession went after the ceremony that mattered." As we have seen, physical absence is only evidence of "severence" from the family. As we have seen a *diga* marriage takes place if a woman goes to live with a man as his wife and quits the parental roof to "enter into another family". (Wood Renton, J. in *Punchi Menika v. Appuhamy*[13], (*supra*)). It is "the severance of the daughter from the father's family and her entry into that of her husband" (De Sampayo, J. in *Punchi Menike v. Appuhamy*[13] (*supra*), it is going out and "becoming as it were a member of the husband's family" (De Sampayo, J. in *Menikhamy v. Appuhamy*[13] (supra), it is the fact that a woman "ceased to be a member of her father's family" (Lawrie, J. in *Kalu v. Howwa Kiri*[12] (*supra*)), that makes such conduct a *diga* marriage. Neither registration nor a particular form of solemnization determines the character of a marriage, either at the time of contracting it or subsequently. That however does not mean that the character of a marriage is determined by quitting or, "for whatever reason", remaining in the *mulgedera*.

Marriage, being an important event in one's life, was solemenized. There were various ceremonies that were performed. (E.g. see Sawers Ch. VII paragraphs 1 & 2 p. 30-31; Armour pp. 10-11; see also M. B. Ariyapala, *Society in Mediaeval Ceylon,* (1956) at p. 355; Ralph Pieris, *Sinhalese Social Organization,* (1956), 197 et seq.; John D'Oyly, *Sketch of the Kandyan Constitution*, ed. L.J.B. Turner, 1929, 82 et seq.). However, it was never in dispute that the contracting of a marriage did not depend on the performance of specific ceremonies. For instance Armour, at p. 11 states:

"These formalities and ceremonies are not however observed in every case and are not always considered as necessary to

constitute lawful wedlock. If the man and wife were equals in respect of family, rank, and station in society, and if their parents countenanced and sanctioned the alliance, their cohabitation will be deemed a lawful union, and their issue will be acknowledged as legitimate and therefore entitled to all the rights of legitimate children, although the usual wedding ceremonies had not preceded the espousal."

Modder: 248-249, writing in 1914, noted that the *magul paha* were at that time rarely held and that the tendency to conform to western ideas was taking over. He refers to the exchanging of wedding rings and the introduction of wedding cake as examples. More importantly, he observes that

"As the formalities and ceremonies known as the "Five feasts" could only be properly observed by the higher and more influential classes, they were not always considered necessary to constitute lawful wedlock. It was sufficient (1) if the man and woman were of the same caste; (2) if they were equal in respect of family, rank and station in society; and (3) if the alliance was countenanced and sanctioned by their parents, or if dead, the parties were of the same caste, and the man publicly acknowledged the woman to be his wedded wife. The cohabitation would then be a lawful union, and the union thereof entitled to all the rights of legitimate children." (Armour 6; Sawers 33).

Hayley (at p. 175) states as follows:

The essentials of a legal marriage when carefully examined appear to have been only three:

(1) The parties must have had the *connubium*:
(2) They must have not been within the prohibited degrees of relationship:
(3) They must have cohabited with the intention of forming a definite alliance:

It was also requisite:

(4) That the consent of parents and relations should be given; and
(5) In the case of chiefs of high rank, the consent of the King.

With regard to the approval of parents and relations, Hayley (p. 175) points out that although it was ordinarily stated to have been one of the essential conditions, it seems doubtful whether "its absence was itself sufficient to make the marriage null and void". If the marriage was not null and void, it would, as we shall see, have been a *diga* marriage.

Regardless of the nature of the solemnization, if what was requisite according to custom to make a marriage had taken place, it was either a *binna* marriage or a *diga* marriage. Whether a marriage was a *binna* marriage or a *diga* marriage depended, not on any ceremony, but on whether the intention was that the woman was to remain in her family or to join the husband's family, Forfeiture depended on whether a marriage was a *diga* marriage, i.e whether the daughter was to belong to her husband's family. And so, indeed, as Bertram, C.J. said, "Forfeiture may, therefore, arise irrespective of any formal marriage ceremony".

Undoubtedly the place of residence is an important indicator of the character of a marriage. Ordinarily, in the absence of contrary evidence we ought to be entitled to presume that the common course of usual events consistent with the ordinary practices of Kandyan society followed. And so, a woman who after marriage lived in her *mulgedera* with her husband may be supposed to have been settled in *binna*. On the other hand, it would be expected that a woman married in *diga* would have been led away from her parental home. It was a symbolic manifestation of the departure of the woman to join another family and bear children who will belong to a different *gens*. Such a person would live in her husband's home or upon the ancestral property of her new family. However, if it was agreed that the marriage was *diga* marriage, it would be a *diga* marriage, irrespective of the fact that the bride took up residence in her father's house.

It cannot be accepted as a correct statement of the law that if a daughter, despite the fact that she was, and was said in her certificate of marriage to have been, married in *diga*, "for whatever reason", did not in fact leave the *mulgedera*, she was therefore married in *binna*. It was usual for a *diga*-married woman to be

conducted to her husband's home and for her to live with her husband in his house. However, it does not follow that if a woman in fact lived in the *mulgedera* "for whatever reason", then the marriage was a *binna* marriage. The determination of the character of a marriage is, perhaps unfortunately, but nevertheless, somewhat more complex than seeking a response to the simple question: "Where did she live"?

MARRIAGE IN *DIGA* OF HER OWN ACCORD IS NEVERTHELESS A *DIGA* MARRIAGE SUBJECT TO THE INCIDENTS OF THAT FORM OF MARRIAGE.

Although Bertram, C.J. stated that his view of the law was confirmed by two circumstances, he also said (at p. 133) that "It is also significant that if a daughter goes out in *diga* of her own accord, that is to say, without being given away by any member of her family, the forfeiture is none the less effected. (See *Meera Saibo v. Punchirala*[43] and *Ram Etana v. Nekappu*[44]). Forfeiture may, therefore, arise irrespective of any formal marriage ceremony."

Although generally marriages were arranged and their terms negotiated, and usually took place with the consent of her parents, a woman was free to contract a *diga* marriage. But if she did so, it would be subject to the usual rule of forfeiture. (See Modder paragraph 242 and Comment at page 432, and at pages 428 and 432 citing, among other authorities, Armour:42 and Wood Renton and Grenier, J.J. in *Ram Etana v. Nekappu*[44] and Hutchinson, C.J. and Van Langenberg, AJ in *Meera Saibo v. Punchirala*[43]). Forfeiture takes place, not because the woman acts without her parent's approval of her own accord, but because the woman by contracting a *diga* marriage had become a member of another family. That does not directly or indirectly support the conclusion that if a woman, for "whatever reason" remains in the *mulgedera* she has the rights of a *binna*-married daughter.

THE CLOSE CONNECTION WITH THE MULGEDERA THEORY

Reliance was placed by Bertram, C.J. in *Mampitiya v. Wegodapela*[9], (*supra*) at 133, and by learned counsel for the

plaintiff-respondent in the matter before us, on certain decisions recognizing an exception to the general rule excluding a *diga* – married daughter from the intestate estate of her father if she had kept up "a close connection" with her father's house.

The "close connection" in the matter before us, apart from the residence of the plaintiff-respondent, was based on the fact that she remained in the *mulgedera* to look after her brother's children. I shall deal with her role as a guardian under the caption "Section 9 of the Kandyan Law Declaration and Amendment Ordinance". I wish to deal here with the "close connection" theory in general.

In *Dingiri Amma v. Ukku Amma*[25], the plaintiff first lived with her husband in her father's house. The marriage was afterwards registered, and then both husband and wife lived at times in the plaintiff's *mulgedera* and at times in the husband's house, until the *mulgedera* was taken down. Then the plaintiff's husband built a new house in the garden on which the *mulgedera* had stood, and the two of them lived there. At the date of the trial, the plaintiff had lived in the new house for twenty years. On these facts, Pereira, AJ held that, if the plaintiff had been married in *diga* at all (as to which there was some doubt), she had reacquired the rights of a *binna* – married daughter. Admittedly, if in the circumstances, it was the view of the Court that by his conduct the father had shown that he had allowed his daughter to settle on the family property in *binna* with her husband, then it would have been correct to conclude, as the Court did, that the daughter had acquired all the rights of a *binna* – married daughter.

However, as Hayley (p. 380) points out, Pereira, AJ based his finding to some extent on an extract from *Perera's Collection* p. 173; and "another instance" in *Marshall's Judgments* p. 329 to the effect that a marriage in *diga* does not divest the wife of her inheritance where she has always kept up a connection with her father's house. *Perera's Collection* 173 and *Marshall's Judgments* 329, deal not with two but with one and the same case. Moreover, Perera, AJ probably did not study the report of the relevant case in *Marshall's Judgments*, but confined himself to a reading of *Perera's Collection* which quotes a passage from *Morgan's Digest* incorrectly summarizing the relevant

case, namely *No. 590 Madewelatenne case* 3rd May 1834 reported in *Marshall's Judgments*[41]. Since it is the misunderstanding of that case that was the source of the "close connection" theory, I shall reproduce the relevant report in Marshall in full. Under the caption "Kandy – Law of Inheritance", Marshall stated as follows:

"58. On this branch of the subject the following case from Madewelatenne was decided in 1834. A father dying about 1814 left six pellas of land, and on his deathbed gave a Talipot to his son, the Defendant, telling him to support his mother to whom he gave two other Talipots, and who took the produce of one of the pellas till her death, which happened about 1826; from that time the defendant, her son, took the produce of this pella as well as of the other five, the present action was brought for a share of the land by a daughter who had been married in *Deega,* but who it appeared had frequently resided at her father's house, where several of her children were born, it further appeared that she and her children were in a state of destitution. The Talipots given to the mother were not to be found; – in his answer, the defendant stated with great particularity the division made by his father of his lands, alleging all those which he now possessed had been bestowed on him by his father, and that his sister, the plaintiff, had forfeited, those which had been given to her for non-performance of Government services, but of this he offered no proof: The Assessors in the original Court were of opinion that the plaintiff, in consideration of his distressed circumstances, was entitled to the pella which his Mother had enjoyed, – the Judicial Agent, that she was only entitled to support for her life, but on reference to the Court of the Judicial Commissioners [this being before the New Charter came into operation] that Court decreed, that she was not entitled to anything. On appeal to the S.C., it was decreed that the plaintiff be put into possession of the Pella possessed by her mother till her death; the S.C. adopted the opinion of the Assessors in the Court of Madewelletenne for the following reasons:" Independently of the state of destitution in which it appears that the plaintiff now is, and which of itself would entitle her to some assistance from the estate of her deceased parents, it appears that, though she was married in Deega, she always kept up a close connection with her father's house, in which indeed

three of her children were born, another reason is, that the defendant, although he undertook to assert in his answer that the plaintiff had received a share of the paternal lands which he even specifically described, yet has not shewn that she received any part thereof; again it appears that the father, on his death bed, gave one Talipot to the defendant, and two others to his wife; what has become of those two latter olas does not appear, but it is not improbable that one of them may have been intended for the plaintiff, more especially considering the frequency of her visits to the parental residence. "No. 590 Madewelatenne, 3rd May 1834."

What Morgan said in his Digest (1862) at p. 15 was this:

"73. – A marriage in *Deega* does not divest the wife of her inheritance where she has always kept up a close connexion with the father's house; and this independently of the state of destitution in which she may be, and which of itself would entitle her to some assistance from the estate of her deceased parents. – No. 690, D. C. Madewelatenne, (M)."

As Hayley (p. 380-382) points out: "... Now it is clear that this judgment does not justify the summary in *Morgan's Digest* to the effect that, a marriage in *diga* does not divest the wife of her inheritance where she has always kept up a close connection with her father's house; and this independently of the state of destitution in which she may be, and which of itself would entitle her to some assistance from the estate of her deceased parents. Apart from the fact that the words used were *obiter dicta*, since the plaintiff in the case was destitute, and that several other considerations admittedly contributed to the decision, attention need only be drawn to the fact that the daughter was only awarded the one-sixth which her mother had possessed and not the half share to which she would have been entitled if her marriage did not "divest her of her interest."

In discussing *Dingiri Amma v. Ukku Amma*[25], Lascelles, C.J. in *Appuhamy v. Kiri Menika*[45], suggests that the decision of Pereira, J. was based on the fact that the woman had not merely been permitted to live in the *mulgedera* and ancestral property but that she had been given a *binna* settlement, which, as we have seen, entails more than residence. The Chief Justice stated (at p. 240) as follows:

"Pereira, J. held, on the authority of D.C.Kurunegala, 19,107, reported in *Modder* 66, that, even if the plaintiff were married in *diga*, she had acquired *binna* rights. D.C. Kurunegala, 19,107, was decided on appeal on the ground that it was substantially a case where a *diga* married daughter returned with her husband to her house and was given a *binna* settlement."

If a *binna* settlement had been made, there is no difficulty. It is then not a mere matter of residence or keeping up connections. D.C.Kurunegala 19,107 is reported in Part III Grenier at 115-116. The daughter had been married in *diga* but she had returned with her husband to the family property, Mighamulawatte. She was given exclusive possession of a piece of land therein and she built a house on it and so, lived "in the same garden but in a different house" ever since. The District Judge held that in accordance with the principles set out in Armour p. 67; Austin p. 22 and in D.C.Kandy 16679, the daughter had not acquired *binna* rights. In appeal Cayley, J. set aside the judgment. His Lordship said: "It appears to the Supreme Court that the case is substantially one in which a *deega*-married daughter returns with her husband to the father's house, and in which the father assigns to them a part of his house and puts them in possession of a specific share of his lands. In cases of this kind a deega-married daughter regains her *binna* rights. See Perera's Armour p. 64."

In *Ukku v. Pingo*[46], Wendt, J., with whom Hutchinson, C.J . concurred, held that a daughter, who married in *diga* after her father's death retained her share by leaving behind in the *mulgedera* a child previously born to her there as mistress of her brother-in-law.

The decision appears to be based on *Sawers' Digest of the Kandyan Law* (Earle Modder's edition 1921) Ch. I Section 9 p. 3 (Cf. *Marshall's Judgments* at 329; Hayley Appendix I p. 6)which is as follows:

"A daughter married in *beena* quitting her parents' house with her children to go and live in *deega* with her husband, before her parents' death, forfeits thereby for herself and her children a right to inherit any share of her parents' estate, (she having at the time a brother or a *beena* married sister), unless one of her children be left in her parents' house."

Sawers refers only to a *binna* – married daughter, the position of whose children bears no analogy whatever to that of a *diga*-married daughter and her children. (See Hayley at p. 372 and p. 382). The object of a *binna* marriage, as we have seen, is not to benefit the daughter "but to raise up heirs to the proprietor by an artificial relationship. It results from this that while the issue of the *binna* marriage take a vested interest either in possession or reversion, the mother's interest is defeasible and will come to an end if she subsequently leaves the family property and assumes a position equivalent to that of a woman married in *diga.*"(Hayley 372).

In *Appuhamy v. Kiri Menika*[45], the woman was married in *diga* and went out to live with her husband at a place situated about two miles from her *mulgedera.* One of her children was left in the *mulgedera* and brought up by her grandmother. There was evidence that the woman "kept up a constant and close connection" with the *mulgedera.* Lascelles, C.J. and Wood Renton J. held that in the circumstances the woman did not forfeit her rights. Lascelles, C.J . referred to the decision in *Ukku v. Pingo*[46] and observed that the decision in that case was based on the passage in Sawers and that the passage in Sawers dealt with the case of a woman married in *binna.* Lascelles, C.J. proceeded on the basis that the Court did not "appear to have attached any importance to this distinction", namely, whether the woman who left her child behind was married in *binna* or *diga.* Indeed, it did not; but it seems almost certain that a different conclusion would have been reached had the importance of the distinction been brought to the notice of the Court.

Lascelles, C.J. then observed that the decision in *Dingiri Amma v. Ukku Amma*[25] (*supra*) was based on *D.C.Kurunegala* 19, 107 which he said was "substantially a case where a *diga* married daughter returned with her husband to her father's house **and was given a *binna* settlement.**

The emphasis is mine.

Lascelles, C.J. also considered *Tikiri Kumarihami v. Loku Menika and Others*[47], The Chief Justice said that in that case "a passage

from *Solomons' Manual of Kandyan Law* is cited with approval, to the effect that a *binna* married daughter who left her parents to marry in *diga* forfeited for herself and her children all right to inherit 'unless she left one or more children at her parents' house."

Neither the decision in *Tikiri Kumarihami v. Loku Menika and Others* [47], nor the passage in Solomons provides any basis for the conclusion of Lascelles, C.J. that a woman married in *diga* did not forfeit her rights although she lived away from the *mulgedera* provided that she left a child at the *mulgedera* who was brought up by the grandmother and kept up a "constant and close connection" with the *mulgedera.* The judgment of the Court delivered by Morgan, C.J. is reported as follows:

> "The plaintiff was first married in *deega* to Hataraleeadela, but she was called back to the *mulgedera* by her parents and lived there with her child. She afterwards married Toradeniya and although the evidence is conflicting in this respect, the Supreme Court concurs with the District Court that that was a marriage in beena. Her right therefore to the paternal inheritance revived. She was subsequently, after the demise of both her associated fathers, married out in *deega* by her brothers to Dohegrinne, but she left her youngest child of the *beena* marriage at the parents' house. "If a daughter married in *binna*" says the late Mr. Solomons in his excellent manual of Kandyan Law, p. 17, "left her parents with children in order to contract a second marriage in *deega* she forfeited for herself and children all right to inherit any portion of her parents' estate unless she left one or more of the children of the *beena* marriage at her parents house."

In *Tikiri Kumarihami v. Loku Menika and Others* [47], (*supra*), the *diga*-married daughter had been recalled by her parents. Moreover, she had then been married in *binna.* Her rights to paternal inheritance revived. And when, after the death of her associated fathers she was given away in *diga* by her brothers, she left her youngest child in the *mulgedera.* As I have pointed out above, the position of the children of a *binna* marriage bears no analogy whatever to that of a *diga*-married daughter or her children: The "same principle", as Lascelles, C.J. supposed, is not equally applicable to the child of a *binna* married daughter and the child of a *diga* married daughter.

Hayley at p. 378 sets out the relevant principles applicable when a daughter changes the character of her marriage. Later, at p. 383, he makes the following explanation:

> "As the *binna*-married daughter's children are regarded as belonging to their mother's family, if her parents, on her departure in *diga,* keep one or more of them in the *mulgedera,* they tacitly recognize the continuance of such children's position in the family. These considerations have no application to the issue of a *diga* – married daughter who belong to their father's house."

Both Lascelles, C.J. and Wood Renton, J. in *Appuhamy v. Tikiri Menika*[45] refer to *Madawelatenne*[41]. Wood Renton, J. (p. 241) concludes that "an original marriage or a remarriage in *binna* seems to be not a condition of the general rule laid down in the *Madawalatenne case*[41], but merely evidence of the closeness of the original, or resumed, connection with the parents' household, which enables the married daughter's rights of inheritance to be preserved." As Hayley (p. 380) points out "A glance at the report shows that the judgment [in *Madawelletenne*] did not purport to lay down any rule of law."

Hayley (p. 382) submitted that the hesitation expressed by Lascelles, C.J. in coming to his decision in *Appuhamy v. Kiri Menika*[45] was "well founded, and that the law laid down in this and the preceding cases is not supported by the authorities and is contrary to the principles of Sinhalese Law."

Although *Siripaly v. Kirihame*[48], is not a case which relied on the so-called "close connection" principle, I should like to refer to it since the facts bear some resemblance to those in *Tikiri Kumarihami v. Loku Menika and Others*[47] and because it underlines the fact that it is not residence but the intention to restore a person's rights that matters. The daughter in this case too had been married out in *diga* but was recalled during her father's lifetime to the family house. She settled there in *binna* with her divorced husband's brother. The documents filed in the case proved "beyond all doubt" that the other children of her father "recognised that she had regained her position as one of [her father's] heirs. After her father's death, the woman

again left the paternal house and lived with her second husband in *diga.* Wood Renton, J. (De Sampayo J. agreeing) held that in the circumstances the daughter had regained her *binna* rights.

Siripaly v. Kirihame[48] was cited with approval in *Dingiri Amma v. Ratnatilake*[17], (*supra*). In that case, Tambiah, J. said (at pp. 166-167) that in trying to establish that a daughter who had married in *diga* had re-acquired *binna* rights, "it must be shown that they were not only received by [the father] and those who were entitled to the inheritance at the *mulgedera* **but further that they acquiesced in their reacquiring *binna* rights and agree to share the inheritance.**"

The "close connection" theory was considered by Bertram, C.J. in *Banda v. Angurala*[49]. The Chief Justice underlined the decisive importance of the intentions of the concerned members of the family as manifested by their conduct. As explained by Tennekoon, C.J. in *Gunasena and Others v. Ukkumenika and Others*[50], although in some cases, of which *Appuhamy v. Kiri Menika*[45], and *Punchi Menika v. Appuhamy*[13], are examples, "the question whether a daughter who had forfeited her rights to the paternal inheritance had regained such rights was tested largely by reference to the maintenance of a connection with the *mulgedera,* yet in the case of *Banda v. Angurala*[49], (*supra*) Chief Justice Sir Anton Bertram held that the regaining of *binna* rights may be evidenced by material other than a connection with the *mulgedera.*

Although in *Mampitiya v. Wegodapela*[9] (*supra*), Bertram, C.J .suggested that it was residence in or absence from the *mulgedera* that was the decisive factor, in *Banda v. Angurala*[49] (*supra*), the Chief Justice said that "there is nothing magic about the *mulgedera.*"

In *Banda v. Angurala*[49], (*supra*), Punchi Appuhamy had two daughters and three sons. The two daughters were married in *diga.* One of the daughters went to live with her husband and at the time of the action to partition the properties of Punchi Appuhamy, many years after his death, she was still there. The matrimonial history of the second daughter was uncertain. Her original husband was said to be dead, and she was said to have married twice subsequently.

However, there was no question that at her original marriage she left the *mulgedera* and went to live in that of her husband. One of the three brothers had died. The Chief Justice said (p. 277):

> "A recital of these facts would seem to suggest conclusively that the partition must be conducted on the supposition that [the daughters] had lost all rights of inheritance from their father, Punchi Appuhamy, unless it can be shown that in some way they regained *binna* rights, and the question for determination is whether they have done so. In all previous cases the question for the recovery of *binna* rights has always appeared to turn upon something done in connection with the *mulgedera*, such as a resumption of residence there; the cultivation of the paternal lands held in connection with it; the leaving of a child in the *mulgedera* or the maintenance of a close connection with the *mulgedera*. But in this case nothing of the sort is suggested. The claim to *binna* rights, however, in this case is based upon circumstances of a very significant and unequivocal character which I will proceed to examine."

After examining numerous deeds (pp. 277-278), Bertram C.J. found that, notwithstanding the *diga* marriages of the two daughters, their two surviving brothers over many years had executed a series of deeds, *inter se*, and with others, "clearly based upon the supposition that their sisters retained rights in the paternal inheritance". His Lordship said (p. 278 in fin. – 280).

> "The question now arises: What is the effect of this very remarkable series of documents? The point at issue is the forfeiture of certain rights of inheritance. Any forfeiture may be waived by those in whose benefit it takes place. It has been customary in considering whether a forfeiture of *binna* rights has been waived to look at the matter from the point of view of the connection of the daughter in question with the *mulgedera*. But in my opinion there is nothing to show that this is the only test. To use a favourite phrase of the later Lord Bowen, "There is nothing magic about the *mulgedera*. Where a forfeiture has taken place it is not the connection with the *mulgedera* which restores the *binna* rights, it is the waiver of the forfeiture, of which the connection with the

mulgedera is the evidence. As was said by Wood Renton C.J. in *Fernando v. Bandi Silva*[14], the instances given in the text books on Kandyan Law of the cases in which *binna* rights can be regained are illustrations of a principle and not categories exhaustive in themselves. **The underlying principle is that the forfeiture by a marriage in *diga* of the *diga* married daughter to a share of the inheritance, may be set aside by her readmission into the family**".

The real question is: Have the brothers waived the forfeiture of their sisters' rights? It seems to me there can be only one answer to this question. On any other supposition the series of deeds above recited would be absolutely unintelligible.

The learned Commissioner's judgment is very concise. He simply says that he is satisfied "from the long string of deeds produced that the girls, though they were given out in *diga,* still held these property rights in the paternal estate and **those rights were long recognised by the family. I therefore** hold that they did not lose their rights to the estate although their marriages were registered as *diga.*" For the reasons I have explained, I agree with the conclusion of the learned Commissioner and dismiss the appeal.

The emphasis is mine.

KANDYAN LAW OR THE PRINCIPLES OF ESTOPPEL?

Basnayake, J. in *Appu Naide v. Heen Menika*[51], (Gratiaen, J. agreeing) said that the rule applied by Bertram, C.J. in *Banda v. Angurala*[49] "has its origin in the Roman Law (Code 1.3.51) according to which everyone is at liberty to renounce any benefit to which he is entitled." Basnayake, J. (at p. 65) proceeded to hold that he preferred to apply the doctrine of "acquiescence" rather than the "associated doctrine of 'waiver' applied by Sir Anton Bertram".

Bertram, C.J. did not dispose of the matter before him on the ground of "waiver": the disposal of the lands was regarded in the circumstances as evidence of readmission into the family. Obviously,

the fact that those in whose hands lie the decision of readmission may also be persons whose rights may be adversely affected by acquiescing in conduct that is consistent with readmission to the family. (See Hayley: 387). However, readmission to the family is not based upon estoppel by conduct. As we have seen, the cases show that residence in and possession of family lands and the taking of their produce may sometimes be regarded as insufficient evidence of readmission to the family and a consequent change of marital status. So also the sale, lease or mortgage of family lands may in some cases not be sufficient evidence of readmission. It may be due to some other arrangement not connected with marital character. The principles of Kandyan Law relating to the rights of succession of daughters married in *diga* or *binna* would have no relevance. Rights pertaining to the property might, however, be ascertained in such cases by the application of principles such as those relating to estoppel by conduct or representation.

In the case before Basnayake, J. the land in question was owned by one Appuhamy. Appuhamy had a son and two daughters. The two daughters were married in *diga.* The District Judge had found that the daughters had reacquired their *binna* rights. No reasons for this appear in the judgment. The facts, however, showed that the brother and sisters had possessed the paternal land in common and equal shares in pursuance of an agreement between them. Deeds were produced to show that the brother and sisters had jointly sold some of the inherited lands to outsiders. Counsel contended that the fact that the brother had renounced his right to certain immovable property belonging to the family which he permitted them to treat as their own although they were not entitled to do so, did not confer any rights on the daughters. He submitted that, in any event, the fact that the brother did not insist on his rights to ancestral lands did not entitle the defendants to claim *binna* rights in them. Basnayake, J. said at p. 54:

There is no evidence that the defendants reacquired *binna* rights, nor does learned counsel for the respondents seriously contend that the defendants had acquired *binna* rights, but he relies on the long-standing family arrangement by which the brothers and sisters enjoyed the ancestral lands in equal shares. ... In the instant case the

deeds produced and the oral evidence ... go to show that despite the fact that the defendants were not entitled to a share of the ancestral lands, including the land in dispute, they continued to possess and enjoy the subject-matter of the action and other lands as if they had not gone out in *deega*. I am unable to see anything in the statements of Kandyan Law by Sawers and Armour which has a direct bearing on the case under consideration. The nearest case is found in Armour where he discusses the right of a *deega* married sister who gets possession of the paternal lands. He says [Armour, **Grammar of the Kandyan Law,** edited by Perera p. 55]:

> "If after the father's death, the daughter was married out in *deega* by her brother, or by their mother, the said daughter will thereby lose her right to a share of the inheritance, and consequently her brother will then become sole heir to the father's landed property. And although the said *deega* married sister did afterwards get possession of a portion of her father's lands, she will not have a permanent title of that portion, it will at her death revert to her brother, or he being dead, to his issue – it being premised that the said parties were full brother and sister, and that the latter had remained in her *deega* settlement until her death."

As there is no rule of Kandyan Law which is applicable to the present question, it must be decided according to general principles of law. ... I prefer to apply to this case the doctrine of acquiescence rather than the associated doctrine of waiver applied by Sir Anton Bertram ... The [daughters married in *diga*] with the knowledge of their brother ... enjoyed two-thirds of the land as their own for over thirty years ... His evidence and his conduct show that he was not unaware of his rights and that he assented to the defendant's dealing with the lands in the way they did. He cannot now be allowed, after standing by, with a knowledge of his rights, to deny the defendants the right to the land which they have enjoyed as their own for so many years.

In *Gunasena and Others v. Ukkumenika and Others*[50], the question that arose was whether three daughters who had been married in *diga* before the death of their father had "reacquired

binna rights". Besides the daughters, the father had four sons. Upon the death of the father, the eldest son applied for Letters of Administration referring to all the children, including the daughters, and their mother as the heirs in law and next of kin. No objection was made to this description and Letters were granted, estate duty was paid and final accounts were filed. However, when application was made for a judicial settlement of the accounts of the Administrator, the petitioner stated that the sole heirs were the four sons, that the widow was entitled to a life interest in the acquired property and that the three daughters "having been married out in *diga* have forfeited their rights of succession to their father's estate." The three daughters filed objections pleading, *inter alia*,

(a) that the male children of the deceased had waived the benefit accruing to them by reason of the *diga* marriages and had treated them as heirs to the estate of their deceased father notwithstanding the *diga* marriages;

(b) that on account of the rules of waiver and estoppel and by their conduct the male children of the deceased had forfeited their claims to the entire estate and that accordingly the three daughters were entitled to share the said estate along with the male children.

In support of their objections, the daughters relied on (1) the fact that the administration proceedings had been conducted on the footing of the averments in the application for Letters of Administration that the daughters were their father's heirs; (2) the execution of three deeds of sale in which the title of the sons and daughters was said to be "by right of paternal inheritance"; and (c) the admission of title of the three daughters in D.C. Kurunegala Case No. 2128/P: For, when a land that had belonged to their father was sought to be partitioned, all the children (and the widow) had filed one answer.

Tennekoon, C.J. (with Weeraratne and Sharvananda, J.J. agreeing) observed at p. 531 that according to the only witness called, and through whom the marriage certificates were produced, the three sisters after marriage in *diga* resided in their husbands' homes and exercised no rights in respect of the *mulgedera* or any of

their father's properties other than those given to them upon marriage. The Chief Justice said:

> "No evidence whatsoever was called by the three sisters. In this state of the evidence one has to proceed on the basis that neither before [the father's] death nor thereafter do any of those acts which are customarily regarded in Kandyan Law as evidence of readmission of a *diga* married daughter into the father's family; there was for instance no evidence whatsoever to indicate that any of the daughters maintained a close and constant connection with the *mulgedera*, or left a child to be brought up at the *mulgedera* or maintained an intimate relationship with the *pater-familias*, or possessed any of the family lands. The case for the three ... sisters was thus based only on 'waiver' by the brothers of the forfeiture as evidenced in the documents referred to above or in the alternative on 'acquiescence' by them in the sisters exercising rights in the paternal property by the same documents."

After examining the evidence adduced, and stating (at p. 534) that a daughter married in *diga* can "in certain circumstances" have the forfeited rights revested in such a daughter, Tennekoon, C.J. stated that, although in certain earlier cases the question whether rights forfeited by a *diga* married daughter had been regained had been "tested largely by reference to the maintenance of a connection with the *mulgedera*", yet Bertram, C.J. in *Banda v. Angurala*[49] held that "the regaining of *binna* rights may be evidenced by material other than connection with the *mulgedera.* After quoting the observations of Bertram, C.J. reported at p. 278, Tennekoon, C.J. (at p. 535), observed that the case was followed by Basnayake, J. in *Appu Naide v. Heen Menika*[51]. He then quotes the observations of Basnayake, J. in *Appu Naide v. Heen Menika* at p. 65 where Basnayake, J. had expressed a preference to apply the doctrine of 'acquiescence' rather than "the associated doctrine of 'waiver' applied by Sir Anton Bertram." Tennekoon, C.J. then quotes De Sampayo, J.'s statement in *Punchi Menike v. Appuhamy*[13] wherein reference is made to the "principle underlying the acquisition of *binna* rights", namely that "the daughter is re-admitted into the father's family and restored to her natural rights of inheritance. This of course is not a one-sided process; the father's family must intend or at least recognize the result."

Tennekoon, C.J. (at pp. 535-536) then goes on to state as follows:

> "Upon an examination of these and earlier authorities it would appear that the re-acquisition of *binna* rights by a daughter who has gone out in *diga* can be established by proving the exercise by such *diga* married daughter of rights in the *mulgedera* or in the paternal property as though there had been no forfeiture, coupled with acquiescence on the part of the father or he being dead, of the brothers in such exercise of rights; the exercise of rights in the paternal property will include the execution by the *diga* married daughter of deeds of sale, lease or mortgage of paternal property with the knowledge and acquiescence of the father or the brothers and is not confined to proof of possession of those lands. From such facts a waiver of the forfeiture can be inferred and for such a waiver to be effective it is unnecessary to show that the waiver, or the acquiescence in the exercise by the *diga* married daughter of rights in the paternal properties resulted in the latter altering her position for worse. This is a part of the rule of estoppel by conduct or representation and is no part of the Kandyan Law relating to waiver by the father or the brothers of the forfeiture that occurs upon a *diga* marriage of rights to the paternal inheritance. From the documents that have been proved in this case, it is plain that the appellants have without question – except belatedly – acquiesced in the sisters exercising rights of disposal over the paternal properties. ... Notwithstanding these deeds being set aside, the fact of their execution with the acquiescence of the brothers remains unaffected. ... These two deeds together with deed No. 352 ... and the pleadings and consent decree in the partition action D.C.Kurunegala Case No. 2128/P **can only be explained on the basis that the sisters had re-aquired *binna* rights in the paternal properties.** The proceedings in the testamentary case also show that until the judicial settlement of accounts the brothers all proceeded on the basis that the sisters were heirs at law of [the father] not only in respect of the movable properties but also of the immovable properties."

The emphasis is mine.

SECTION 9 OF THE KANDYAN LAW DECLARATION AND AMENDMENT ORDINANCE

In *Gunasena and Others v. Ukkumenika and Others*[50], (*supra*), the District Judge had held that all three sisters were heirs of their father and were entitled to shares in his immovable properties. However, Tennekoon, CJ (Weeraratne and Sharavananda, JJ. agreeing), while affirming the District Judge's decision in so far as the 2nd and 3rd respondent sisters were concerned, allowed the appeal only in so far as it concerned the 4th respondent – the third sister – and held that the 4th respondent was not entitled to succeed to her deceased father's immovable properties.The reason given for differentiating between the 4th respondent sister (who was married on 24 October, 1944) and her two sisters, the 2nd respondent (who had married on 11th July, 1935) and the 3rd respondent (who had married on 14th October, 1938) was that the other two sisters had been married before 1st January, 1939, the date on which the Kandyan Law (Declaration and Amendment) Ordinance (Cap. 59) came into force; whereas the 4th respondent having married after the coming into operation of the Kandyan Law (Declaration and Amendment) Ordinance (Cap. 59) cannot be admitted to *binna* rights in view of section 9 (1) of that Ordinance. That section, Tennekoon, C.J. said, provides, *inter alia,* that:

> "No conduct after any marriage (whether *binna* or *diga*) of either party to that marriage or any other person shall ... cause or be deemed to cause a person married in *diga* to have the rights of succession of a person married in *binna* or a person married in *binna* to have the rights of succession of a person married in *diga*."

In *Alice Nona v. G. Sugathapala*[52], the matter did not relate to the rights of succession but to the question of maintenance. However section 9 (1) of the Kandyan Law Declaration and Amendment Ordinance was applied. The applicant had contracted a *binna* marriage. She claimed maintenance. The husband offered to maintain her on condition of her living with him. The wife, however, refused on the ground that if she changed her residence and went to live with the husband, her rights of inheritance might be affected. The

magistrate held that this was not a sufficient reason within the meaning of section 4 of the Maintenance Ordinance for the wife to refuse to live with her husband. In appeal, Tennekoon, J. upheld the decision of the magistrate. He said that "Under the law now governing the rights of *binna* married daughters change of residence cannot affect the nature of the marriage or her rights to succession. See section 9 (1) of the Kandyan Law Declaration and Amendment Act ... Admittedly the marriage was one contracted after 1938 and the provisions of this section will accordingly apply ..."

In *Yaso Menika v. Biso Menika*[53], the 8th, 9th and 10th respondents claimed the right to succeed to the intestate estate of their father. T. S. Fernando, J. (Abeyesundere, J. agreeing) held that it appeared from the 8th respondent's

> "own evidence that she had married and moved away from her parent's household and had not come back to reside therein. Her claim to succeed to the deceased intestate's property therefore failed in any event. The learned District Judge, while holding that the 8th respondent was not entitled to succeed in her claim, held that the other two claimants were so entitled because, to use the learned Judges own words, although they were given out in *diga* they have come back to the [parental home] and are entitled to a share of the acquired property.
>
> ... The question arising in this case appears to have been decided in the District Court without paying any regard to the relevant provisions of the Kandyan Law Declaration and Amendment Ordinance. Sections 9 and 15 of this Ordinance are not merely relevant but they also effectively bar [the 9th and 10th respondents from succeeding to any rights in the acquired property of [their father]. In the case of ... the 9th respondent, there is no dispute that she was herself married in *diga* in 1950. Her claim to succeed is therefore barred by section 9 (1) of the Ordinance referred to above which enacts that "a marriage contracted after the commencement of this Ordinance in *binna* or in *diga* shall be and until dissolved shall continue to be for the purposes of the law governing the succession to the estates of deceased persons, a *binna* or *diga* marriage, as the case may be, and shall have full

effect as such; and no change after such marriage in the residence of either party to that marriage or of any other person shall convert or be deemed to convert a *binna* marriage into a *diga* marriage or a *diga* marriage into a *binna* marriage or cause or be deemed to cause a person married in *diga* to have the rights of succession of a person married in *binna*, or a person married in *binna* to have the rights of succession of a person married in *diga*."

In the case of ... the 10th respondent, we have permitted the production before us by her of her birth certificate; an examination of that document reveals that [the father] had not registered himself as her father, ... Section 15 (c) of the Ordinance aforesaid precludes [the 10th respondent] in these circumstances from maintaining her claim to a share of the acquired property of [her father].

The appeal has to be allowed and the order made by the District Court declaring the 9th and 10th respondents entitled to a share of the deceased intestate is accordingly set aside...

In *Ranhotidewayalage Rana v. Ranhotidewayalage Kiribindu*[1], the plaintiff-respondent, Kiribindu, who was the younger sister of the defendant-appellant, Rana, instituted an action for a declaration of title to a half share of a land called 'Gallajjewatte' and for damages for wrongful possession of her share by the defendant. The plaintiff averred that the property in suit belonged to her father, Ukkuwa, and though married in *diga*, she did not leave the *mulgedera* and thereby, when her father died intestate, she became entitled to a share of the paternal land called 'Gallajjewatte'. The defendant-appellant filed answer denying the right of the plaintiff to inherit from her father as she had contracted a *diga* marriage in her father's lifetime after January, 1939. The defendant had married and lived in the *mulgedera* with his wife and children. The plaintiff and her parents too lived in that house. Shortly before the plaintiff got married, the defendant's wife died. The plaintiff married one Piyasena on 27 July, 1939. The marriage certificate stated that the marriage was in *diga*. Piyasena died in 1946. Ukkuwa died in 1957. The plaintiff's position was that although she married in *diga*, she remained in the

mulgedera to look after the minor children of the defendant, her brother Rana.

The learned District Judge held that on the evidence for the plaintiff, which he accepted, the plaintiff did not shift her residence though the marriage was registered as a *diga* marriage. The argument in appeal proceeded on the basis of this finding and the question for determination was this: As the plaintiff did not leave the *mulgedera* notwithstanding her *diga* marriage, had she forfeited her right to the inheritance of her father's estate?

The Supreme Court was called upon to interpret section 9 (1) of the Kandyan Law Declaration and Amendment Ordinance. Thamotheram, J. (Ismail, J. agreeing) proceeded to consider the law before the enactment of section 9 (1).

Thamotheram, J. (at p. 79) concluded that

> "The position before the amendment under consideration in this regard was that it was possible to contradict a certificate of registration which stated that the marriage was in *diga* or in *binna* by oral evidence ... The effect of the amendment was that it was no longer possible to prove the character of marriage by oral evidence.
>
> In this respect the law as it was before was amended. The character of the marriage contracted remained so during marriage and after dissolution, it being a question of fact, the best and only evidence was the certificate of registration."

With great respect, I am unable to agree that section 9 made the marriage certificate the best and **only** evidence of the character of the marriage. Had the marriage certificate been the "only" admissible evidence, how was it possible for Thamotheram, J. to conclude that, although the certificate in the case before him stated the marriage to be ***diga*** in character, the woman was entitled to a half share of her father's land called 'Gallajjewatte'? That was possible because he took the woman's continuous residence in the *mulgedera* from the time of the marriage and/or the fact that she had maintained a close

connection with the *mulgedera* to be evidence of the fact that the marriage, notwithstanding what the certificate had said, was from its inception a *binna* marriage or that it had been later converted into a *binna* marriage.

Section 9 provides as follows:

> "(1) A marriage contracted after the commencement of this Ordinance in *binna* or *diga* shall be and until dissolved shall continue to be, for all purposes of the law governing the succession to the estates of deceased persons, a *binna* or *diga* marriage, as the case may be, and shall have full effect as such; and no change after any such marriage in the residence of either party to that marriage and no conduct after any such marriage of either party or of any other person shall convert or be deemed to convert a *binna* marriage into a *diga* marriage or a *diga* marriage into a *binna* marriage or cause or deemed to cause a person married in *diga* to have rights of succession of a person married in *binna*, or a person married in *binna* to have rights of succession of a person married in *diga*.
>
> (2) Where after the commencement of this Ordinance a woman leaves the house of her parents and goes out in *diga* with a man, but does not contract with that man a marriage which is valid according to law, she shall not by reason only of such departure or going out forfeit or lose or be deemed to have forfeited or to have lost any right of succession to which she is or was otherwise entitled."

Section 9 (1) applies to a case of a marriage contracted after the commencement of the Ordinance. In terms of section 2, the date of commencement is 1st January, 1939. The marriage in the case before Thamotheram, J. and in the matter before us, took place on 27th July, 1939, and so section 9 (1) is applicable.

Was the marriage in *binna* or *diga*? There is no definition of what these terms mean in the Ordinance, and therefore the matter must be decided by reference to the principles of Kandyan Law. Since the certificate of marriage states that the marriage was a *diga* marriage,

as the Court did in *Mampitiya v. Wegodapela*[9] (*supra*), we should begin with the conclusion that the marriage actually celebrated by Kiribindu, the plaintiff-respondent, was a *diga* marriage.

Section 9 (1) provides that a *binna* or *diga* marriage shall be and until dissolved continue to be for all purposes of the law governing the succession to the estate of deceased persons a *binna* or *diga* marriage, as the case may be. The relevant period commences from the time the parties began to treat themselves as married persons and to live as married persons. (*Kalu v. Howwa Kiri*[12] (*supra*); *Punchimahatmaya v. Charlis*[18] (*supra*); *Kotmale v. Duraya*[19] (*supra*); *Ukku v. Kirihonda*[20] (*supra*); *Dingirihamy v. Mudalihamy et al*[21] (*supra*); *Sinno v. Appuhamy*[54]; *Dissanayake v. Punchi Menike*[22] (*supra*) and *Tennekoon Mudiyanselage Ukku Amma and Others v. Vidanagamage Beeta Nona*[23] (*supra*)). In the case before us the relevant date was the same as the date of the registration of the marriage, namely 27th July, 1939. It was not a case like *Ukku v. Kirihonda*[20] or *Dingirihamy v. Mudalihamy*[21] or *Sinno v. Appuhamy*[54], *Dissanayake v. Punchi Menike*[22] or *Tennekoon Mudiyanselage Ukku Amma and Others v. Vidanagamage Beeta Nona*[23], where the registration took place a long time after the marriage, by which date, the character of the marriage may have been altered. In the circumstances what Kiribindu and her husband and their father intended at the time of marriage was that which they told the registrar they were doing, namely, contracting a *diga* marriage. (Cf. the observations of Moncrief, ACJ in *Ukku v. Kirihonda*[20] quoted above). The certificate of marriage was in terms of section 39 of Ordinance No. 3 of 1870 and section 28 of the Kandyan Marriage and Divorce Act, No. 44 of 1952, the "best evidence" of the character of the marriage in the technical sense in which that phrase has been used in dealing with matters of the kind before us.

The "best evidence" principle was introduced by section 39 of Ordinance No. 3 of 1870. In many instances, the registration took place after the traditional ceremonies had taken place. Sometimes this happened after many years. The provision was intended to exclude oral testimony of what took place. Moreover, as the sensational "Kurunegala Polyandry Case" (*Regina v. Opalangu*[55])

showed, such a rule was desirable if misinterpretation of what took place at the registry was to be avoided.

Section 28 of the Kandyan Marriage and Divorce Act, No. 44 of 1952 re-enacted the provisions of section 39 of the 1870 Ordinance.

The rule has continued to serve the useful purposes for which it was intended. E.g. see *Ukku v. Kirihonda*[20]; *Ram Etana v. Nekappu*[44]; *Dingirihamy v. Mudalihamy*[21]; *Sinno v. Appuhamy*[54]; *Kiri Banda v. Silva*[56]; *Dullewe v. Dullewe*[57]; See also *Dissanayake v. Punchi Menike*[22] and *Dingiri Amma v. Ratnatillaka*[17], *Mampitiya v. Wegodapela*[9]; *Seneviratne v. Halangoda*[58]; *Chelliah v. Kuttapitiya Tea and Rubber Co.*[6]; *H. P. James v. Medduma Kumarihamy*[59]; *Tennekoon Mudiyanselage Ukku Amma and Others v. Vidanagamage Beeta Nona*[23].

Kiribindu's case is that she did not forfeit her rights because she never left the *mulgedera*. As we have seen, residence is only evidence of the character of a marriage. It is not conclusive evidence. Mr. Marapana was right in pointing out that "none of the sources on Kandyan Law classify married women as those who lived in the *mulgedera* as opposed to those who left the *mulgedera* in referring to their rights to the paternal inheritance." In the matter before us, Rana's wife had died shortly before Kiribindu's marriage. Therefore, although she was married in *diga,* she remained in her father's house to look after her brother's motherless children. No doubt she rendered a most valuable and praiseworthy service; but that alone would not convert her *diga* marriage into a *binna* marriage.

The following illustration given by Armour (pp. 61-62) clarifies the position of a daughter like Kiribindu, who was married in *diga,* but who resided in the *mulgedera* to play the role of a guardian to minor children at the *mulgedera:* She does not thereby acquire the rights of a daughter married in *binna:*

> "The father having died intestate, leaving issue by the same wife, an infant son, an infant daughter, and a daughter married out in *diga,* and also a grand-daughter, the child of a predeceased daughter, (by the same wife), who was married out in *diga,* all his

lands will devolve to the infant daughter and to the son. **Should the surviving *diga* daughter then return to the deceased father's house, and in the capacity of guardian to her infant brother and sister, manage the affairs of their father's estate, and if she then gave away her younger sister in *diga* marriage, the said younger sister will thereby lose her right to a share of the said lands, and the brother will then become sole proprietor thereof, but the elder sister, who had returned home, although she acted as guardian to her brother and younger sister, and had managed the estate, will not have thereby acquired the rights of a *binna* daughter ... "**

The emphasis is mine.

The matter before us was not a case in which a *diga*-married daughter returned during her father's lifetime and was **allowed by her father,** notwithstanding arrangements regarding her dowry, to settle on the father's property in *binna* with her former husband or a new husband; in which case, as we have seen, she would have acquired all the rights of a *binna*-married daughter. The father probably never intended her to settle in his house in *binna.* At the time of the marriage, it was known that Kiribindu would remain in the *mulgedera*, not because a *binna* settlement was intended, but to look after Rana's children. If residence in the *mulgedera* was because a *binna* settlement was intended, why did her father give her away in *diga* unless he clearly intended that and no other status for his daughter, although he knew that the daughter would continue to live in the *mulgedera*? There was nothing to show that he ever changed his mind. Hayley (p. 372) points out that a *binna* marriage was not contracted for the benefit of the daughter, but to raise up heirs to the proprietor by an artificial relationship. If he was right in his explanation, the need for a *binna* marriage did not exist in Ukkuwa's family, for he had a son, Rana, and Rana had three children at the time of Kiribindu's marriage.

As we have seen, whether a marriage was to be in *diga* or *binna* would ordinarily have been determined during negotiations which preceded the marriage. In my view, by reason of a family arrangement agreed upon at the time of the marriage, of which a *binna* settlement was no part, Kiribindu was to remain in the

mulgedera to look after Rana's children. For her part, she and her husband had a place of residence and support. In addition, she had the good fortune to remain at home, despite the fact that she had been married in *diga* and would ordinarily, according to custom, have had to go away. Sawers (Chapter I, paragraph 14, p. 5), after stating that "Daughters must accept the husband chosen for them by their parents, or in the event of their parents being dead, by their brothers, and must go out in *diga*, adds the following "Note": "Proverb: Women are born to three miseries or great evils:– 1st, to quit the place of their birth; 2nd, to the pains of childbearing; and 3rd, to be under subjection to their husbands."

There was nothing, except for the mere fact of residence, to suggest that the daughter was allowed to settle in *binna*. On the other hand, there was the contemporaneous recording by the Registrar of Marriages of the intention of the parties that the marriage was a *diga* marriage despite the fact that it was known that the residence of the daughter and her husband would be at the *mulgedera*. *Chelliah v. Kuttapitiya Tea and Rubber Co.*[8] (*supra*), was different. In that case, the daughter's marriage was registered as a *diga* marriage; however she never left her father's home and lived there continuously until her death with her husband. Three children were born to this marriage. All of them were born in the *mulgedera*. The whole family lived together and the daughter and her husband possessed the fields and gardens and lands belonging to her father. The lands in dispute were cultivated by the husband, for which he was given a share of the produce. In the circumstances, it was argued that if the daughter did by the mere fact of having contracted a marriage declared to be in *diga* sustain a forfeiture she re-acquired those rights and was fully revested with them. Garvin, SPJ (Jayewardene, J .agreeing) held at p. 96 that "the conclusion was inevitable that [the daughter] was fully vested with the rights of inheritance and did in fact inherit her father's property ..."

In *Mampitiya v. Wegodapela*[9] (*supra*) the woman was given away in *diga* after her father's death by her brother. However, the evidence satisfied the Court that the family had intended a *binna* connection. Although Bertram, C.J. did state that if for "whatever reason" a daughter married in *diga* who remained in the *mulgedera* retained her *binna* status, as we have seen, the remarks were *obiter,* for there were

other considerations that admittedly contributed to the decision. Moreover, as we have seen, the authorities do not support such a view.

In the matter before us the marriage of Kiribindu, the plaintiff-respondent, was a marriage in *diga*, and in terms of section 9 (1) of the Kandyan Law Declaration and Amendment Ordinance, for the purpose of the law governing her succession to the estate of her deceased father, Ukkuwa, a *diga* marriage and must have full effect as such. The effect of her *diga* marriage was that she lost her right of succession to the estate of her father. Therefore she had no right, title or interest in the lands which she seeks to partition, for those were not lands she could have inherited from her father.

Mr. Goonesekera submitted that section 9 (1) had no applicability in the determination of the matter before us. He argued that the scope of section 9 (1) was limited to the determination of rights flowing from the form of a marriage, as for instance in the determination of the rights of a *diga* married widower to the estate of his deceased wife or child, or in deciding upon the right of succession of a woman to the estate of her deceased husband. It did not, he said, apply to rights of succession that did not depend on marriage. "A long line of cases", he said, had established that it is the departure from the parental house that results in the loss of rights of inheritance, "and not the form of the marriage." Consequently, "there is nothing in section 9 (1) to alter a *diga* married daughter's right to paternal inheritance if in fact, either there was no severance from the *mulgedera* or there was a departure and a subsequent return to the *mulgedera*, for whatever reason, and restoration to the family unit. This interpretation," he submitted, was "strengthened by section 9 (2) which he said recognizes the loss of rights by mere departure, without marriage, leaving it open for the reacquisition of rights on return."

The rights of succession of a Kandyan daughter to the intestate estate of her father has always depended on whether she was married or unmarried. If she was married, those rights depended on whether she was married in *binna* or *diga*. In certain cases, where the woman had left her parental home, she lost her rights, not because she left her parent's home, but because she did so in order to, and did, contract a *diga* **marriage.** I have discussed this matter

above and pointed out that leaving the home, for example to seek employment, or even to cohabit with a man, in circumstances in which a daughter could not be held to have contracted a *diga* marriage, did not cause a forfeiture because there was no marriage although there was a separation from the parental household. Section 9 (2) was not a recognition of a loss of a daughter's rights upon leaving her home, but an attempt to avoid what, the Kandyan Law Commission in its report at paragraph 169, described as the "curious results" flowing from the decisions in cases like *Kalu v. Howwa Kiri*[12], (*supra*), *Punchimahatmaya v. Charlis*[18] (*supra*), and *Kotmale v. Duraya*[19]. The Court had in those cases correctly, according to the principles of Kandyan Law, decided that a daughter married in *diga*, albeit married according to the customs of the land, forfeits her rights, even though the marriage was not registered, and therefore invalid in law. Section 9 (2) sought by legislative intervention to eliminate the anomalies resulting from the application of the Kandyan Law in the context of the law making registration the basis of a valid marriage. It sought so to do by making the principle of forfeiture operative only if a marriage was valid in law by registration and not merely valid on account of conformity with customary law.

The "long line" of decisions referred to by Mr. Goonesekere, as we have seen, were concerned with the test of "severance". That test has been concerned with ascertaining whether, upon marriage, the woman became a part of the husband's family, or whether she belonged to her father's family. Where she became a part of her husband's family, she was said to be a person married in *diga*. When she was a member of her father's family, she was said to be married in *binna*. Customarily, a woman, who was married in *diga* left her parental home and went to live with her husband, whereas a woman married in *binna* usually lived with her parents in her father's house or on his properties. There were exceptions. However there was no requirement in law making it a condition of a *binna* marriage that the woman shall live in her parental home. Nor was there a requirement that a woman married in *diga* must live in her husband's house. If in a particular instance, the normal course of conduct was not followed, the circumstances must be examined to ascertain why that was the case. If it is claimed that a woman who contracted a marriage of one character had the character of her marriage altered, it must be

ascertained by an examination of the evidence in the case, including, but not limited to, the place of residence, whether that was in fact the case. Where the daughter never left the *mulgedera*, was she permitted to do so because it was intended that she should continue to be a member of her father's family? Upon the return of a daughter married in *diga* was she, as Mr. Goonesekere put it, "restored to the family unit", or was she merely permitted for other reasons, such as the exercise of her right to shelter and support in the event of destitution, or on account of some family arrangement, without a *binna* connection being intended? The submission that the mere fact of remaining in the *mulgedera* for "whatever reason", gives a *diga* married daughter the rights appropriate to a *binna* married daughter, notwithstanding the *obiter dictum* of Bertram, C.J. to that effect in *Mampitiya v. Wegodapela* (*supra*) at p. 132 – there was much more than residence in that case – is untenable in the light of a careful consideration of the authorities.

Mr. Goonesekere submitted that "Forfeiture was not an incident of marriage, but quitting the paternal roof. So that if the connection with the *mulgedera* was re-established in full, the logic of Kandyan family relations required that the right of inheritance was regained." Forfeiture was an incident of a *diga* marriage, because the daughter is given her dowry and sent off to join another family and to bear children who will belong to a different gens. When she ceases to belong to her father's family, she ceases to have rights of inheritance to her father. Those rights belong only to the members of the father's family. If the daughter was recalled or returned, her marriage may be converted into a *binna* marriage with full effect in respect of inheritance, if it is clearly established that a *binna* connection was intended, i.e. if she was intended to become a part of the father's family, or as Mr. Goonesekere said, "if the connection with the *mulgedera* was **re-established in full**."

In the matter before us, the plaintiff-respondent's husband, Piyasena, died in 1946. What was the effect of that? Ukkuwa, her father, died in 1957. In *Ranhetidewayalage Rana v. Ranhetidewayalage Kiribindu*[1], Thamotheram and Ismail, JJ. held that, section 9 (1) of the Kandyan Law Declaration and Amendment Ordinance provided that so long as a marriage subsists no change in the character of the marriage can be established by proof of change

of residence or conduct of either party to the marriage or any other person. However, after the dissolution of the marriage, "a change can alter the situation. A bride can regain her lost rights after the marriage is no more ..." (per Thamotheram, J. at p. 80). "After dissolution of marriage the *diga* married woman can regain her lost rights by change of residence, etc". (per Thamotharam, J. at p. 91).

In that case, Weeraratne, J. in a dissenting judgment, held that the character of the marriage remains the same before and after dissolution. With that position, I am in complete agreement. Kiribindu did not upon the dissolution of her marriage revert to the position of an unmarried daughter. There was obviously no marriage; but her status as one who had been married in *diga* continued. Consequently, as we have seen (e.g. in considering *Kalu v. Howwa Kiri*[12] (*supra*); *Punchimahatmaya v. Charlis*[18] (*supra*), *Kotmale v. Duraya*[19] (*supra*), the *Ambaliyadde case*[34] (*supra*), *Jud. Com. Kandy 5137* (*supra*); Armour 65-66; Nitiniganduwa 62, 65, 66.), a *diga*-married daughter who returned to her father's house after the dissolution of her marriage was not entitled to a share of her father's intestate estate. Hayley (p. 384) states as follows on the basis of various authorities he cites:

> "The frequency of divorce, and the simplicity with which marriages are dissolved, make it important to consider the position of a daughter who returns from her *diga*-husband's house. In such a case, she does not ordinarily recover any right to inherit, whether she returns before or after her father's death. If, however, with the consent of her parents, she marries again in *binna*, then her previous marriage is disregarded and the full rights of a *binna*-married daughter accrue to her."

With great respect, I am unable to agree with Weeraratne, J.'s opinion that section 9 (1) has the effect of precluding a change of status even after the dissolution of the marriage. In the most obvious case, her father could, after the dissolution of the marriage, have arranged a *binna* marriage for the daughter and reinstated her in the family, as for instance, as we have seen the father did in the case of one of his three daughters in *Dingiri Amma v. Ratnatilaka*[17] (*supra*). See also *D.C.Kandy 18457*, (1894) Austin 96; *Babanissa v.*

Kaluhami[38]. We have also seen that in *Siripaly v. Kirihame*[48] (*supra*) the daughter who was married in *diga* was, after the dissolution of her marriage during her father's lifetime, recalled to the family house and settled in *binna* with her divorced husband's brother. Consequently, it was held, her *binna* rights had "revived".

The right to contract another marriage after the dissolution of a former marriage is an important right. Such a marriage would have to be a *binna* or *diga* marriage if it was a Kandyan marriage. Section 9 (1) did not expressly or by implication provide that the intention of the parties to the earlier marriage determined the character of the second marriage. The section was formulated to avoid such a situation. There was also a preservation of the exercise of rights relating to the family in certain circumstances. The Niti Nighanduwa (Translated by Le Mesurier and Panabokke, (1979)) p. 27 states that a man who has an only daughter who is divorced and given in charge of her mother, has a right to insist on her being married in *binna* in his presence "so as to preserve his family name and anscestral lands".(See Hayley p. 168 footnote (x)). Alternatively, the father could, after the dissolution of a marriage, do certain things to manifest his intention of a *binna* settlement. The legislature had good reasons for not paying heed to the view of the Kandyan Law Commission (paragraph 174) that "in no circumstances can a marriage once registered as in *diga* be altered into a *binna* one and *vice versa*" and for ignoring its recommendation (at p. 40) that "A marriage registered as a *diga* marriage should always be deemed to be a *diga* marriage, and a marriage registered as a *binna* marriage should always be deemed to be a *binna* marriage." The legislature, no doubt, recognized the desirability of reducing litigation, which the commissioners were confident would be achieved by the adoption of their recommendations which they said would "settle several vexed questions and close up for all time a fertile source of litigation" (paragraph 175); but they did so by limiting the proof of change of marital character by evidence of change of residence or conduct of the parties to the marriage or any other person, to the period commencing with the marriage until its dissolution; and not by legislating that if a woman had been married in *diga* or *binna*, then for all time, under whatsoever circumstances, and for the purposes of determining her rights of succession, she would remain a *diga* or *binna* married woman, as the case may be.

In the case before us, if her father's intention had been that Kiribindu's marriage should be in *binna*, and he had made a mistake in agreeing that the marriage to Piyasena should be in *diga*, upon the dissolution of her marriage on the death of her husband, Piyasena, he could have arranged a *binna* marriage for her. He did not do so. Nor did he do anything after Piyasena's death to manifest his intention that a *binna* settlement was ever intended. He had contemporaneously with the celebration of the marriage agreed that it should be a *diga* marriage in which the daughter would for certain purposes, including her rights of succession, belong to her husband's family, although she would remain at home to look after her brother's children, since their mother had died. After the dissolution of the marriage brought about by Piyasena's death, he was content to let her status remain as it was. He did not do anything from which it could be inferred that he had readmitted her into his family. If we were to delve further, and accept Hayley's explanation (cf. also the passage cited above from Chamber's Encyclopaedia and the citation I have made from the Niti Nighanduwa p. 27; and Modder's statement quoted above that a *binna* marriage occurs only in cases in which "there are few or no sons") of a *binna* marriage, an explanation that helps to make sense of many a principle relating to the law of succession, there was no need for a *binna* marriage, for Ukkuwa had no problem about raising heirs, or preserving his family name and anscestral lands.

For the reasons stated in my judgment, I hold that Ranhoti-dewayalage Kiribindu, the plaintiff-respondent, had no right, title or interest in the lands sought to be partitioned. The appeal is allowed and the judgments of both courts below are set aside. I make order dismissing the plaintiff's action. The parties will bear their own costs of this Court and the Courts below.

FERNANDO, J. – I agree.

WIJETUNGA, J.

I have had the advantage of reading in draft, the judgments of my brothers Amerasinghe, Dheeraratne and Wadugodapitiya.

I am in respectful agreement with the conclusions and the orders proposed by my brothers Amerasinghe and Dheeraratne.

DHEERARATNE, J.

Introduction

Plaintiff-respondent (Kiribindu) filed this action to partition 6 lands described in the plaint. There was no dispute that Ukkuwa, Kiribindu's father was at one time the owner of all those lands. The only contest in the case arose regarding the devolution of the interests of Ukkuwa, who died in 1957, admittedly leaving as his children daughter Kiribindu and son Rana. Rana died in 1971 leaving as his heirs his children the 1st defendant-appellant and 3rd and 4th defendant-respondents. Kiribindu was married to one Piyasena on 27.7.1939 and according to the relevant entry in the certificate of marriage it was in *diga*. Ordinarily, under Kandyan Law, Kiribindu's marriage in *diga* would result in a forfeiture of her right to succeed to the paternal inheritance. It appears that shortly before Kiribindu got married, her brother Rana's wife died leaving three minor children (present 1st defendant-appellant and 4th and 6th defendant-respondents). Kiribindu's husband Piyasena died in 1946. Kiribindu claimed half share of the lands sought to be partitioned on the basis that she is entitled to half share of her paternal inheritance. The contesting defendants prayed for dismissal of Kiribindu's action on the basis that she had no interests in the lands inasmuch as she had forfeited her rights to paternal inheritance by her contracting a *diga* marriage. However, Kiribindu's claim was based on two alternative hypotheses viz.

(1) Primarily because of need to look after her brother Rana's motherless minor children, she never left the *mulgedara*; and severance of the connection with the *mulgedara* being the predominent idea of a *Diga* marriage, she never forfeited but preserved her rights to the paternal inheritance.

(2) Even if she lost her right to succeed to her paternal inheritance by virtue of her *diga* marriage, she reacquired that right during her father's lifetime, by her continuous residence in the mulgedara after the death of her husband in 1946.

Kiribindu also claimed that the decision in the earlier action DC Kegalle L/16312 between her and her brother Rana for declaration of

title in respect of another land, relating to the devolution of her father Ukkuwa's interests, is *res judicata* between the parties. That case went up in appeal and the decision of the Supreme Court is reported as *Ranhetidewayalage Rana v. Ranhetidewayalage Kiribindu*[1]. In that case Thamotheram, J. and Ismail, J. with Weeraratne, J. dissenting, *inter alia* held on a construction of section 9 of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938 **that after dissolution of a marriage of a *Diga* married woman,** she can reacquire her lost right to succeed to her paternal inheritance by change of her residence to the mulgedara.

In the present action learned District Judge held with Kiribindu on the question of *res judicata* and ordered interlocutory decree of partition be entered. The Court of Appeal affirmed that judgment and the 1st defendant (a son of Rana) has now appealed to this Court. Special leave was granted by this Court on the question of applicability of subsection 9(1) of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938 in the light of the earlier Supreme Court decision and whether a plea of *res judicata* on account of the earlier decision bars the present action. In terms of Article 132 (3) of the Constitution, His Lordship the Chief Justice being of opinion that the question on which leave was granted is one of general and public importance, decided that this appeal be heard by a bench of five judges of this Court.

The Plea of *Res Judicata*

The plea of *res judicata* was upheld by the original Court mainly because it felt it was bound by the earlier decision of the Supreme Court and had no authority to review the correctness of that decision. The doctrine of estoppel *per rem judicatam* is based on the maxims *interest rei publicae ut sit fines litium* (it is in the public interest that there should be an end to litigation) and *nemo debet bis vexari pro una et eadem causa* (no man should be vexed twice over the same cause). The doctrine of precedent does not depend on those maxims but depends simply upon the desirability of certainty and uniformity of the law. (For the contrast see *Waring, Westminster Bank Ltd. v. Burton Butler and Others*[60].)

The earlier action was between Kiribindu and Rana; Rana's children who are defendants in the present action being those who have succeeded to the rights of Rana are his privies. There is no question therefore about the sameness of the parties in both actions. Learned counsel for Kiribindu contends that although the subject matter of the two actions are different, the grounds of the plaint and the media through which relief is claimed are identical; there is a final decision on the question whether Kiribindu did acquire *binna* rights or not; therefore the earlier action is *res judicata* between the parties on the basis of issue estoppel. Learned counsel relied on the decisions of *Dingiri Menika v. Punchi Mahatmaya*[61], *Appuhamy v. Punchihamy*[62], *Morais v. Victoria*[63] and *Krishnan v. Thurairajah*[64]. Learned counsel for the appellant on the other hand contended that an erroneous decision on a pure question of law even though *res judicata* between the parties and their privies on the same cause of action, it is not *res judicata* between the same parties in respect of a different cause of action or where different relief is sought. The earlier action between the parties was a case of declaration of title to a land called Gallajjewatte; in the present action the relief claimed and the subject-matter are different, in that Kiribindu seeks to partition some other lands. Learned counsel for the appellant relied on the decisions in *Katiritamby v. Parupathi Pillai*[65], *Guneratne v. Punchibanda*[66] and *K. Subramaniam v. Kumaraswamy*[67]. In the last of those cases Sansoni J. at page 131 explained the legal position as follows:-

"The question of law involved, and I should add that is a pure question of law and nothing else, is the correct interpretation of certain provisions of the Jaffna Matrimonial Rights and Inheritance Ordinance (chapter 48) and Ordinance No. 58 of 1947, by which it was amended. The 1st defendant by deed acquired several allotments of land from time to time during the subsistence of his marriage with one Rasammah. She has died leaving her husband (the 1st defendant) and four children (8th to 11th defendants). The judgment against which it is sought to appeal decided the rights of 1st, 8th, 9th, 10th and 11th defendants in respect of one land so acquired.

Mr. Chelvanayakam submits that this judgment is *res judicata* as regards the rights of these parties in respect of all other lands which were similarly acquired by the 1st defendant; it is necessary to have the decision considered by the Privy Council. If this submission were

correct it would be a strong reason for allowing this application. But Mr. Renganathan challenges its correctness and he relies on the judgment in *Katiritamby v. Parupathi Pillai*[65]. It was there decided that an erroneous decision on a pure question of law will operate as *res judicata quoad* the subject-matter of the suit in which it is given, and no further. Unlike a decision on a question of fact or of mixed law and fact, an erroneous decision on the law does not prevent the Court from deciding the same question arising between the same parties in a subsequent suit according to law. Caspersz on Estoppel was cited as an authority by Garwin AJ. in his judgment (de Sampayo J. agreeing). This judgment was followed in *Guneratne v. Punchi Banda*[66] by Schneider J., (Maartensz AJ. agreeing). In view of these two decisions of this Court I do not consider it necessary to discuss the other authorities cited in the course of the argument. Assuming, then, that the other lands which were purchased upon other deeds by the 1st defendant during the subsistence of his marriage with Rasammah were purchased under circumstances which were exactly similar to those under which the land now in dispute was purchased, the rights of the parties under those deeds and the manner of devolution of those lands upon the death of Rasammah raise pure questions of law to which the rule already enunciated would apply. It should therefore, be open to the 1st defendant, if he is so advised, to canvass the correctness of the judgment already given when those questions arise for decision".

We have not been convinced why we should depart from the *dicta* of Sansoni J. and that leaves it open to us to consider whether the earlier decision is erroneous in law or not.

Registration Conferring Validity of Marriage

The forms of marriage recognized by Kandyan Law are *diga* and *binna*. "In the former, which is the usual type of alliance in a patriarchal system, the husband conducts his bride to his own house or that of his parents, and she becomes, so long as the marriage subsists, a member of his family. The latter ... is perhaps the older form. In modern times it is usually entered into only when the bride is an heiress. The husband is brought to the house of the wife or her relations, the essential factor being his residence on the property belonging to the wife's family, not necessarily that of her father. He

continues throughout the alliance in a subordinate and somewhat humiliating position" (Hayley 193). What were the essentials of a Kandyan marriage in early times? The vagueness of the ideas regarding marriage is expressed by Hayley at page 174 as follows; "The marriage laws present us at the outset with a curious anomaly. Although the status of the wife is one of great importance, conferring on her substantial rights in her husband's property after his decease, and in spite of the fact that persons of good caste and positions display a keen concern in the prevention of any kind of *mesalliance,* whereby the fair name of the family may be degraded, there was nevertheless, prior to recent legislation on the subject, a remarkable vagueness of ideas with regard to the inception, maintenance, and dissolution of matrimonial alliances. Wedding ceremonies were elaborate and among persons of wealth and position, costly, but the most elaborate ceremony guaranteed no more permanance to the union, than mere cohabitation. The poorer classes habitually dispensed with any ceremony, a practice which appears to have increased in more modern times, especially where the bride has been married before, which is frequently the case, for Knox says, "Both women and men do commonly wed four or five times before they can settle themselves to their contention." Hayley continues;

"The essentials of a legal marriage when carefully examined appear to have been only three:

(1) The parties must have had *connubium*;
(2) They must not have been within the prohibited degrees of relationship;
(3) They must have cohabited with the intention of forming a definite alliance.

It was also requisite,

(4) That the consent of the parents and relations should be given; and
(5) In the case of chiefs of high rank, the consent of the king.

The approval of parents and relations is ordinarily stated to have been one of the essential conditions, but it seems doubtful, for reasons stated below, whether its absence was of itself sufficient to make the marriage null and void."

The nightmare caused to the then administrators of the country by the fluidity of the institution of the Kandyan marriage, is perhaps

reflected in the carefully worded preamble to the Kandyan Marriage Law Ordinance, No. 13 of 1859, by which for the 1st time registration was made essential for the validity of a Kandyan marriage. That preamble reads; –

"Whereas it was agreed and established by a convention signed at Kandy, on the 2nd day of March, in the year of Christ 1815, that the dominion of the Kandyan Provinces was vested in the Sovereign of the British Empire, saving to all classes of people in those Provinces, the safety of their persons and property, with their Civil rights and immunities according to the Laws, Institutions, and Customs established and in force amongst them. And saving always to the Sovereign of the British Empire, the inherent right of government to redress grievances, and reform abuses in all instances whatever, particular or general, where such interposition shall become necessary. And whereas, accordingly, the rights and liabilities of the Kandyans, (as far as they have not been affected by Local Ordinances), have always been adjudicated upon by Courts of Law of the island, in accordance with the Laws, Institutions and Customs, established among the Kandyans; and whereas the right reserved as above-mentioned to the Sovereign has from time to time, through the Governors and the Councils of this Island, as the circumstances of the people have become changed by the influence of a just Government, the spread of education, and the extension of commerce;

And whereas the customs of the Kandyans, now considered as law regulating the contract of Marriage, permits a man to have more than one living wife, and a woman to have more than one living husband.

And whereas this custom is wholly unsuited to the present conditions of the Kandyans, and is in no way sanctioned by their National Religion; and whereas such custom is a great hardship and oppression to the industrious classes, and the frequent cause of litigation, leading to murders and other crimes;

And whereas from the circumstances aforementioned, the Marriage custom of the Kandyans is become a grievance and an abuse, within the meaning of the said Convention, and a large and influential portion of the Kandyan people have petitioned for redress and reform of the same. And whereas it is expedient, in order to such

redress and reform, that Her Most Gracious Majesty should, in accordance with the said Convention, make provision through the Legislature of this Island for the contracting and solemnizing of Marriages within the said Provinces, and for registration of such Marriages, and for the dissolution of such Marriages and matters relating to the same."

By that Ordinance registration was made compulsory (section 2) for the validity of a Kandyan Marriage, which feature was continuously adopted by subsequent legislation. Poligamy was made illegal (section 6) and punishable (section 33). There was no requirement to specify the character of marriage at registration i.e. whether *diga* or *binna*. About the working of that Ordinance, Modder at pages 28-29 states, {with the tinkering which the main enactment had received from the amending Ordinances No. 4 of 1860, 8 of 1861 and 14 of 1866, the true effect of this legislation was not realized till some time afterwards. Sir Hercules Robinson, (afterwards Lord Rosmead), then Governor, wrote in 1868:- 'It is probably within the mark to assume that two – thirds of the existing unions are illegal, and four – fifths of the rising generation, born within the last eight or nine years, are illegitimate. The oldest child born since the bringing into operation of Ordinance No. 13 of 1859 cannot now be more than nine years of age; but fifteen or twenty years hence, or sooner, if matters be left as they are, a state of antagonism must arise between the natural and legal claimants to property, which is impossible to contemplate without dismay.' The Ordinance No. 13 of 1859 was repealed by the Amended Kandyan Marriages Ordinance No. 3 of 1870 which enabled *inter alia* the type of marriage to be specified at registration of the marriage; if not specified the marriage was presumed to be contracted in *diga*. Unions contracted before and after the Ordinance No. 13 of 1859 came into operation were validated and issues of such unions were legitimized.

Section 39 read – "The entry as aforesaid in the register of marriages and in the register of divorces shall be the best evidence of the marriage contracted or dissolved by the parties, and of the other facts stated therein. If it does not appear in the register whether the marriage was contracted in *Binna* or *Diga*, such marriage shall be presumed to have been contracted in *Diga* until the contrary be shown." The Kandyan Marriage and Divorce Act, No. 44 of 1952

repealed Ordinance No. 3 of 1870 and section 28 of this Act retained the "best evidence" rule.

Judicial decisions, however, relating to section 39 of Ordinance No. 3 of 1870 appear to have applied the "best evidence" rule with some degree of laxity, because most of the entries in the registers were not contemporaneous, but have been made long after the *de facto* or customary marriage took place. See *Ukku v. Kirihonda*[20]. *Dingirihamy v. Mudalihamy et al*[21]. *Sinno v. Appuhamy*[54]. It was held in a series of cases that the entry regarding the character of marriage is not conclusive and could be rebutted by evidence to the contrary and that section 39 itself indicated the exceptional cases in which oral evidence may be permitted. The intention of the legislature in enacting section 39 appears to have been frustrated by this line of judgments.

Forfeiture and Reacquisition of *Diga* Married Daughter of Rights to Paternal Inheritance.

Mr. Goonesekera for the 1st defendant-respondent contended that although the old treatises such as Sawers, Armour and Niti Nighanduwa may not have been clear on this matter, preferring to restrict the rights of the *diga* married daughter to one of maintenance only, judicial decisions did recognize the rights of the *diga* married daughter preserving or reacquiring the right of succession to paternal inheritance. Hayley at pages 379 to 382 regarded the exception made in the case of a *diga* married daughter who has kept a close connection with her father's house by certain "modern" judgments contrary to the principle of Kandyan Law. As regards reacquisition of *binna* rights by returning to the *mulgedera* Hayley at page 389 summarized the position as follows: "If the *diga* married daughter returns during her father's lifetime, and is allowed to settle on the estate in *binna* with her former husband or a new husband she acquires all the rights of a *binna* married daughter." "If the *diga* married daughter returns after her father's death, she does not recover her right to succeed, unless the other heirs themselves give her in *binna* marriage, or expressly consent to her marriage with either her former husband or a new husband being considered a *binna* marriage." "*Diga* married daughter who returns in destitute circumstances is entitled to maintenance out of the family estate even in the hands of a purchaser for value."

Judicial decisions placing strong reliance on the concept of attachment to or severance from *mulgedera* the sole criteria to determine the character of the marriage proceeded to decide whether the *diga* married woman forfeited or reacquired the right to inherit paternal property. In *Kalu v. Howwa Kiri*[12] it was held that going out in *diga* with a man although no valid marriage was contracted worked forfeiture of rights to inherit father's property. In *Chelliah v. Kuttapitiya Tea and Rubber Co.*[8] it was held that a *diga* married daughter remaining in the *mulgedera* does not forfeit her rights to inherit paternal property. In *Mampitiya v. Wegodapela*[9] it was held that if the bride was not conducted in accordance with custom but she remained in the *mulgedara*, the forfeiture was never consummated. In *Appuhamy v. Kiri Menika*[45] it was decided that keeping close contact with the *mulgedera* after the *diga* marriage does not work forfeiture of the right to inherit paternal property by a *diga* married daughter; however, whether the *diga* married woman preserves her *binna* rights or reacquires them, her husband will continue to possess the rights of a *diga* married husband. See *Seneviratne v. Halangoda*[58].

Some later decisions have taken the view that where forfeiture has taken place by reason of *diga* marriage, it is not the connection with the *mulgedera* which restores *binna* rights, but it is the waiver of the forfeiture by the father or those who were entitled to paternal inheritance which mattered; the evidence of that being the connection of the *mulgedera*. See Bertram C.J. in *Banda v. Angurala*[49]. In *Appu Naide v. Heen Menika*[57]. Basnayake J. preferred to apply the doctrine of acquiescence rather than the associated doctrine of waiver applied by Bertram C.J.; so did Tambiah J. in *Dingiri Amma v. Ratnatilaka*[17]. In *Gunasena and Others v. Ukkumenika and Others*[50], Tennakoon C.J. called it waiver of forfeiture – estoppel by conduct or representation which he said was no part of the Kandyan Law.

THE KANDYAN LAW COMMISSION

In 1927, in pursuance of a resolution adopted by the Legislative Council, a Commission was appointed to "codify" the Kandyan Law. However in 1930, that Commission was terminated and the Kandyan Law Commission was appointed consisting of the same personnel with the exception of Dr. Hayley who was substituted as the Chairman.

The new Commission was appointed with amended terms of reference viz. "for the purpose of considering the present state of the Kandyan Law and making recommendations thereon". (Dr. Hayley resigned later; and most other personnel changed from time to time).

The report of the Commission was published in September 1935 as Sessional Paper xxiv of 1935. I shall set down in full the portion of that report (sections 168 to 176 at pages 23 and 24) relevant to the decision in this case.

168. *Children* – (i) Children: The position of daughters married in *diga* and *binna* and unmarried daughters.

Exclusion of *Diga* Married Daughter from her Father's Estate – The comparatively simple rule excluding the *diga* married daughter from the inheritance has become complicated at the outset owing to the modern ideas regarding marriage, and, in particular, the requirement of registration. It is true that, according to Kandyan ideas, it was the conducting of the daughter away from the father's family, with the dowry, that was the origin of her exclusion, but then in the early times the conducting of a daughter by a man of equal caste with the consent of her relations constituted a marriage, particularly in the case of low rank who could not afford costly ceremonies.

169. Where, therefore, decisions like *Kalu v. Howwa Kiri*[12] have laid down that the departure of the daughter without registration of the marriage is sufficient to cause a forfeiture, although they appear to follow Kandyan principles, they, in fact, lead to curious results. The woman's marriage will not be recognized in law. She will, therefore, not only lose her share in the father's state, but she will also be unable to claim life interest in her husband's acquired property should he predecease her, and her children being illegitimate, will not be able to succeed to their father's *paraveni.*

170. Conversely, this departure with the husband was held to be so essential, in *Mampitiya v. Wegodapela*[9]. that notwithstanding the registration of marriage as a *diga* one, the Court allowed the fact that that daughter continued to live with her parents virtually to convert it to a *binna* marriage, entitling her to a share in her father's estate. The result of this decision is to allow proof in every case of the nature of

the marriage in order to contradict the register, although section 39 of Ordinance No. 3 of 1870 says that registration of the nature of the marriage shall be the best evidence.

171. As it is only in matters connected with succession that the difference between *diga* and *binna* marriages is of importance, we are of opinion that modern conditions make it advisable to enact that a marriage registered as *diga* marriage should be deemed to be a *diga* marriage, and a marriage registered as a *binna* marriage should be deemed to be a *binna* marriage, and conversely that the exclusion of the daughter from the inheritance will only take place where there has been a *diga* marriage valid in law, and contracted during the life time of her father.

172. ***Diga* Married Daughter who has kept up a close connection with her Father's House.** – A similar matter needing examination is the position of a *diga* married daughter who has "kept a close connection with her father's house." Starting with certain observations of Pereira J. in 1905 in the case of *Dingiri Amma v. Ukku Banda*[25] a series of modern decisions, of which reference need be made only to *Appuhamy v. Kiri Menika*[45], has evolved a rule, which was probably unknown to Kandyan Law, that a *diga* married daughter who keeps up a close connection with her father's house does not forfeit her rights to inherit from her father's estate.

173. Two other questions which may also be examined at this stage are those of a *diga* married woman who acquires the status of a *binna* married woman by reason of a subsisting *diga* marriage being altered into a *binna* one, and of a *binna* married woman who acquires the status of a *diga* married woman by reason of her subsisting *binna* marriage being altered into a *diga* one.

174. There is no doubt that Kandyan Law recognizes both these cases, but it is not necessary to deal in detail with the law relating to them, nor to examine further the rights, if any, under the old law, of a *diga* married woman who has kept up a close connection with her father's house, because we are of opinion that the time has come when an end must be made of the nice questions which arise and the

interminable argument and litigation that they give occasion to, on these cases continuing to be accorded legal recognition, and would therefore recommend that it be declared that a marriage registered as in *diga* or *binna* shall for all purposes be deemed to be a marriage in *diga* or *binna* as the case may be, and that in no circumstances can a marriage, once registered as in *diga* be altered into a *binna* one, and *vice versa.*

175. We are of the opinion that the recommendations if given legal effect will settle several vexed questions and close up for all time a fertile source of litigation.

The recommendations of the Commission relevant to the above-mentioned matters are given at page 40 of the report and are expressed in the following manner;

(1) (i) A marriage registered as a *diga* marriage should always be deemed to be *diga* marriage, and a marriage registered as a *binna* marriage should always be deemed to be a *binna* marriage.

(ii) in the case of a daughter, her exclusion from the inheritance to take place only where there has been a *diga* marriage valid in law and contracted before the death of the father.

(iii) Where a daughter is married in *diga* after her father's death and the other heirs are willing to make a settlement on her, provision to be made whereby the other heirs shall have a right of emption at the market value of her share.

Since certain speculative arguments seem to have been presented in the earlier case on what may or may not have transpired in the State Council at the passage of the Ordinance, I shall briefly refer to some important facts obtained from the National Archives in that regard. The Draft (Bill) dated 1.12.1936 of the proposed Ordinance and titled "an Ordinance to declare and amend the Kandyan Law in certain respects" gave the objects and reasons as follows:- "The object of this Bill is to give Legislative effect to the recommendations made by the Kandyan Law Commission which was published as Sessional Paper XXIV of 1935".

Clause 9 of the Bill read:-

9(1). A marriage contracted in *binna* or in *diga* as the case may be, or deemed by the provisions of the Amended Kandyan Marriage Ordinance, 1870, or any other law for the time being in force, to be or to have been so contracted, shall be and until dissolved shall continue to be, for all purposes of the law governing succession to the estates of deceased persons, a *binna* or a *diga* marriage, and shall have full effect as such; and no change in the residence of either party to the marriage, and no conduct of either party to the marriage or of any other person, shall convert or deemed to have converted a *binna* marriage into a *diga* marriage, or a *diga* marriage into a *binna* marriage, or cause or deemed to have caused a person married in *diga* to have the rights of succession of a person married in *binna*, or a person married in *binna* to have the rights of succession of a person married in *diga*.

(2) Whenever the rights of any person in relation to the law of intestate succession under this Ordinance or otherwise depend upon or are affected by the fact that any person is married, or married in *diga* or *binna*, as the case may be, the marriage must be a marriage valid in law, and, in particular, a woman shall not lose any right to which she would otherwise be entitled by reason of her having left her parents' house and gone out in *diga*, unless she shall have contracted a marriage valid in law.

The draft was referred to a Select Committee of the State Council and the only amendment adopted regarding clause No. 9 aforesaid appears to be that it should not be given retrospective effect. The clause then came up for consideration as amended (in the present form as it appears in the Ordinance) and passed by the Council with the rest of the clauses.

Section 9 of the Ordinance reads:

9(1). A marriage contracted after the commencement of this Ordinance in *binna* or in *diga* shall be and until dissolved shall

continue to be, for all purposes of the law governing the succession to the estates of deceased persons, a *binna* or a *diga* marriage, as the case may be, and shall have full effect as such; and no change after any such marriage in the residence of either party to that marriage and no conduct after any such marriage of either party or of any other person shall convert or deemed to convert a *binna* marriage into a *diga* marriage or a *diga* marriage into a *binna* marriage or cause or deemed to cause a person married in *diga* to have rights of succession of a person married in *binna*, or a person married in *binna* to have rights of succession of a person married in *diga*.

(2) Where after the commencement of this Ordinance a woman leaves the house of her parents and goes out in *diga* with a man, but does not contract with that man a marriage which is valid according to law, she shall not by reason only of such departure or going out forfeit or lose or deemed to have forfeited or to have lost any right of succession to which she is or was or otherwise entitled on the death of any person intestate.

Construction of Section 9 of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938

Before the earlier case between the parties was decided, there were few decisions of the Supreme Court, where the view was taken that a *diga* married daughter, having married after the Kandyan Law Declaration and Amendment Ordinance came into operation, cannot be admitted to *binna* rights in view of section 9 of the Ordinance. See *Gunasena and Others v. Ukkumenika and Others*[50], *Yaso Menika v. Biso Menika*[53] and as *obiter* in *Alice Nona v. G. Sugathapala*[51].

It was common ground between the majority view and the minority view in the earlier case that according to the Kandyan Law applicable before the Ordinance came into operation, it was possible for a woman married in *diga* to show that *binna* rights were reacquired by her (a) during the subsistence of the marriage and (b) even after dissolution of the marriage. The majority and the minority view differed on the construction given to the words "shall be and

until dissolved continue to be" in section 9(1). The majority view was that it was these words which inhibited reacquisition of *binna* rights of a *diga* married woman only during the subsistence of the marriage and not after dissolution of the marriage.

But before I consider which of the two constructions is correct, let me advert to a new argument presented to us by Mr. Goonasekera which was probably not presented to Court in the course of arguments in the earlier case. It is Mr. Goonasekara's contention that the subsection 9(1) is applicable only to determine rights of succession under the Kandyan Law which flow from forms of marriage, like succession of a *diga* married widower to his deceased wife's estate or to a child or to rights of succession on death of a husband; the section does not extend to cover rights of succession which are not dependent on marriage; if the correct position taken by the long line of judicial decisions is that the departure from the parental house that results in the loss of rights of inheritance and not the form of marriage, then there is nothing in subsection 9(1) to alter a *diga* married daughter's right to paternal inheritance if in fact there was no severance from the *mulgedara* or there was a departure and subsequent return to the *mulgedara*. Mr. Goonasekara submits that the construction he advances is strengthened by subsection 9(2) which recognizes loss of rights by mere departure without marriage, leaving open for reacquisition of rights on return.

It appears to me that attachment or severance from the *mulgedara* loomed large in deciding acquisition of rights at a time when marriage laws were not well defined. The element of registration introduced to confer validity on the Kandyan marriage with the concomitant evidentiary value attached to the entries in the marriage register has substantially altered the picture. Subsection 9(2) refers to a situation where a woman goes in *diga* with a man but does not contract with that man a valid marriage. In that case she does not forfeit any right of succession which she is or was entitled on death of any person intestate. In such a situation, in relation to paternal property she has to be treated in all probability as an unmarried daughter. An unmarried daughter's position before the Kandyan Law

Declaration and Amendment Ordinance came into operation was that in the first instance, on the death of her father she shared the inheritance equally with her brothers and *binna* married sisters; but this interest was temporary or defeasible or transient joint interest which she later lost by a subsequent *diga* marriage (Hayley 273 & 278). The Ordinance made a significant change in this regard, which I think has direct bearing on the problem at hand. Subsection 12(1) of the Ordinance reads:-

> "The *diga* marriage of a daughter after the death of her father shall not affect or deprive her of any share of his estate to which she shall have become entitled upon his death, provided that if within a period of one year after the date of such marriage the brothers and *binna* married sisters of such daughter or any one or more of them, but if more than one then jointly and not severally, shall tender to her at the fair market value of the immovable property constituting the aforesaid share or any part thereof, and shall call upon her to convey the same to him or to her or them, such daughter shall so convey and shall be compellable by action to do so."

It is significant that the right of emption is not given to any *diga* married sister who never left the *mulgedara* or reacquired *binna* rights by readmission to the mulgedera.

In this background let me consider the meaning of the subsection 9(1) taking it part by part.

A marriage contracted

A valid marriage contracted in terms of the law currently in operation. Section 3 (b) (regarding registration); section 5 (1) (prohibited degrees of relationship); section 6 (relating to a second marriage without dissolving the first) of the Kandyan Marriage and Divorce Act, No. 44 of 1952, are all attracted. Going in *diga* with a man sans registration is no marriage.

After commencement of the Ordinance

According to section 2, after 1.1.1939.

In *binna* or *diga*

The two types of marriage recognized in Kandyan Law. These are not defined in the Ordinance and for that matter not even in the Kandyan Succession Ordinance or Kandyan Marriage and Divorce Act.

shall be and until dissolved continue to be,

The marriage status ends with dissolution; therefore the marriage will be *diga* or *binna* as long as the marriage subsists – until it is dissolved; no marriage could be switched midstream from one type to another. Obviously, it could not be so switched after dissolution.

for all purposes of the law governing succession to the estates of deceased persons,

The point at which succession to the estates of deceased persons could take place is not restricted to the period of subsistence of the marriage and there is no room to assume it is so restricted. The point at which succession takes place could be during the subsistence of the marriage or after dissolution. In the case of the succession to the estates of husband and wife *inter se*, it must necessarily happen after the death of one party and therefore after dissolution of the marriage.

a *binna* or *diga* marriage, as the case may be, and shall have full effect as such;

A marriage cannot be *binna* for one purpose and *diga* for another; or partially *binna* or partially *diga*.

and no change after any such marriage in the residence of either party to that marriage

After such marriage, means after the marriage contract takes place; and therefore includes both the period during which the marriage subsists and the period after its dissolution.

and no conduct after any such marriage of either party to that marriage or of any other person

Here too, the term after any such marriage, includes both periods of subsistence of marriage and after its dissolution. Conduct would include, execution of deeds, enjoyment of property, reception by parents or brothers etc.

shall convert or deemed to convert a *binna* marriage into a *diga* marriage or a *diga* marriage into a *binna* marriage

This idea of conversion of one type of marriage into another seems to suggest subsistence of the marriage and it therefore relates to change of residence of parties to the marriage and conduct of the parties as aforesaid, after marriage, but before dissolution of marriage.

or cause or deemed to cause a person married in *diga* to have rights of succession of a person married in *binna*, or a person married in *binna* to have the rights of succession of a person married in *diga*.

1. No change of residence of either party to that marriage, and

2. No conduct of either party to that marriage or of any other person;

both (change of residence and conduct) taking place after such marriage, which includes the period after dissolution as well, cause ... a person married in one type of marriage to have rights of succession of a person married in the other type.

Conclusion

For the above reasons I hold that the earlier decision was erroneous in law. *Kiribindu*, in terms of section 9 (1) of the Ordinance, could not have preserved or reacquired a right of succession to

paternal property, by reason of her having contracted a *diga* marriage. Her change of residence or conduct after marriage could not have altered her rights. She gets no interest from the lands sought to be partitioned.

The appeal is allowed and the judgments of both courts below are set aside. Judgment is entered dismissing the plaintiff's action. The parties will bear their own costs of this Court and of all Courts below.

We are indebted to learned counsel for their invaluable assistance.

WADUGODAPITIYA, J.

I have had the benefit of reading the judgment of my brother, Dheeraratne, J. and must state that the facts of this case have been adequately set out by him and need no further elaboration. On the application of the law to the facts, however, I hold a different view.

There is no dispute that the question that arises for adjudication in this case is one of succession by the daughter, Kiribindu (plaintiff-respondent) to a share of the property of her late father, Ukkuwa. The vital or relevant date which has to be taken into account, therefore, is, the date of Ukkuwa's death, and, the pivotal question that arises for consideration is, "what was Kiribindu's status on the day her father, Ukkuwa, died?;" for, as Wood Renton C.J. (with de Sampayo J., agreeing) said, in *Siripaly v. Kirihame*[48]: "It is only reasonable that in such circumstances the *binna* married daughter's title to a share in the paternal inheritance should be held to have crystallized at the time of her father's death." The answer to this question would, in my view, determine whether or not Kiribindu is entitled to a share of the paternal inheritance. Kiribindu's father Ukkuwa died in 1957, and there is no question of the fact that, at her father's death Kiribindu was an unmarried woman living in her father's house; never having severed her connections with the *mulgedera*. Kiribindu married Piyasena in *diga* on 27.7.39, but continued, notwithstanding the *diga* marriage, to live in her father's house (the *mulgedera*); never having

left it or severed connections with it. Although this marriage was dissolved on Piyasena's death on 30.7.1946, Kiribindu never contracted a subsequent marriage but continued as before, to live in the *mulgedera*.

It is of importance to note that even though her marriage certificate stated that she married in *diga*, Kiribindu was never conducted out of the *mulgedera* either by her husband Piyasena or by his family. On the contrary, the couple, after their *diga* marriage, continued to live in the *mulgedera*. The fact is not contested, that Kiribindu never left her father's house, for the reason that she was needed there to fulfil a family obligation. It appears that sometime prior to her marriage to Piyasena, her sister-in-law, the wife of her only brother, Rana, died prematurely, leaving three minor children (1st defendant-appellant, and the 4th and 6th defendant-respondents); the responsibility for whose care and upbringing naturally devolved on Kiribindu. Thus, the then unmarried Kiribindu was in fact required by her father and her only brother, Rana, to remain in the *mulgedera* in order to look after the latter's three minor children, and, function as their foster mother. Further, according to the admitted facts, this situation continued without change despite her subsequent marriage in *diga* to the aforementioned Piyasena in 1939. It needs to be mentioned that it is this self-same brood of three minor children, who, as the 1st defendant-appellant and the 4th and 6th defendant-respondents, are now seeking to contest Kiribindu's claim to her paternal inheritance.

Thus it was, that even though the certificate of registration of marriage stated that the marriage was in *diga*, Piyasena and Kiribindu continued after their marriage, to live in the *mulgedera*, and Kiribindu, even after her husband's death in 1946, never remarried, but continued to live in the *mulgedera*. The important fact then, is that all her life, i.e. before her marriage, after her marriage and during her widowhood, Kiribindu always lived in her father's house, the *mulgedera*, and never left it or severed connections with it either physically or otherwise. Therefore, when her father died in 1957, she was in fact an unmarried daughter living in the *mulgedera* as set out above. Hence, in the particular circumstances of this case, questions

such as re-acquisition of rights, reversion, conversion of one type of marriage to another, severance from the *mulgedera*, change of residence and return, subsequent conduct of the parties to the marriage, acquiescence, waiver of forfeiture etc., do not arise.

According to the submissions of learned Counsel, the law applicable is the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938 (date of assent: 1st January, 1939) and section 9 (1) thereof states as follows:-

> "A marriage contracted after the commencement of this Ordinance in *binna* or in *diga* shall be **and until dissolved shall continue to be,** for all purposes of the law governing the succession to the estates of deceased persons, a *binna* or a *diga* marriage, as the case may be, and shall have full effect as such; and no change after any such marriage in the residence of either party to that marriage and no conduct after any such marriage of either party to that marriage or of any other person shall convert or be deemed to convert a *binna* marriage into a *diga* marriage or a *diga* marriage into a *binna* marriage or cause or be deemed to cause a person married in *diga* to have the rights of succession of a person married in *binna*, or a person married in *binna* to have the rights of succession of a person married in *diga*.

Applying the law to the facts, one finds that the crucial words as far as this case is concerned are: "...and, until dissolved shall continue to be ..." This is to say, a *diga* or *binna* marriage shall continue to be such only as long as the marriage itself subsists. Once the marriage is dissolved, the labels "*diga*" and "*binna*" fall away and cease to apply, and once that happens, the words "*diga*" and "*binna*" cease to be of any consequence, "for all purposes of the law governing the succession to the estates of deceased persons." The words quoted above, viz, "until dissolved shall continue to be", are indeed essential for the correct working of the section. For one thing, it obviates difficulties which would arise, e.g., in a situation where a woman married in *diga*, chooses, after the dissolution of such marriage, to contract a marriage in *binna*, during the lifetime of her

father, and, to go even further, where, upon the dissolution of such second marriage, she contracts a third marriage, this time in *diga*, once again! Then again, it seems clear that the labels "*diga*" and "*binna*" cannot exist independently, by themselves, but must necessarily qualify and apply only to a subsisting marriage. Thus, if there is no marriage subsisting, questions regarding *diga* and *binna* cannot arise in the first place. It is important to note also, that nowhere is there even a suggestion that the status of widowhood must continue to bear the yoke of *diga* or *binna* for life.

Therefore, a marriage contracted in *diga*, as in the instant case, "shall for all purposes of the law governing the succession to the estates of deceased persons," be and continue to be a *diga* marriage until, and only until dissolved. To repeat, Kiribindu's marriage in *diga* was dissolved upon the death of her husband Piyasena in 1946 whilst her father, Ukkuwa, was still alive. Thenceforth, in terms of section 9 (1), she ceased to be a *diga*-married woman and assumed the status of a single unmarried woman. And, if as set out above, she never re-married and never left or severed connections with the *mulgedera*, she automatically became entitled to a share of the paternal inheritance upon her father's death in 1957, inasmuch as she was in fact an unmarried daughter.

Thus, it appears that section 9 (1) of the Ordinance applies only to marriages which in fact subsist on the relevant date. It does not apply to the facts of, and will not govern the instant case, where the marriage has been dissolved and has ceased to exist. Further support for this preposition may be had from the sub-heading and the marginal heading to section 9, both of which deal only with "marriages", i.e. subsisting marriages.

Therefore the question that has arisen in the instant case, viz: whether the daughter, Kiribindu is entitled to succeed to a share of her paternal inheritance, must be decided upon considerations which are independent of section 9 (1) of the Ordinance. As set out above, it is my view that Kiribindu, the Plaintiff-respondent in this case is

entitled to her natural rights of inheritance, and must succeed to her paternal inheritance in terms of the law of succession. Since she was one of two children of the deceased Ukkuwa, she would be entitled to half the paternal inheritance.

I would therefore dismiss this appeal with costs.

Appeal allowed.
Plaintiff-1st respondent's
action dismissed.