1939 *Present :* **de Kretser and Nihill JJ.**

KIRI BANDA *v.* DINGIRI BANDA.

85—D. C. (Inty.), Kurunegala, 4,167.

Kanadyan law—Right of cousins to succeed to inheritance—Female cousins married in deega—No forfeiture of rights.

Where a Kandyan died unmarried and issueless, leaving as his next-of-kin the children of his father's brother, viz., two sons and three daughters married in *deega*,—

***Held*, that the cousins married in deega did not forfeit their rights to the inheritance.**

UKKU Banda, a Kandyan, died unmarried and without issue, leaving as his next-of-kin, the children of his father's brother Kapuruhamy. Kapuruhamy's children were two sons and three daughters married in *deega*. The question was whether the married daughters forfeited their rights to their cousins' property by their *deega* marriage.

C. V. Ranawake, for the appellants.—The District Judge's finding against us is based on what appears to be the combined application of the rules attaching to a *deega* forfeiture and the principle of the reversion of inherited property to the source whence it came where descendants fail.

The rule of *deega* forfeiture has been incorrectly applied. Here admittedly the appellants' and respondents' father had been dead some years at the time Ukku Banda died. The rule of *deega* forfeiture involves the forfeiture of a daughter's right to inherit any portion of her father's estate (*see*, for instance, the rule as stated by Wood Renton C.J. in *Punchi Menika v. Appuhamy* [1]). Can it be said here that we had no rights to what became our father's property on Ukku Banda's death ? The principle should not be extended beyond its true limits. Were it to be so extended we should have a clear and unequivocal rule ; in its absence, the policy of the law would be against the imposition of a forfeiture. See *Menikhamy v. Appuhamy* [2].

What constitutes a parental estate must be finally decided at the point of time when one's father dies ; it is to that estate the *deega* married daughter forfeits her rights. While the *deega* forfeiture is based on the theory of a dowry being given to a daughter out of the father's estate, it would indeed be a serious penalty attaching to a *deega* marriage which a *deega* daughter has to pay, if, after her father's death, whenever the occasion arises which, but for her *deega* marriage, entitles her to any property, she has to forego such title on the basis that the property historically may be described as paternal property.

The other rule of inherited property reverting to the source whence it came has been equally incorrectly applied in this case, for the real question is one of *succession to the estate of a deceased cousin, not to a paternal*

[1] *19 N. L. R. 353.* [2] *5 Balasingham's Notes 38.*

estate. A succession collaterally is not at all obnoxious to Kandyan custom. See *Kiriwante v. Ganetirala* [1], *Dingiri Menika v. Appuhamy* [2], *Dinga v. Happuwa* [3].

E. A. P. Wijeyratne, for the respondent.—The word "forfeiture" is unhappily used. It connotes a "disqualification" which Courts of Law are reluctant to impose. *Deega* involves an "abandonment" of certain rights and that too for good reasons. A *deega* woman severs her connections with her father's home and becomes a member of a new family with rights to succeed to her husband's property. She gets a dowry and should not get another portion by inheritance—*Hayley, p. 462.* There is a duty cast on the father and other male members to maintain her in case of return in a destitute condition—*Sawer, p. 4; Peiris v. Kiribanda* [4]. The object was also to reduce the number of shareholders—See *Modder, p. 229,* and *Armour, p. 5.*

In the case *Menikhamy v. Appuhamy* (*supra*) there was no *deega. Deega* involves consensus, connubium and certain ceremonials. In that case the woman became the mistress of a Tamil man. *Kiriwante v. Ganetirala* (*supra*) can be distinguished, as there are no *deega* results in case of maternal paternal property where parents have separate estates. Similarly, *Dinga v. Happuwa* (*supra*) has no application, as the property there had come to the mother from a collateral.

Dingiri Menika v. Appuhamy (*supra*) supports the respondent's case as *deega* half-sisters do not inherit where there are half-brothers or *binna* half-sisters. Besides, that case lays down an important principle that males are preferred to females, where parties claiming inheritance are in equal degree of relationship. See also *Menikhamy v. Suddana* [5] where a brother's acquired property is succeeded to by brothers in preference to sisters.

The true principle is that people who bore the family name were preferred to those belonging to a different family—*Hayley, p. 407.* Title must therefore be traced back to the ancestral roof-tree—*Modder, p. 597-598.*

Thus a *deega* daughter will not inherit her mother's paternal property, where the mother was a *binna* woman and as such was regarded as a male member of the family. A *deega* sister did not share in the inherited property of a brother (*4 C. W. R. 3*). Nor did she succeed to the inherited property of a sister (*Perera v. Setuwa* [6]). On the same principle *deega* nieces were excluded (*6 N. L. R. 133*), and nephews were preferred to *deega* sisters—*Hayley, 473* and *Niti, p. 113.*

The present case deals with cousins but cousins are treated as brothers and sisters—*Modder, p. 640.* The passage from *Sawer, p. 14* . . . . "shall go equally to such cousins" . . . . clearly means such cousins as have not abandoned their rights by *deega.* Thus in any table of devolution when reference is made to sons and daughters or brothers and sisters it means such daughters or such sisters as have not married out in *deega.*

[1] *2 N. L. R. 92.*
[2] *6 N. L. R. 133.*
[3] *7 N. L. R. 100.*
[4] *27 N. L. R. 52.*
[5] *28 N. L. R. 266.*
[6] *17 N. L. R. 307.*

The only authority to the contrary is in *Austin's Reports, p. 149,* where *deega* nieces inherited. There the decision on the point of law was really left to the assessors as the full copy of the judgment produced will show. As against that decision—see *Hayley, p. 428 and Niti, p. 100.*

C. V. Ranawake, in reply.—The argument, obviously cannot be accepted, that cousins being looked upon as brothers and sisters, we should be disentitled as Ukku Banda's sisters. For the purpose of determining succession cousins must remain cousins.

The plea of abandonment of our rights set up in appeal by the respondent is equally untenable. We cannot presume an abandonment which has been unambiguously proved.

Cur. adv. vult.

October 2, 1939. DE KRETSER J.—

One Ukku Banda died unmarried and issueless leaving as his next-of-kin the children of his father's brother, Kapuruhamy. The children of two brothers or of two sisters are called brothers and sisters although in reality they are cousins, and these five children of Kapuruhamy, two sons and three daughters, made a close approach therefore to the position Ukku Banda's brothers and sisters would have held.

The three females were married in *deega* and the question is whether they therefore had no right to inherit from Ukku Banda. If Ukku Banda had sisters of his own married in *deega* they would not have inherited from him save in exceptional circumstances which need not now be considered. It is urged that his cousins should be similarly disqualified because they ought to be treated as Ukku Banda's sisters.

The strongest emphasis is laid, however, on the argument that a *deega* married female abandons for all time every claim to any property to which is attached the quality of inherited ancestral property, and that the disqualification is not limited to her own parent's property. It is urged that it is not a case of forfeiture, in which case one would hesitate to extend the disqualification, but a case of voluntary abandonment: the *deega*-married daughter loses her status, her identity as a member of her father's clan, and becomes a member of her husband's clan; and there can be no complaint since she takes her portion with her in the form of dowry.

It seems to me that it is rather a fiction to term the loss she sustains a voluntary abondonment. She usually has no voice in the matter of her marriage, and one requires some strong reason before one can accept the position that a person has abandoned something which would be to her advantage. Besides, abandonment surely depends on intention. If one can assume that a daughter marrying in *deega* abandons her claim to her parents' estates, a portion of which she knows would be hers but for her marriage, why must one assume that she means to abandon even claims to a cousin's estate, which may only come into existence much later? There can be no doubt that it is a case of forfeiture which we are faced with. All the authorities hitherto have gone on that footing.

It is not of much use to seek to know the reason for this customary law. A custom like this merely means a repetition of a large number of cases, and the origin of a custom is usually difficult to trace. It is interesting from the point of historical and scientific research to attempt

to ascertain the reason for the existence of the custom, but from a legal point of view all we are concerned with is the proof of the custom. That proof is gathered from writers, who may be trusted to know what they are writing about, from the evidence of well-informed witnesses, and of course from the trend of judicial decisions. If the custom is not proved one must fall back on the Common law, which is the Roman-Dutch law. I deprecate the attempt to evolve principles : it is a snare the attractions of which one would do well to avoid. What, we are asked, is the reason underlying the forfeiture which a *deega* marriage involves ? Is it that the female just loses her identity ? that "what the husband is the wife is ?" that his people become her people ? It may be so. It is a theory not without its attraction for the anthropologist, the biologist, the sentimentalist, who may find some evidence of his theory in the fact that in the days when communication was difficult and a woman married and left for some distant village she was really cut off from her people. But on the other hand we find her not only naturally looking back on her old home, but custom favouring a marriage between her children and her brothers' children, a custom which, of course, never received judicial recognition.

We find that if she had occasion to come back, her family did not regard her as a stranger but were under a natural obligation to maintain her, and they might even go the length of restoring her to her previous position in the family. She might even marry in *deega* and yet keep in touch with her family, so that both parties might indicate that she was not losing any rights by her marriage.

Sawer, a recognized authority on the subject, says at page 2 of his *Digest* that on the failure of issue of the sons and of the daughters married in *binna* the *deega* married daughters succeed to their father's property; *i.e.*, they are not cut off for ever. But if the *deega* married daughters are dead, then the brothers of the father succeed in preference to the children of such daughters, but if the father's brothers are dead then the children of the *deega* married daughters succeed in preference to their cousins, the children of the father's brothers.

A better reason would be that at her marriage the daughter marrying in *deega* is given her portion in advance by her father, or out of the father's estate by the brothers, if her father be dead. It was not fair therefore for her to expect more, and it was left to them to decide whether she should have more or not. It was a matter of arrangement really.

The provision is always with regard to her parent's property, the property on which she obviously had a natural claim. Nowhere do we find the forfeiture carried any further, and in the absence of authority I am not inclined to extend it. But as a matter of fact there are authorities to the contrary, and they are of such antiquity that they are not only more likely to express the customary rights as they existed at the time when the promise was made by the British Government to preserve the customary rights of the people, but they have never been challenged and must have been acted on quite frequently.

The earliest authority is to be found in *Austin's Reports, at page 149.* Mr. Wijeyratne's diligence furnished us with a copy of the record, which is annexed hereto. The Supreme Court was assisted by assessors, who

were Kandyans, and took the evidence of two chieftains on the point. These witnesses presumably were recognized as competent to express an opinion, and there is no indication that their authority was challenged or other evidence offered. The lawyers appearing in the case were themselves well qualified in the subject. In fact the question whether a *deega* married cousin would succeed does not seem to have been considered so much as the question whether she forfeited her rights because her uncle had given her in marriage. The argument rather seems to have been that she succeeds through her uncle, and her uncle having given her in marriage might she not be taken to forfeit her claims to any rights arising indirectly through that uncle? The rights coming to her father, himself an uncle of the deceased, do not seem to have been challenged. The opinion was that she would not forfeit her rights, and this Court adopted that view.

The taking of similar evidence has been common, even in recent times; *vide Dewendra Unnanse v. Sumangala Terunnanse*[1] and *Saranankara Unnanse v. Indajoti Unnanse*[2].

The case reported by Austin was decided as far back as 1851. Then in 1902 came the decision in *Dinga v. Happuwa*[3] where this Court held that a *deega* married daughter does not forfeit her right to inherit land, which had been acquired by her mother, or to which her mother had succeeded collaterally *or otherwise than by inheritance from her father.* These last are the important words. This decision followed a decision by Lawrie J. in an unreported case. Lawrie J. had been District Judge of Kandy for many years and his opinion always received the greatest consideration. In *Kiriwante v. Ganetirala*[4] he said that in a case where a matter was uncertain a daughter ought not to be deprived of a share of her inheritance: "Unless the law be clear, and unless the forfeiture be certain it should not be decreed". Withers J. agreed. It is a statement which commends itself to me. In *Dingiri Menika v. Appuhamy*[5] where the question related to acquired property, Lawrie J. said—" . . . . . I doubt whether the forfeiture created by a *deega* marriage extends further than to the father's estate, and even with regard to his estate the tendency ever was to relax the law and to admit the *deega* married daughter."

There is therefore authority which covers this point, and I see no reason why the rights of the deceased's female cousins should be affected by their marriages in *deega.* There is no reason to interpret the statement at page 584 of Modder as an authority to the contrary. All he says is that when the direct line of descent is broken, inherited property goes over to the next nearest line which issues from the common ancestral roof-tree. That is the rule under a number of systems of law, including the Roman-Dutch law. In this case one goes back to Ukku Banda's grandfather before one begins to come down. That does not mean that Ukku Banda's grandfather is artificially revived and that the property passes to him and then he dies and it passes to Kapuruhamy, who is also artificially revived; and it being Kapuruhamy's inherited property his daughters married in *deega* take nothing. Such a way of looking at the matter is most unnatural.

[1] *29 N. L. R. 415.*
[2] *20 N. L. R. 385.*
[3] *7 N. L. R. 100.*
[4] *2 N. L. R. 92.*
[5] *6 N. L. R. 133.*

There was an attempt to suggest that Ukku Banda left acquired property as well, and that in the case of such property the male cousins should be treated as brothers and therefore exclude their sisters. To begin with, while there was some suggestion at an early stage of the trial that Ukku Banda owned acquired property, this position seems to have been abandoned during the course of the trial, and the District Judge clearly goes on the footing that the property in question was inherited property. It is too late to go back again. But I do not see how the position would be any better for the respondents, were it otherwise. Their strongest arguments are based on the assumption that this property is parental property.

The position that the brothers take all the acquired property of a deceased brother to the exclusion of the sisters is now established, but not without considerable challenge in more recent years. There is no reason to extend the forfeiture. It has been supposed that the reason why the sisters were disqualified was that they contributed no effort to the acquisition, whereas the labourers of the family ought to be rewarded, and the brothers were the toilers and earners. The claim was even greater when, as often happened, two brothers took one woman to wife. No such consideration, if that be the true one, applies to the cause of cousins, none of whom contributed to any acquisition by Ukku Banda.

Sawer, at page 13, deals with the rights of inheritance to both ancestral and acquired property. Dealing with the case of *sisters*, he says that they have "only the same degree of interest in their deceased brother's acquired property that they have in their deceased parents' estate." And it has now been settled that the sisters are excluded by the brothers. But the sisters do come in if the brothers and their sons fail.

Proceeding further, at length arrives at the statement that the property goes to cousins (called brothers and sisters) on the mother's side, that is to say, the mother's sisters' children; and then says that, failing them, it goes to the mother's brothers and their children, and failing them to the father's brothers and their children, and failing them to the father's sisters and their children. Where cousins are called to the inheritance there is no distinction between males and females. He makes this quite plain at page 14 when he says—"When a person dies intestate, leaving no nearer relations than first cousins called brothers and sisters, his or her acquired property shall go equally to such cousins by the father's and mother's side, that is to say, to the children of the father's brother or brothers, and to the children of the mother's sister or sisters, share and share alike." The last words are most important and can admit of no doubt.

There is nothing in the case of *Menkhamy v. Suddana*[1] to the contrary. According to Modder, at page 617 of his work, "In regard to acquired property there is no definite system laid down by the jurists, but the tendency is to give preference to the maternal over the paternal line, and to elect males before females in the same degree". He is summarising the law very generally, and even then he speaks only of a 'tendency'. While this statement may be true in general, we have the authority of Sawer for the very situation we are now dealing with.

[1] *28 N. L. R. 266.*

The order made in the lower Court is set aside, and the appellants are declared entitled to the rights they claim with costs both in this Court and in the Court below.

NIHILL J.—I agree.

Appeal allowed.