1960 *Present :* **Basnayake, C.J., K. D. de Silva, J., Sansoni, J., H. N. G. Fernando, J., and T. S. Fernando, J.**

KARUNAWATHIE MENIKE, Appellant, *and* EDMUND PERERA, Respondent

S. C. 541—D. C. Kandy, 5029/P

Kandyan Law—Diga married widower—Death of son unmarried and without issue—Devolution of immovable property inherited by him from his mother—Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, s. 16.

Held, by SANSONI, J., H. N. G. FERNANDO, J., and T. S. FERNANDO, J. (BASNAYAKE, C.J. and K. D. DE SILVA, J., dissenting): Prior to the date when the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938 was enacted, when an unmarried Kandyan died intestate and without issue, leaving surviving him his brothers and sisters and his diga married father, any immovable property which the deceased had inherited from his mother devolved absolutely on his father and not on the brothers and sisters subject to a life interest in favour of the father.

APPEAL from a judgment of the District Court, Kandy. This appeal was referred to a Bench of five Judges under section 51 of the Courts Ordinance.

B. S. C. Ratwatte, with *D. C. W. Wickremasekera*, for Defendant-Appellant.

H. W. Jayewardene, Q.C., with *M. Rafeek* and *C. P. Fernando*, for Plaintiff-Respondent.

Cur. adv. vult.

November 11, 1960. BASNAYAKE, C.J.—

This appeal was argued before de Silva J. and myself on 7th December 1959. As there are conflicting decisions on the question of Kandyan law arising on this appeal and as some of the decisions are not in harmony with the law as stated by Sawers and D'Oyly and declared by the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938, under Section 51 of the Courts Ordinance, I made order that this case shall be heard by five Judges of this Court.

The question for decision is whether on the death of a Kandyan unmarried and without issue, leaving surviving him his brothers and sisters and his diga married father, his deceased mother's immovable property which she acquired by purchase before her marriage in diga and which he inherited on her death goes absolutely to his father or to the brothers and sisters subject to a life interest in favour of the father.

Learned counsel for the appellant sought to canvass the decisions of this Court which are not consistent with the law as stated by Sawers.

It is common ground that Bandara Menika and Ukku Banda were husband and wife and were married in diga on 7th August 1899. At the

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time of her marriage Bandara Menika was the owner of the land in dispute by right of purchase from Tikiri Mudianse on deed P3 of 30th August 1892. On her death it devolved on her five children Muttu Banda (1/5), Kumarihamy (1/5), Kamalawathie (1/5), Ran Banda (1/5) and Karunawathie (1/5) in equal shares. Muttu Banda died on 7th October 1931 unmarried and issueless. On his death Ukku Banda claimed that he became entitled to his deceased son's share in the property inherited from his mother and sold it to the plaintiff by deed P 6 of 16th May 1932. The plaintiff also purchased the shares of Kumarihamy (1/5) by P 7 of 17th April 1930, Kamalawathie by P8 of 16th January 1933, Ran Banda by P9 of 12th January 1935 and Karunawathie by P10 of 12th August 1940. By deed D1 of 13th August 1942 the plaintiff transferred to the defendant the 1/5 share purchased on P10 from Karunawathie Menika. The defendant disputes Ukku Banda's right to inherit the maternal property of his son and asserts that Muttu Banda's (1/5) share devolved on his brother and sisters.

In the instant case the learned District Judge has held that the father inherits the property absolutely on the authority of the case of *Appuhamy v. Silva* [1]. In that case Gratiaen J. held that the father succeeded absolutely on the footing that the decision in *Chelliah v. Kuttapitiya Tea and Rubber Co. Ltd.* [2] was an authoritative decision on the point. I find myself unable to agree with his view that that is an authoritative decision. Garvin J. expressly states after quoting section 33 of Sawers Digest and referring to the case of *Appuhamy v. Hudu Banda,* [3] :—

> " There seems no reason to doubt that a diga married father is at least entitled to a life interest in the landed property of a deceased child which such child inherited through his mother. Kiri Menika is therefore entitled at least to a life interest in the lands involved in the action."
>
> " It was submitted, however, that he is entitled to inherit such deceased child's property without any limitation it being premised that such child died without issue. This is a point upon which the Kandyan law is far from being clearly ascertained and *I am not sure that it is necessary for the purposes of this case to decide the question.*"

He then goes on to say :—

> " Inasmuch however as the question has been raised and argued at some length it is perhaps desirable that we should express our views upon the point."

It is clear from these words that the Judges did not purport to do more than express their views on the point as it had been raised and argued at length. On the facts of the case before him Garvin J. said :—

> " . . . . In this particular case since the property of the child was originally that of her grandfather it may well be that in the absence of closer relations of the intestate child's mother the father would be

[1] *(1955) 56 N. L. R. 247.* [2] *(1932) 34 N. L. R. 89.*
[3] *(1903) 7 N. L. R. 242.*

preferred to the children of the child's mother's sisters who by contracting *diga* marriages had excluded themselves from participating in that inheritance."

Garvin J. makes no reference in this judgment to the case of *Bungappu v. Obias Appuhamy* [1], which is a judgment of two Judges and was decided before *Appuhamy v. Hudu Banda* (*supra*) to which he refers. In Bungappu's case Moncreiff J. with Browne J. concurring states :—

" By Kandyan Law, on the death of a person without issue leaving parents, brothers, and sisters, the usufruct of his acquired property goes to his parents, and in this case the usufruct of Appuhamy's acquired property went to Dingiri Menika, the mother."

This is a clear decision and is in point. Though it deals with acquired property the rule of succession of the parents is the same in the case of inherited property. The judgment refers to the passages of Sawers and Marshall quoted below :—

In the case of *Appuhamy v. Hudu Banda* (*supra*) Middleton J. following Sawers but independently of *Bungappu v. Obias Appuhamy* (*supra*) formed the view that the diga married father derived only a life interest in the immovable property of his deceased son dying intestate and issueless and leaving brothers and sisters. In *Bisona v. Janga and others* [2] I followed that decision in preference to the case of *Ranhottia v. Bilinda* [3]. In *Ranhottia's* case the Court followed the view of Armour in preference to the view contained in section 96 of Marshall's judgments. Even assuming that what appears in section 96 of Marshall is the view of Sawers the reason for preferring Armour to Sawers is not stated. In *Ran Menika v. Mudalihamy* [4] and *Appuhamy v. Dingiri Menika* [5] the opinions of Marshall and Sawers were preferred to Armour's. Grenier J. who wrote the judgment in *Ranhottia's* case observes :—

" It will thus be seen that there is a direct conflict between *Sawer* and *Armour* in regard to the question whether the *acquired property* of a son goes to the father or to the brothers and sisters. According to *Armour*, where both father and mother are alive, and one of their sons dies unmarried, childless, and intestate, his *acquired property* goes absolutely to the mother to the exclusion of the father, and it is only in the event of the mother having predeceased her son that the father becomes entitled to the property. I need hardly say that *Armour's* opinion is not based upon any positive rule of the Kandyan Law to be found in any standard authority on the subject, nor is *Sawer's* opinion, on the other hand, based on any such authority. But dealing as we are with a system of primitive law and custom such as obtains amongst Kandyans, I am inclined to think that the District Judge was right in following the opinion of *Armour* rather than of *Sawer*."

[1] *(1901) 2 Browne 286.*
[2] *(1948) 41 C. L. W. 40.*
[3] *(1909) 12 N. L. R. 111.*
[4] *(1913) 2 C. A. C. 116.*
[5] *(1889) 9 S. C. C. 34.*

The two statements referred to by Grenier J. are *Armour* (Perera at pp. 88-89) and Marshall, section 96. Though he refers to Sawers, p. 13, I have not been able to trace at that page in Modder's edition the passage he had in mind. They are as follows :—

Armour :—" The mother is the heiress to the acquired property of all kinds, left by her child who died unmarried and without issue and intestate, and such property will be entirely at her disposal. The mother is entitled to all the movable property left by her daughter who died a widow, childless, and intestate to the exclusion of the deceased daughter's full sisters and their issue. If the mother had departed this life, previous to the demise of her child, then the father will be entitled to the reversion of the deceased child's acquired property, if circumstances did not disqualify the father from coming to the succession."

Marshall, section 96 :—" If a person die childless, but leaving parents, brothers and sisters, the property which the deceased may have received from his or her parents reverts to them respectively (if from the father, to the father, if from the mother to the mother) and his acquired property, whether land, cattle or goods, also goes to his parents, but only the usufruct of it. The parents cannot dispose of such acquired property by sale, gift or bequest, but it must devolve on the brothers and sisters, who however, have only the same degree of interest in their deceased brother's acquired property that they have in their deceased parent's estate, ultimately it is divided equally among the brothers of the whole blood of the deceased, or their sons according to what would have been their father's share ; failing brothers' sons, it goes to sisters of the whole blood or their sons, failing them, to the brothers of the half-blood, uterine, and their children, failing them, to the sisters of the half-blood, uterine, and their children, failing both brothers and sisters of the half-blood uterine and their children, to brothers of the half-blood by the father's side and their children, next to sisters of the half-blood, by the father's side and their children, next to the mother's sister's side, that is to say, the mother's sister's children (see the latter part of par. 91), failing them, to the mother's brothers and their children, next to the father's brothers, and their children, and, failing them, to the father's sister's, and their children."

The only other passage in Armour which has a bearing on the question before us though it does not deal with a case in which the deceased son leaves brothers and sisters is that at Perera p. 76. This is what he says :—

" The father is entitled to inherit the lands and other property, which his deceased infant child had inherited from the mother, in preference to the relations of the person from whom that property had been derived to the said child's mother."

The judgment of Grenier J. is itself not a strong expression of opinion in the Kandyan Law. The report does not show that the case of *Appuhamy v. Hudu Banda* (*supra*) was cited or considered. Nor does the

earlier case of *Dingiri Menika v. Appuhamy*[1] show that the view taken in *Appuhamy's* case was considered. *Dingiri Menika's* case itself does not appear to be an authoritative expression of opinion. This is what Wendt J. says :—

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

The report of the case in Austin p. 155 is very meagre and deals with the succession to paternal property a case the facts of which are entirely different from the one before us and does not apply to it, the conflict of claims there being between the father of the deceased child and the children of her deceased grandaunt. It reads " Sorana was the original proprietor of a certain land. He had a sister called Poossamba, and a daughter (who was married to plaintiff) called Rangkiry. At Sorana's death, the daughter succeeded to the land ; and on the death of the latter, her daughter Belinda (born to plaintiff) became entitled to the same. She however also died shortly after, and her father in this suit claims the land as sole heir-at-law. The defendants are the children of Poossamba (Rangkiry's paternal aunt). The Court below held that the father was the heir-at-law of his child." In appeal it was affirmed.

Sawers and Armour contain the only extant collections of the customs of the Kandyans. The subsequent works of Modder and Hayley cite Sawers and Armour as authorities. Marshall's exposition based on Sawers and Armour has also come to be regarded as authoritative. The only other statement of Kandyan law is the Niti Niganduwa. There is nothing in it which contradicts Sawers or which is directly in point on the question before us. It would appear from the observations of Dias J. in *Appuhamy v. Dingiri Menika*[2] that Marshall's opinions on Kandyan law were treated as of great weight as far back on 1889. The case of *In re the Estate of Punchi Banda*[3] decides that the diga married father of an intestate dying without issue is entitled to inherit, before the uterine half-sisters and brother of his deceased mother, the property derived from his mother, which she in turn inherited from her father. This is also not decisive of the point before us. *Ukkuhamy v. Bala Etana*[4] decides that when a Kandyan dies unmarried intestate and without issue his acquired immovable property devolves on his mother (the father being dead) in preference to the deceased's brothers and sisters. In this state of the decisions of this Court none of which can be regarded as authoritative decisions we must turn to the writers on Kandyan law such as Sawers, Armour and Marshall. Of these Sawers and Marshall are regarded as being more authoritative than Armour.

[1] *(1907) 10 N. L. R. 114.*
[2] *(1889) 9 S. C. C. 34.*
[3] *(1907) 2 A. C. R. 29.*
[4] *(1908) 11 N. L. R. 226.*

Of Sawers Lawrie J. who himself was an authority on Kandyan Law and whose opinion on questions of Kandyan Law has always been regarded with respect says in *Kiri Menika v. Mutu Menika*[1] " I regard Sawers as the best authority on Kandyan Law. He was Judicial Commissioner of Kandy from 17th August, 1821, until he retired on pension on 3rd July, 1827." Of Armour the same Judge says at p.379 " Mr Armour's opinion has not the same weight as Mr. Sawers', for he was not a Judge ; he was appointed Interpreter to the Judicial Commissioner in October, 1819 ; afterwards he was Secretary to the Judicial Commissioner's Court, an office which he held when Mr Sawers was the Commissioner." Of Armour's work Lawrie J. says " Armour's grammar of Kandyan Law (first published in the Ceylon Miscellany in 1842) is mainly a translation of the Niti Niganduwa ".

The following is what Sawers says on the point arising in this case (s. 33, p. 12) :—

" A wife dying intestate, leaving a son who inherits her property, and that son dying without issue, the father has only a life interest in the property, which the son derived or inherited from or through his mother. At the father's death, such property goes to the son's uterine brothers or sisters, if he have any, and failing them, to the son's nearest heirs in his mother's family."

Earlier he had said in s. 29, p. 10—

" Failing immediate descendants, that is, issue of his own body by a wife of his own or higher caste, a man's next heir to his landed property (reserving the widow's life interest) is his father, or if the father be demised the mother, but this for a life interest only or on the same conditions as she holds her deceased husband's estate, which is merely in trust for her children ; next, the brother or brothers and their sons ; but failing brothers and their sons, his sister or sister's son succeeds."

Marshall adopts the view of Sawers. In his treatise he says :

" 79. Failing immediate descendants, that is, issue of his own body by a wife of his own or of higher caste, a man's next heir to his landed property (reserving the widow's life interest) is his father, or if the father be dead, the mother, but for a life interest only." (Marshall, p. 338).

" 83. If a wife die intestate, leaving a son who inherits her property, and that son die without issue, the father has only a life interest in the property which the son derived from or inherited through his mother. And at the father's death such property goes to the son's uterine brothers or sisters, if he have any, and, failing them, to the son's nearest heirs in his mother's family." (Marshall, p. 340).

Even John D' Oyly confirms the view that the parents get only a life interest. See D'Oyly, p. 105 :—

" *N.B.* The Chiefs say that both Parents have an equal life interest only in the property—the property must ultimately go to the Brother.

[1] *(1899) 3 N. L. R. 376 at 378.*

" If he leave only a Father and Brothers, his Land and goods to his Father—for life only.

" If he leave only a father, Sister or Sister's son, the same—for life only.

" If a man die leaving a Father and Mother and Brothers and Sisters, property acquired from either of his parents reverts—if he has no Father, both to his Mother—if no Mother, both to his Father.

" But only a life interest—It must be kept for the Brothers and for the Sisters married in Binna."

The following statement in the Niti-Niganduwa at p. 111 supports the view that the father has only a life interest : " Again, inasmuch as the property of the mother is, on her death, inherited by her child or children, if she dies leaving her husband, he may, on behalf of the children, take care of the lands etc. so inherited, but he cannot appropriate or alienate any portion of them."

The fact that the view I have expressed ab ve has been adopted by the Legislature in section 16 of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938 when enacting that piece of Legislation, to my mind, reinforces the conclusion I have reached. As the Kandyan Law Commission did not recommend any change in the diga widower's right to the acquired property of his deceased wife (ss. 256–269—Report of the Kandyan Law Commission), Section 16 may be rightly regarded as a declaration and not an amendment of Kandyan Law.

I therefore set aside the judgment of the learned District Judge and direct that the shares of the respective parties be determined according to the law as stated herein and that a decree be passed accordingly.

DE SILVA, J.—I agree.

SANSONI, J.—

The question for decision is whether property which a Kandyan child of diga married parents inherited from his mother devolves, on his death unmarried and without issue, on his father or on his brother and sisters.

It was recognised long ago that the institutional writers Sawers and Armour did not express any decided or clear opinion on the point. Sawers at page 8 of Campbell's edition says : " Failing immediate descendants, that is, issue of his own body by a wife of his own or a higher caste, a man's next heir to his landed property, (reserving the widow's life interest) is his father, or if the father be demised, the mother, but this for a life interest only, or on the same condition as she holds her deceased husband's estate, which is merely in trust for her children ; next the brother or brothers and their sons ; but failing brothers and their sons, his sister or sister's son succeeds." This passage has been commented on in Modder's Kandyan Law (1914 edition) at page 599 in the following terms : " It is noticeable that while Sawers restricts the mother's right to a usufruct, it does not subject a father's claim to any limitation

whatsoever, but leaves it unqualified and absolute." Modder also cites it as authority for the following statement at section 307 : " Property, inherited from his or her mother or maternal ancestors by a person dying childless and intestate, will devolve on his or her heirs on the mother's side, in the following order : (1) the diga married father, (2) brothers and sisters of the full blood equally, and their issue per stirpes." Modder also remarks at page 490 that although Sawers does not expressly state that it is a condition precedent to the father's inheriting that he should have been married in diga, the dictum should be understood as implying a marriage in diga, which was the most common form of marriage.

In *Ukkuhamy v. Bala Etana*[1], Wendt, J. agreed with the view of Lawrie, J. that this passage in Sawers refers to the paraveni property of the person : he also pointed out that it deals with a case in which all the degrees of relationship are represented.

In *Dingiri Menika v. Appuhamy* [2] there was a contest between a diga married father and the mother's half brothers and sisters with regard to property which the deceased child inherited from his mother. The District Judge had held that the father was the sole heir, following the Supreme Court decision in *D. C. Kandy No. 23620* [3]. Wendt, J. referred to the passage at page 8, which I have already quoted, and pointed out that a difficulty was created by another passage at page 9 of Sawers which reads : " A wife dying intestate, leaving a son who inherits her property, and that son dying without issue, the father has only a life interest in the property which the son derived or inherited from or through his mother ; at the father's death such property goes to the son's uterine brothers or sisters, if he have any, and failing them to the son's nearest heirs of his mother's family." Wendt, J. then cited Armour (Perera's edition page 76) who said that " the father (by jataka uruma) is entitled to inherit the lands and other property which his deceased infant child had inherited from the mother, in preference to the relations of the person from whom that property had been derived to the said child's mother." While remarking that the authorities were in an unsatisfactory state, Wendt, J. adopted the view of the District Judge whose experience of the administration of the Kandyan Law entitled his opinion to very great weight. He also remarked that no decided case negativing the father's right had been brought to their no ice. Middleton, J. agreed w th Wendt, J. and this is significant, because in *Apphuhamy v. Hudu Banda* [4] Middleton, J. had previously held that a diga married widower was entitled only to a life interest in property which his deceased children had inherited from their mother. In his judgment in that case, which was that of a single Judge, Middleton, J. referred to the passages at page 9 of Sawers, and page 76 of Armour, but not to the passage at page 8 of Sawers.

The father's claim to an absolute estate even in his child's acquired property was upheld in *Ranhotia v. Bilinda* [5]. Mr. Hayley in his book

[1] *(1908) 11 N. L. R. 226.*
[2] *(1907) 10 N. L. R. 114.*
[3] *(1852) Austin 155.*
[4] *(1903) 7 N. L. R. 242.*
[5] *(1909) 12 N. L. R. 111.*

on Kandyan Law, published in 1923, doubted the correctness of the decisions in *Ukkuhamy v. Bala Etana* [1] and *Ranhotia v. Bilinda* [2] but the view taken earlier has always prevailed.

The question was again raised, after a lapse of 25 years, in *Chelliah v. Kuttapitiya Tea and Rubber Co.* [3]. Garvin, J., with whom Jayewardene, A. J. agreed, considered the question whether property which a Kandyan inherited from her mother devolved on her father or on her maternal cousins. It may be that it was not necessary to decide the question in that case, but it was raised and argued at some length. Garvin, J. referred to the earlier authorities, which I have already mentioned, and said : " The weight of judicial decision would seem to favour the view that the father is heir to the property of his child who dies intestate and without issue, not merely to a life interest therein but to the full dominium."

Finally, in *Appuhamy v. Silva* [4], Gratiaen, J. (with whom I agreed) followed the ruling in *Chelliah v. Kuttapitiya Tea and Rubber Co.*[5]. We were there invited to reconsider the question in view of the decision of Basnayake, J. (as he then was) in *Bisona v. Janga* [6], where it was held that the father inherited only a life interest in his child's property. Gratiaen, J. in his judgment said that it was " not at all desirable to disturb a long-established ruling on any question affecting rights of succession."

Most of the judges who have had to consider whether a father inherited only a life interest or an absolute interest in property which his deceased child had inherited from the mother have admitted that it was not an easy matter to decide, but a decision had to be made and it was made many years ago. On such a matter " it is more important that the applicable rule of law be settled than that it be settled right," as Brandeis, J. once observed. In *Bourne v. Keane* [7], Lord Buckmaster said that when decisions upon which title to property depends have been accepted for a long period of time, they should not be altered even by the House of Lords unless it could be said positively that they were wrong and productive of inconvenience.

Whatever may be the better view, it is clear that for at least fifty years this Court has, save for one instance, consistently held that the father succeeds to the full dominium. The profession and the public would have acted on that basis, and I think we would be doing grave injustice to many persons if we were now to disturb the law as laid down by successive generations of judges.

I would dismiss this appeal with costs.

H. N. G. FERNANDO, J.—

I agree with the reasons given by my brother Sansoni (whose judgment I have had the opportunity of reading) for declining to reconsider the view maintained in a series of decisions of this Court upon the question

[1] *(1908) 11 N. L. R. 226.*
[2] *(1909) 12 N. L. R. 111.*
[3] *(1932) 34 N. L. R. 89.*
[4] *(1955) 56 N. L. R. 247.*
[5] *(1952) 54 N. L. R. 89.*
[6] *(1948) 41 C. L. W. 40.*
[7] *(1919) A. C. 815.*

of law arising in this appeal. The Legislature had a clear opportunity, when the Kandyan Law Declaration and Amendment Ordinance of 1938 was enacted, to declare retrospectively that the law on this question should not be taken to have been what those decisions had stated it to be. The circumstance that this opportunity was not availed of is an additional reason why I do not feel disposed to overrule the view which this Court has hitherto upheld.

T. S. FERNANDO, J.—

I have had the advantage of reading the judgment prepared by my brother Sansoni and, as I find myself in agreement with him that this appeal should be dismissed, I shall content myself by setting down shortly the reasons for my conclusion.

The question for decision is whether on the death on 7th October 1931 of a Kandyan unmarried and without issue, leaving surviving him his brothers and sisters and his diga married father, his deceased mother's immovable property which she had acquired by purchase before her marriage in diga and which he had inherited on her death goes (*a*) absolutely to his father or (*b*) to his brothers and sisters subject to a life interest in favour of his father.

This question has to be decided according to the law relating to intestate succession to property among the Kandyans as it obtained on 7th October 1931. Had the question been one of application of the law declared as having effect on and after 1st January 1939, it would have had to be decided in accordance with the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, section 16 of which enacted as follows :—

> " If a person shall die intestate after the commencement of this Ordinance leaving him or her surviving parents, whether married in binna or in diga, or a parent, but no child or descendant of a child and no surviving spouse, then—
>
> (*a*) the parents in equal shares, or if one only be alive, then that one shall, if there be surviving any brother or sister of the deceased or the descendant of a brother or sister, be entitled to a life-interest in the acquired property of the deceased. The right of a sole surviving parent shall arise and continue whether or not the other parent shall have died before the deceased intestate ; . . . . "

The relevant law has from and after 1st January 1939 therefore been settled by legislation but, as evidenced by the need for the constitution of this Divisional Bench, when the question has to be decided in accordance with the law as understood before that date difficulties arise on account of certain differences of opinion to be gathered from reported decisions of the Supreme Court. In view of the approach to the problem that has commended itself to me, it does not appear to me to be necessary to

examine decisions of the Court that have been delivered in the very distant past, and I shall examine only those decisions that date from about fifty years ago.

In the year 1907, a bench of two judges of this Court (Wendt J. and Middleton J.) in *Dingiri Menika v. Appuhamy* [1] upheld the view of the law that has been applied by the District Judge against whose judgment the present appeal has been preferred. In doing so, Wendt J. observed as follows :—

> " In this unsatisfactory state of the authorities, the learned District Judge, whose long administration of the Kandyan Law in the District Courts of Kandy and Kurunegala entitles his opinion on a controverted point to very great weight has accepted the view adopted in the case in *Austin* [2]. No decided case distinctly negativing the father's right which was there recognised has been brought to our notice, and I think the judgment of the court below should be affirmed."

Middleton J. (who had in the earlier case of *Appuhamy v. Hudu Banda* [3] taken the opposite view) in agreeing with Wendt J's decision stated :—

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

In the following year, 1908, Wendt J. in *Ukkuhamy v. Bala Etana* [4] held that where a Kandyan dies unmarried, intestate and without issue his acquired immovable property devolves on his mother (the father being dead) in preference to his (deceased's) brothers and sisters. Wendt J. for reasons he has set out in that judgment did not consider that the case of *Bungappu v. Obias Appuhamy* [5] embodies an authoritative decision.

In 1909, a bench of two Judges (Hutchinson C.J. and Grenier J.) in *Ranhotia v. Bilinda* [6], after referring to the conflict between the statements contained in *Sawer's Digest* and in *Armour*, stated that it seems right that in case a son dies unmarried, childless and intestate, his acquired property should go to his father to the exclusion of his brothers.

This same question was raised in a case—*Chelliah v. Kuttapitiya Tea and Rubber Co.*[7]—that was decided by Garvin S.P.J. and Jayewardene A.J. some 23 years later. The question before the Court in that case was whether a father is heir to his child born in a diga connection in respect of landed property inherited through the mother who inherited in virtue of her retention or reacquisition of her rights of inheritance to her father's estate. Garvin S.P.J. was not sure whether it was necessary for the

[1] *(1907) 10 N. L. R. 114.*
[2] *(1852) Austin's Rep. 155.*
[3] *(1903) 7 N. L. R. 242.*
[4] *(1908) 11 N. L. R. 226.*
[5] *(1901) 2 Br. 286.*
[6] *(1909) 12 N. L. R. 111.*
[7] *(1932) 34 N. L. R. 89 at 97.*

purpose of the case before him to decide the question that is now before us, but as this latter question had been raised and argued at great length he thought it was perhaps desirable that the Court should express its view. Having entered thereafter upon a consideration of previous decisions and other authorities, he went on to say :—

> " The weight of judicial decision would seem to favour the view that the father is heir to the property of his child who dies intestate and without issue not only to a life interest therein but to the full dominium. While I am myself inclined to think that it is more in keeping with the principles of intestate succession so far as they are discernible in the Kandyan Law that the father should take only a life-interest in the property which his deceased child inherited from his mother, the balance of judicial decision is the other way."

Even if the view be taken that the statement reproduced above has to be considered as an *obiter dictum*, nevertheless the observations of a judge of the eminence of Garvin S.P.J. must carry great weight. It is significant that after another 23 years went by, in 1955, another bench of two judges (Gratiaen J. and Sansoni J.) in *Appuhamy v. Silva*[1] followed the opinion expressed by the judges who decided *Chelliah's case* (*supra*) and applied it to the case before them. In doing so, the Court declined to accede to an invitation to review the question as if it were *res integra*. Nor did the Court think it appropriate that the controversy should be revived by the convening of a Collective Court, notwithstanding a decision in 1948 (*Bisona v. Janga* [2]) to a contrary effect, Gratiaen J. stating that it is not at all desirable to disturb a long-established ruling on any question affecting rights of succession. As a great judge (Lord Mansfield) said nearly a hundred and eighty years ago in *Bishop of London v. Fytche* [3], " They had heard very strongly upon the other side arguments to the contrary ; and certainly it might have admitted of a difference of opinion ; but since it has been judicially established, there is a period when it is wiser, better and safer not to go back to arguments at large. He did not know where it would lead to . . . . The object of the law is certainty, especially such parts of the law as are of extensive and general influence, which affect the property of many individuals and which inflict pecuniary penalties ; which create personal disabilities ; and which work forfeitures of temporal rights." That certainty has been ensured for us by the legislature where the question of succession now before us is to be decided as on or after 1st January 1939. Where it arises for decision as at an earlier date, there should be no less certainty and our duty appears to be to apply the law that has been applied since 1907, i.e. for more than half a century, rather than disturb it.

For the reasons which I have set out above, the judgment of the District Court should, in my opinion, be affirmed and this appeal dismissed with costs.

Appeal dismissed.

[1] *(1955) 56 N. L. R. 247.*

[2] *(1948) 41 C. J. W. 40.*

[3] *(1782) 1 Brown P. C. 211.*