KANDYAN LAW

AND

BUDDHIST ECCLESIASTICAL LAW

By

T. B. DISSANAYAKE, B. A. (London)
Advocate of the Supreme Court of Ceylon.

and

A. B. COLIN de SOYSA,
Proctor of the Supreme Court of Ceylon.

முக்கிய அறிவித்தல்

உடனுதவும் பகுதி

பொதுசன நூலகம் யாழ்ப்பாணம்

நீங்கள் எடுத்து வாசிக்கும் புத்தகத்தில் கீறுதல், கிறுக்குதல் கிழித்தல், வெட்டுதல் போன்ற ஊறுபாடுகளைச் செய்ய வேண்டாமெனக் கேட்டுக்கொள்கின்றோம் புத்தகங்களை எடுக்கும் பொழுது இப்படியான குறைபாடுகளைக் கண்டால் நூலகப் பொறுப்பாளருக்கு உடன் தெரிவிக்கவும். இல்லாவிடில் இவ்வூறு பாடுகள் உங்களாலேயே செய்யப்பட்டதென்று கருதப்படுவது டன் நூலகத்தில் விதிக்கப்படும் தண்டனையையுஞ்சேர்க்க நேரிடும்.

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Dharmasamaya Press,
49, First Division – Maradana,
COLOMBO.
1963

To The Law Society of Ceylon

with Compliments

from R. L. Pereira

PREFACE

No legal treatises on Kandyan Law written in the time of the Kandyan Kings are extant. After the establishment of the British Government a digest of the Kandyan Law was prepared by Simon Sawers about the year 1821 and was first published in 1839. A Grammar of the Kandyan Law by John Armour was published in 1842. There is also a compilation known as the Niti Niganduwa which was written in Sinhala but was translated into English and published in 1880.

The principles of the Kandyan Law by Frank Modder was published in 1902. Its second edition was published in 1914. A treatise on the Laws and Customs of the Sinhalese by F. A Hayley was published in 1923, and a short digest of Kandyan Law by A. B. Colin de Soysa was published in 1945.

During the last twenty-five years many changes have taken place. The Kandyan Law has been declared and amended in certain respects by Ordinances Nos.39 of 1938 and 25 of 1944, while the Law relating to Kandyan marriages and Divorces has been amended and consolidated by Acts Nos. 44 of 1952, 34 of 1954 and 22 of 1955. There have been many decisions of the Supreme Court interpreting the ancient law as well as the enactments that have been introduced.

This book makes many references to the decisions of our courts setting out the principles of the cases almost in the language of the judge and they have been arranged so as to make a comprehensive statement, as far as practicable, on the various aspects of the Kandyan Law and what is termed Buddhist Ecclesiastical Law.

8th February 1963

T. B. Dissanayake,
No. 8, 36th Lane,
off Buller's Road,
Colombo 8.

A. B. Colin de Soysa,
No. 12, Dambulla Road,
Kurunegala.

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ABBREVIATIONS

A .C. R.	Appeal Court Reports.
Aser.	Aserwatham's Reports.
Austin.	Austin's Reports.
Br.	Brown's Reports.
Bal.	Balasingham's Reports.
Bal. N.	Balasingham's Notes of Cases.
C. A. C.	Court of Appeal Cases.
Cey. Law Rec.	Ceylon Law Recorder.
C. L. R.	Ceylon Law Reports.
C. L. W.	Ceylon Law Weekly.
C. W. R.	Ceylon Weekly Reporter.
C. P.C.	Civil Procedure Code.
Doyly.	Constitution of the Kandyan Kingdom by Doyly.
F. B.	Full Bench.
Grenier	Grenier's Reports.
Hayley	Laws and Customs of the Sinhalese by F. A. Hayley.
Kan. Com. Rep.	Report of the Kandyan Commission Sessional Paper No. 24 of 1935
Lor.	Lorensz's Reports.
Leader	Leader Law Reports.
Mat. Cases.	Matara Cases.
Mod. or Modder.	Principles of Kandyan Law by Messrs. Frank Modder and E. F. C. Modder.
N. L. R.	New Law Reports.
N. N.	Niti Niganduwa.
P. A.	Perera's Armour on Kandyan Law.
Per. Call.	Perera's Collections on Kandyan Law.
Pr. C.	Privy Council.
Ram.	Ramanathan's Reports
S. C. C.	Supreme Court Circular.
S. C. R.	Supreme Court Reports.
S. D.	Sawers Digest by Modder.
Tamb.	Tambyaha's Reports.
Times.	Times Law Reports.
V. D. L	Institutes of the Law of Holland by Vanderlinden.
Vand.	Vanderstraaten's Reports.
W. P.	Laws of Ceylon by Walter Pereira.

CORRECTIONS

Page	line	incorrect	correct
4	27	treaonable	treasonable
5	27	were	was
13	18	Perjudices	prejudices
19	17	particuarly	particularly
30	4	desendants	descendants
31	30	Kandayn	Kandyan
32	33	hereiditary	hereditary
36	18	gread	great
38	14	sechion	section
40	13	thc	the
40	32	aci	act
46	8	uuder	under
46	15	1864	1844
46	33	immovoble	immovable
49	4	unnecessry	unnecessary
53	34	sistsr	sister
54	31	thc	the
55	7	paltform	platform
56	11	marrirge	marriage
57	22	evcn	even
62	10	eithcr	either
64	16	incapcity	incapacity
65	20	mrriage	marriage
66	21	paragrph	paragraph
78	3	deemcd	deemed
81	12	derermining	determining
82	7	deflorarian	defloration
83	20	aclion	action
85	22	mariage	marriage
86	19	ordinauce	ordinance
96	11	my	may
97	6	diovrced	divorced
97	17	mrrriage	marriage

CORRECTIONS

Page	line	incorrect	correct
99	3	deemd	deemed
99	25	he	the
101	20	wttnesses	witnesses
102	11	excutors	executors
107	13	contigency	contingency
113	27	effected	affected
113	37	imovable	immovable
114	1	effected	affected
115	4	sectron	section
115	35	tho	the
118	30	cetegory	category
123	19	interpretaton	interpretation
123	29	plaintjff	plaintiff
126	9	reccipt	receipt
129	6	esate	estate
129	6	entiled	entitled
130	31	scrreral	several
134	35	thc	the
142	35	purchaer	purchaser
150	25	wordly	worldly
153	13	meaing	meaning
155	20	childrcn	children
157	17	inhert	inherit
160	8	legetimate	legitimate
160	16	daugher	daughter
166	31	whieh	which
167	1	intenion	intention
167	3	intenion	intention
170	26	conexion	connexion
179	30	oblitreated	obliterated
179	18	rigths	rights
184	1	imediate	immediate
186	7	recriprocally	reciprocally

CORRECTIONS

Page	line	incorrect	correct
188	11	porperty	property
189	39	bnt	but
192	2	brothers's	brother's
197	18	aud	and
199	6	aud	and
199	31	conected	connected
204	12	consius	cousins
217	31	intetnion	intention
218	27	ahould	should
224	23	sectron	section
231	19	ptoperty	property
233	38	acquircd	acquired
236	7	elegitimate	legitimate
241	17	Budddism	Buddhism
246	38	garnts	grants
267	32	pirior	prior
272	20	tne	the
272	36	beloging	belonging
287	6	excuted	executed

CHAPTER 1.

INTRODUCTION

The Kandyan territory was ceded to England by the Convention of 2nd March 1815. Paragraph 4 of the Convention guaranteed to all classes of the people in the Kandyan Provinces the safety of their person and property, with the civil rights and immunities, according to the laws, institutions and customs established and in force amongst them.

Section 7 of the proclamation dated 21st November 1818 declared "that every Kandyan, be he of the highest or lowest class is secured in his life, liberty and property from encroachment of any kind or by any person, and is only subject to the laws, which will be administered according to the ancient and established usages of the country, and in such manner and by such authorities and persons as in the name and on behalf of His Majesty is hereinafter declared".

By the proclamation dated 31st May 1816 it was declared and notified that the ancient laws of Kandy were to be administered till His Majesty's pleasure should be known as to their adoption in toto as to all persons within those provinces or their partial adoption as to the natives.

We have no direct expression of the Sovereign's will with respect to them. Any expression was unnecessary at the time, the laws in question being special laws which affected Kandyans only (a).

When Great Britain took possession of the Kandyan Provinces in 1815, the Kandyan Sinhalese were found to be administering their affairs by the light of the body of customary law, which was usually referred to as the Kandyan Law. They were left in the enjoyment of their own "Kandyan Law" and are still governed by it, except in so far as it has been touched upon or supplemented by subsequent legislation (a)

(a) Williams vs Robertson (1886) 8 S. S. C. 36.

Under the Kandyan Marriage Ordinance No. 3 of 1870, the expression "Kandyan Provinces" means the following Provinces:–

(1) The Central Province, (2) Seven Korales and Demala Hat Pattu of Puttalam in the North Western Province, (3) The Uda, Palle and Radda Palatas of Bintenna; the Vannames of Nadene, Wewgam Pattu, and Akkaraipattu; the Sinhalese villages in the division of Panawa—all in the Batticaloa District; the Sinhalese villages in the Kaddakulam Pattu, in the District of Trincomalee in the Eastern Province, (4) Sabaragamuwa: four and three Korales and lower Bulatgama in Sabaragamuwa Province, (5) Yakkawala in the Southern Province, (6) Tamankaduwa and Nuwarakalawiya in the North Central Province and (7) all Sinhalese villages in the Mullativu District of the Northern Province.

Under the new Kandyan Marriage and Divorce Act No. 44 of 1952 "Kandyan Provinces" means the following :– (1) The Central Province, (2) The North Central Province, (3) The Province of Uva, (4) The Province of Sabaragamuwa, (5) Chinnacheddikulam East and West Korale and Kilakkumulai South Korale in theVavuniya District, of the Northern Province, (6) Bintenne Pattu, Wegam Pattu, and Panama Pattu, in the Batticaloa District, and Kaddukulam Pattu in the Trincomalee District of the Eastern Province, (7) The Kurunegala District, and Demala Hat Pattu in the Puttalam District of the North Western Province.

The village of Yakkawala in the Southern Province has been removed from the above as the people of this village do not now have recourse to Kandyan Marriage Customs.

Under the Kandyan regime, executive and judicial powers were united in the Sovereign. Every individual had the liberty of seeking redress first by application to the principal people of his village, next to the headmen or Chiefs of his Province; next to his superior Chief, and lastly to the King,—appeal lying from all

subordinates to any of the intermediate, or to the Supreme Authority, in case either party was dissatisfied with the decision.

Accordingly the "Superior Judicial Power" resided in the King, and was exercised either in original jurisdiction, or in appeal. When a case was brought under royal cognizance, it was heard in the King's presence. The King sat at the window of an apartment in the palace, and the Kandyan Chiefs kneeling in the Hall or Verandah below, questioned the parties and witnesses, according to the King's directions, and his Majesty, after taking their opinion, passed his decision.

Then there was the Wahalhabe, presided over by either of the Adigars, or either of the Prime Ministers. It was an Appellate Court, to which an appeal lay from the decision of the Dissawani Court and its decisions were final.

Next came the Maha Naduwa, or Great Court, which properly consisted of Adigars, Dissawas, Lekam and Mohandirams on two benches; but for a few years previous to its abolishment, all the Chiefs were called to assist at it, and specially any who were distinguished for ability and judgment.

The Dissawa Naduwa, or Provincial Court was presided over by the Dissawa or Governor of the Province, and the Principal Mohottalas, generally three or four in number, acted as assessors.

The Lekam, Ratemahatmayas and other principal Chiefs had a civil and criminal jurisdiction over all persons subject to their orders. The Mohottalas, Koralas, Wanniyas and other headmen had a limited jurisdiction in Civil and Criminal matters over all persons subject to their authority respectively, but they usually exercised it only when the Dissawa was absent in Kandy. Then the Liyanaralas, Undiyaralas, Koralas and Araccis of the upper districts adjacent to Kandy, had also a very limited power, and settled trifling civil cases rather as arbitrators than Judges, when two par-

ties submitted them to their cognizance. Similarly the Vidanes appointed over particular villages had limited powers of the same nature in civil and criminal matters of trifling importance.

There was also the ancient institution, the Gansabhawa, or Village Court. It was a Court of arbitration, consisting of the oldest, most experienced and most respectable people. It was presided over by the Gamarala or Syndic of the village. Words used by Hallam, illustrative of the fondness of the Saxons for the old Judicium Parium of the Country Court, applied with little alteration, to the feeling of the Kandyans towards the Gansabhawas:-"They stood in opposition to foreign lawyers and foreign law, to the chicanery and subtlety the dilatory and expensive, though accurate technicalities of Normandy, to tribunals when their good name could not stand them in stead nor the traditions of their neighbours support their claims".

Lastly there was the Saki Balanda, consisting of the principal men of a district, whose duties were, in many respects, similar to those of a Coroner (b),

Treason, Conspiracy and Rebellion were always considered to be properly punishable with death, and there were several instances prior to the reign of the last King in which they had been visited with capital punishment. With respect to persons of inferior note implicated in the same tresonable acts, the punishment has, however, in many instances, been mitigated or wholly remitted. Conviction was almost universally followed by confiscation of property,and sometimes involved that of the relations of the traitor. Of adultery with the King's wives, which was considered a species of treason, two instances are cited, in both of which capital punishment was inflicted upon both criminals.

Of illicit intercourse with the King's concubines, there are several instances, in which the delinquents were sentenced to suffer severe corporal punishment, and sometimes to the additional penalty of cutting off the hair, or imprisonment — but this offence was never punished with death.

(b) Mod. 53

Wilful and deliberate homicide was punished with death. If a man killed another who came to rob his house by night, the homicide was generally held to be almost altogether free from blame and liable to but slight punishment. If a man killed on the spot another found in the same room with his wife, under such circumstances that adultery was presumed, the homicide was held to be justifiable, and the perpetrator entirely innocent. If a man killed another by misadventure, the homicide was considered to be in a slight degree culpable. Robbery is punishable with death. The instances in which robberies have been punished with death are few. In other cases they were visited with corporal pnnishment, imprisonment and fine in severity proportioned to their supposed atrocity.

In the case of Arson, the criminal would be sentenced to suffer severe corporal pnnishment and imprisonment, and to make satisfaction for the property destroyed.

There are three recorded cases of conviction for forging Royal Grants and Dissawas Sittu for land, and one for coining and uttering false pagodas. The offenders suffered severe corporal punishment with the addition of imprisonment (c)

By the said Convention of 1815 the Dominion of the Kandyan Provinces were vested in the Sovereign of the British Empire, to be exercised through the Governors or Lieutenant Governors of Ceylon for the time being, and their accredited agents, saving to the Adigars, Dissawas, Mohottalas, Koralas, Vidanes and all other Chief and Subordinate Native headmen, lawfully appointed by authority of the British Government, the rights privileges and powers of their respective offices.

By Proclamation of 21st November 1818 it was declared that no person shall be considered entitled to execute office, either of the higher or lower class of headmen, unless thereto appointed by a written

c) N. N. XXVI.

instrument signed, in respect to superior Chiefs by His Excellency the Governor, and for inferior headmen by the Honourable the Resident, or provisionally by any Agent of Government thereto duly authorized.

The Charter of 1833 created the principal Courts of Justice in the island, and established a uniform procedure to be adopted by them. Rules and orders, passed from time to time by the Supreme Court, regulated the practice and procedure. Ordinance No. 11 of 1868 amended and consolidated the laws of the Colony relating to the administration of Justice. These were abolished and replaced by the Courts Ordinance and the Civil Procedure Code in 1889 (d).
Armour in his Grammar of the Kandyan Law says: 'In judicial investigations touching Property and succession, two estates Aya (persons) and Deya (things) must be defined and discriminated primarily.

Aya, persons are principally discriminated in reference to ;–

1. Birth and caste.
2. Nidahasoon, free people, and Dahasoon, slaves.
3. Prawarjita (of the Buddhist order of priesthood) and Grahasta, (laity).

Distinction is also made amongst persons with reference to age:–

1. Danna Aya (literally nocents), adults, those who have attained the full age of sixteen years– the age of majority.
2. Nodanna Aya (literally innocents), infants, those who are under that age.

By the word "Things" (Deya) is meant all that is owned, enjoyed and maintained by persons, as their Wastoo or property which consists of things:–

1. Addrawyawat, incorporeal.
2. Drawyawat, corporeal, substantial, or tangible.

Addrawyawat Wastoo. or incorporeal property, comprises rights of inheritance, titles, privileges, rank, reputation, caste etc.

(d) Mod 65

Drawyawat Wastoo or corporeal property consists of :–

1. Sawinyaanaka, beings sentient or animate.
2. Awinyaanaka, things inert and inanimate.

By Sawinyaanaka Wastoo is meant slaves, cattle, poultry and other domesticated animals.

By Awinyaanaka Wastoo is meant all things inert and not endowed with winyanne, intellect or sense which consists of:–

1. Nischala Dey, Immovable things, such as houses lands, gardens, cornfields, ponds etc.

2. Chanchala Dey, or movable things, such as jewels, apparel, money, grain, etc.

The Dalada Dhatu or the Tooth Relic of Buddha belongs to all the inhabitants of this country.

Forests and wildernesses, unreclaimed or untenanted by men, mines of precious stones and metals, and pearl banks belong to the King.

Banners and other insignia conferred by the king on any Province or district, belong to all the inhabitants of that particular division of the country.

A pond or tank, an aqueduct or watercourse, a temple, an ambalam or a choultry constructed at the expense of all the inhabitants of a village, belong to the said inhabitants in common.

Sannases, guns, swords, etc. bestowed by the King on individuals as honorary rewards, belong in common as heirlooms to all the descendants of the grantee.

Wild cattle and other animals of the forest having been captured and tamed become the property of the person who had taken them; but domesticated animals, which had run astray, and were seized by any other person than the owner will not become the property of the captor, but must be restored to the owner (e).

All legal disabilities with regard to caste are virtually abrogated and obsolete. Slavery has been totally

(e) P. A. 1

abolished by Ordinance No. 20 of 1844. Ordinance Nos. 13 of 1859. and 3 of 1870 declared all forms of polygamy illegal and set up a system of marriage by registration.

By Ordinance No. 3 of 1846 the English Law of Evidence was introduced. This ordinance was amended by ordinance No.9 of 1852. Both these ordinances have been repealed by the Evidence Ordinance No. 14 of 1895 which has consolidated, defined and amended the Law of Evidence.

Ordinance No. 5 of 1852 was enacted to introduce into this Colony the Law of England in certain cases, and to restrict the operation of the Kandyan Law as it was expedient that the Law of England should be observed as the law of this Colony, in certain respects, and that the Laws of the Kandyan Provinces should be assimilated as far as may be to the Laws of the Maritime Provinces. It was enacted that the English Law should be observed (1) in all maritime matters, (2) in all contracts and (3) questions arising upon or relating to Bills of Exchange, Promissory Notes and cheques in and respect of all matters connected with such instruments. The Criminal Law of the Maritime Provinces was extended to the Kandyan Provinces.

It also declared that where there was no Kandyan Law or Custom having the force of Law applicable to the decision of any matter or question arising for adjudication within the Kandyan Provinces, for the decision of which other provision is not herein specially made the Court shall in any such case have recourse to the Law as to the like matter or question in force within the Maritime Provinces which is hereby declared to be the law for the determination of such matter, or question.

With the numerous encroachments which the English Law has made upon it, the Kandyan Law, as it obtains at the present day, is restricted in its application to the following subjects :—

(1) Marriage, considerably modified and regulated by local Statutes; (2) Inheritance and Succession including Adoption and (3) The right of Acquisition, mainly upon deeds (f).

(f) Mod. 77.

In the year 1862 the Supreme Court held that the wife of a Scotchman domiciled in the Kandyan Provinces was subject to the Kandyan Law (g). In 1886 a bench of three Judges of the Supreme Court overruled the above decision and held that the Kandyan Law did not apply to Europeans or Burghers resident in the Kandyan Districts (a). In 1891 a full bench of the Supreme Court held that the Kandyan Law was applicable only to the Native Kandyan Highlanders and not to Europeans, Moors, Hindus and Low Country Sinhalse who were British Subjects long before the Kandyan Provinces came under British rule (h).

Kandyan Law is the customary Law which a certain section of the community within the Kandyan Provinces, namely, the Kandyan Sinhalese, were allowed by the British Government to retain. It did not amount to a distinct lex loci rei citae governing absolutely the devolution of land. It is therefore not what may be termed a local law governing all persons living within a certain area; it is rather a personal law attaching to the individuals, wherever they may be, belonging to a certain particular class or section of the Sinhalese subjects of the Crown. That being so, the mere fact that a person is born or is resident within the Kandyan Provinces is insufficient to bring him within the pale of the Kandyan Law (i).

A child of a low country Sinhalese man who had become permanently settled in the District of Kandy and had married a Kandyan woman was held not to be a Kandyan (J). Similarly the offspring of a Kandyan father by a Low country Sinhalese woman could not be regarded as a Kandyan subject to the incidents of the Kandyan Law. A person could not acquire a Kandyan domicil as distinguished from a Ceylon domicil. It is only when the word "nationality" is used in its strictly legal sense that it can be said that the wife takes the husband's nationality and the child the

(g) Kershaw vs Nicholl Ram. 1862 157.
(h) Wijesinghe vs. Wijesinghe 9 S. S. C. 199.
(i) Mudiyanse vs Appuhamy 16 N. L. R. 117.
(j) Kapuruhamy vs Appuhamy (1910) 13 N. L. R. 321.

father's. Every subject of the Crown, be he Sinhalese, Tamil, Chinese, or Hottentot, is British in nationality, that is to say, he is subject to the British Flag. There is no rule of law that makes the offspring of parents belonging to different races, as distinguished from different nationalities in the strictly legal sense of the term, belong to the race of either, the father or mother (k).

The decision in Mudiyanse vs Appuhamy reportted in 16 N.L.R. 117 and referred to in the last paragraph, was, however, in effect a declaration that no person possessed the personal status of a Kandyan, unless he could establish an unbroken Kandyan parentage on both sides up to the date of the cession of the Kandyan Kingdom, and that the estates of all persons who are the offspring of a mixed marriage between a Kandyan Sinhalese and a low country Sinhalese, or the descendants of such offspring, must devolve in accordance with the Roman Dutch Law. It was generally felt that the pronouncement was not in accordance with Kandyan customary law as understood by the Kandyans themselves.

Ordinance No. 23 of 1917 was therefore enacted with a view to declaring that customary law in its generally accepted sense. It declared the law applicable to the issue of marriages between persons subject to the Kandyan Law and persons not so subject. Section 2 is as follows :- The issue of the following marriages that is to say :- (a) A marriage contracted between a man subject to the Kandyan Law and domiciled in the Kandyan Provinces and a woman not subject to the Kandyan Law, (b) A marriage contracted in binna between a woman subject to the Kandyan Law and domiciled in the Kandyan Provinces and a man not subject to the Kandyan Law, shall be deemed to be and at all times to have been persons subject to the Kandyan Law.

(k) Mudiyance vs Appuhamy 16 N. L. R. 117.

Section 4 [2] lays down that the expression "domiciled" shall be interpreted in the same manner as it would be interpreted if the Kandyan provinces constituted a separate country.

This enactment does not apply to the offspring of irregular unions [1]. Unless the marriage of a Kandyan woman is contracted in binna, the provisions of this Ordinance will not apply. Hence the children of a Kandyan woman married in diga to a Low country Sinhalese man are not subject to the Kandyan Law [m]

Where a Low country Sinhalese was married in binna to a Kandyan woman and the marriage was registered under the marriage Registration Ordinance No. 19 of 1907, the issue of such marriage was subject to the Kandyan Law. It is not necessary that a marriage which was to have the effect provided for in section 2 should be registered under the Ordinance No. 3 of 1870. Marriages between Kandyans and non Kandyans whether contracted under Ordinance No.3 of 1870 or Ordinance No. 19 of 1907 are valid if the provisions of those Ordinances had been complied with (n).

Under the interpretation given to the term 'marriage' in the old section 37, read with section 4 (2) of 23 of 1917 it was possible for even non Kandyans, such as Burghers to marry under the Kandyan Law that is under Ordinance No.3 of 1870. As the continuation of such a provision in a law intended to apply exclusively to the Kandyans, is considered undesirable, the new Kandyan Marriage and Divorce Act No. 44 of 1952 enacts that the solemnization or registration of a marriage between persons either of whom is not a person subject to Kandyan Law should not be allowed or authorised.

The Matrimonial Rights and Inheritance Ordinance No. 15 of 1876 enacted (1) that whenever a woman, married after the proclamation of this Ordinance a man of different race or nationality from her own, she should

(l) Ran Banda Vs Kanamma (1924) 6 Cey. L. Rec. 40-

(m) Punchimenika vs Peris (1923) 1 Times 148.

(n) Natchiappa Chetty vs Pesonahamy (1937) 39 N. L. R. 377.

be taken to be of the same race and nationality as her husband for all the purposes of this Ordinance (section 2) and (2) that the respective matrimonial rights of every husband and wife, domiciled or resident in this Island and married after the proclamation of this Ordiance in, to, or in respect of movable property should during the subsistence of such marriage and of such domicile or residence, be governed by the provisions of this Ordinace (section 5). The Object of this Ordinance was to break up the old Roman Dutch Law of community of estate and to preserve the separate interests of husband and wife in immovable property. Hence a Kandyan woman who married a Sinhalese of the Low Country who lived with her in her house is not governed by the said Ordinance as a Low country Sinhalese is not a person of different race or nationality from a Kandyan Sinhslese (o)

Though legislation was introduced to declare the law applicable to the issue of marriages between persons subject to the Kandyan Law and persons not so subject no legislation has been introduced declaring the status of a wife or the law applicable in the case of the estates of the parents. As already stated under section 2 of Ordinance No. 15 of 1876 the wife is to be taken to be of the same race and nationality as her husband for certain purposes. But except for this puropose, and presumably the purpose is the question of the status of the wife, the Ordinance does not apply to Kandyans. Judicial authority so far has been that a Low Country Sinhalese is not a person of different race or nationality from a Kandyan Sinhalese, and that, therefore, under the provisions of the same section the matrimonial rights of a Low Country Sinhalese husband and his Kandyan wife are to be governed by the Kandyan Law (p).

Thus the right of inheritance to the property of a Kandyan, married to a non Kandyan will be governed by the Kandyan Law. The right of inheritance to the estate of a non Kandyan married to a Kandyan, will be governed by the General Law or the law applicable to that class of persons.

(o) Manikam vs Peter 4 N. L. R. 243.

(p) Bandaranayake vs Bandaranayake (1922) 24. N. L. R. 245.

The body of law commonly known as Kandyan Law was till comparatively recent times, contained in no written records. It was essentially a customary law, and when it had to be administered there was nothing to guide the opinion of the Sovereign, Judge and Chiefs, but tradition and living testimonies. In the absence of written records of the law which the Board of Commissioners and Agents of the English Government were called upon to administer in the Kandyan Provinces after they were ceded to the British, it was necessary to refer questions of law to the Chiefs of the Provinces, and it became customary for these Chiefs to be associated as Assessors with the Board of Commissioners and Agents in the administration of justice. In 1818 a request was communicated to the Board of Commissioners by the Government in England asking for an account of the ancient institutions, customs, feelings and perjudices of the Kandyan people. It was thereupon agreed by the Board that the members should each draw up a separate memorandum on different subjects and that these should be forwarded to the Government with the remarks of the Collective Board. The outcome of all this was Sir John D'Oyly's sketch of the Constitution of the Kandyan Kingdom, Sawers' memoranda and notes of the laws of inheritance, marriage etc. and Turnour's statement of the Laws of Inheritance, in the Province of Sabaragamuwa, but these do not by any means form a connected or exhaustive statement of the ancient institutions, customs, feelings and prejudices of the Kandyan people. Reference might also be made to Armour's Grammar of Kandyan law which was first published in 1842, and to the Niti Nighanduwa or Code of Kandyan Law, a translation of which was published in 1880 (q).

The relative value of the authorties mentioned has been a matter of some dispute. Shortly after the Charter of 1833 had constituted the Supreme Court, the tribunal of appeal in Kandyan cases, D'Oyly's work was forgotten, the Niti Nighanduwa was not translated and was perhaps unknown, decisions of the earlier Courts were not accessible,

(q) Kand. Com Rep.

and the only authorities to which reference could be made were the printed editions of Sawers' Memoranda and Armour's Notes. The question at times arose which of them, in case of conflict, was to be followed. The answers were not always fortunate. The manner in which Sawers' Digest was composed, and the fact that he was for years one of the Board and for six years Judicial Commissioner, are sufficient to give his opinions great weight. That Armour was an able scholar and a man of learning is true, but his work is later in time, an amorphous medley in composition and bears obvious traces of the influence of Roman Dutch Law and the legal practice in force in his own day. The merits of the Niti Nighanduwa do not appear to have been sufficiently appreciated hitherto. Obscure as its origin, and vexatious as its examples occassionally are, its statements nevertheless generally coincide with the evidence furnished by Olas, Sannasas, and the historical books (r). This is' Hayley's opinion.

Armour was not only a judge– not that being a Judge necessarily adds to the weight of one's authority – but a Sinhalese scholar, which Sawers was not and an apt student. Possessed of an inquiring turn of mind, and imbued with an anxiety to acquire the best information on any subject, he was interested in, his long and extensive intercourse with the Kandyan Chiefs and Buddhist Priests, with whom, he as Interpreter and Secretary came in daily contact, for upwards of eighteen years, gave him an insight into the laws, customs and usages of the Kandyans, which few people differently placed, could have obtained. Moreover he was constantly surrounded by the records of the Judicial Commissioner's Court, and made the best use of them by noting down points of interest and importance so that, as pointed out by Carr C. J. "the authority of Mr. Armour founded as it is, on a series of decisions of the late Judicial Commissioner's Court" is certainiy entitled to great weight than is sought to be assigned to it. Sir Edward Creasy in his elaborate judgment in "In Re Kershaw" (B. & S. 87) characterized Armour as "the best work on Kandyan

(r) Hayley 19.

Law". Then, there is an anonymous recapitulation in Sinhalese entitled Niti Nighanduwa which has been brought forward as an authority, but the authenticity of which has, with no inconsiderable reason, been doubted, and its genuineness even repudiated by some, who have pronounced it a glaring forgery. This work was translated in 1880 by Messrs. C. J. R. Le Mesurier and T. B. Panabokke. Both Armour and Sawers have been recognized as standard authorities for over three fourths of a century, whereas the Niti Nighanduwa was unheard of by, and unknown to the legal profession until rescued from obscurity by the praiseworthy efforts of its translators in 1880. If it were genuine or authoritative, it should bear at least the imprimatur of the eminent Chieftains who were responsible for its birth, or even the name of its erudite compiler. The absence of the credentials, the atmosphere of doubt and uncertainty which its origin is shrouded in, and the very date of its existence being a matter of speculation, cannot entitle it to any claim for consideration, much less to take a place in the legal literature of the land, although its enthusiastic sponsors would have it soar above the rank of such admitted standard works as Armour and Sawers (S). This is the opinion of Modder.

No legal treatises on Kandyan Law written in the time of the Kandyan Kings are extant and in order to ascertain the Kandyan Law on any particular topic we have to turn to the compilations of Kandyan Law made immediately after the establishment of the British Government in the Kandyan Kingdom. They are Sawers' Memoranda of the Law of Inheritance, later known as Sawers' Digest, Armour's Grammar of Kandyan Law and the Niti Nighanduwa. The first named was prepared about the year 1821. Sawers made his, collection, as a member of the Board of Commissioners constituted in 1816 to administer the affairs of the Kandyan Provinces at the request of the British Government. The collection contains information gathered from the Chiefs of Kandyan Provinces and others who acted as Assessors to the Board in its judicial administration. It was first published in 1839 and

(s) Modder Liii (53)

a second time in 1860 under the title of Sawers' Digest of the Kandyan Law. The second named is a collection of Kandyan Law by John Armour who, prior to his elevation to the office of District Judge of Tangalle, later of Matara and finally of the Seven Korales, officiated as the Secretary of the District Court of Kandy. Armour's knowledge of Sinhalese gave him an advantage over other compilers of Kandyan Law and it is regrettable that he did not write hisGrammar of Kandyan Law in Sinhalese. We would then have had the law stated in the very language of those from whom he ascertained it. The third compilation known as the Niti Nighanduwa was first written in Sinhalese and it was not translated till 1880. Both the Sinhalese text and the English translations have been printed at the Goverment Press under Government aegis. Both versions are now out of print. It is the only collection of Kandyan law in the Sinhalese language and was compiled after the cession of the Kandyan Kingdom. The compiler introduces his book thus — "In this Island of Lanka there are three kinds of Law. Of these Royal Law and Sacred Law have been from ancient times set forth in books, but that kind of law which is called Traditional law has not as yet been committed to writing. As the law therefore must have been doubtful and uncertain, in the interests of the Sinhalese community, that the dispensers of justice may learn what it is, and avoid bias in their investigations and that Sinhalese law may be better known, I undertake this work. It is called Niti Nighanduwa, and is compiled from the archives of the Court of Kandy with the help of elders versed in the ancient law." As the work was not translated till 1880 the earlier judgments of this Court make no reference to it. It is a matter of regret that this only legal publication in Sinhalese is and has been out of print for quite a long time. Learned Counsel submitted that the Niti Nighanduwa should not be regarded as authoritative and he called in aid the following observation of Burnside C. J. in Siriya vs Kalua (9 S C. C. 45) : — "I cannot regard the dicta in Marshall and Armour, and even the Niti Nighanduwa, whatever may be its

whatever may be its pretensions as a legal authority, as sufficient to disturb a solemn decision of this Court'. These observations cannot be regarded as a pronouncement that the customary law of the Kandyans on the question of adoption is not correctly recorded in the Niti Nighanduwa. Burnside C.J. has dealt with Marshall and Armour in the same breath. It has never been suggested that this observation has affected the value of Armour's Kandyan Law (t). This is the opinion of Basnayake C. J.

The principles of Kandyan Law by Frank Modder was published in 1902. The second edition of the said book was by Frank Modder in collaboration with Earl Modder and published in 1914. Those principles and rules of the Kandyan Law, which are now admitted or well recognized are stated in the form of a digest under each head, the authorities and best known decisions in support or illustrative of the text, many of them inaccessible to the ordinary reader or scattered in treatises and reports not always at hand, follow immediately in the form of notes.

A Treatise on the Laws and Customs of the Sinhalese by F. A. Hayley was published in 1923. This contains an account of the legal customs of the Sinhalese with a statement of the Kandyan Law as it is now administered in our Courts. His endeavour was to give some account of the body of Law, which, from its antiquity, may be of interest to students of Sociology and Jurisprudence in general, and at the same time to note its modern development for the benefit of the profession. Where portions of it have fallen into abeyance or been abolished by legislative enactment, the nature of the rules substituted has been indicated.

Ordinance No. 39 of 1938 was enacted to declare and amend the Kandyan Law in certain respects. The subjects dealt with are (1) The revocation of Grants, (2) The disinherison of heirs, (3) Adoption, (4) The definition of "Acquired" and "Paraveni" Property and (5) The Law of Intestate succession.

(t) Dayanganie vs Somawathie 58 N. L. R. 337.

The rights, qualities and capacities of persons may be convenienty grouped and treated under the head of "Civil Status" that is to say, the status of persons, as members of civilised communities recognized and regulated by the laws of such communities. This status may be dealt with as it is influenced, respectively, by considerations of (1) Birth, (2) Age and mental or corporeal incapacity, and (3) Marriage (u).

Individual rights are exercised over things which belong to an individual as his own exclusive property, and are such as he is entitled to by:-

1. Lathimi, the right of acquisition. 2. The right by marriage. 3. Daahimi, or Procreate right. 4. Wadahimi, Parturiate or Birth right. 5 The rights of Ascendants and Collaterals. 6. The right by adoption (w).

CHAPTER II.

BIRTH IN RELATION TO CIVIL STATUS.

By birth, children are either legitimate or illegitimate. Legitimate children are born of married parents. Under the Kandyan Law, legitimacy and illegitimacy were distinguished as follows:- If the father and mother were of equal caste and rank, and have been married according to custom, or if not (according to custom) if they have been married agreeably to the wish of their kinsfolk, their children are legitimate children, and are entitled to the right of inheritance in their father's estate. But if a man married a woman of lower caste than himself, or a woman within the prohibited degrees of relationship, or a woman of equal rank, without the consent of the parents, the marriage was contrary to custom and the ties of relationship and the children born of it are illegitimate (a).

(u) W.P. 166. (w) Mod. 96. (a) N.N. 13.

There was no penalty against concubinage, if the woman was of equal caste with the man, but in fact such connections if not stigmatized by some decisive act on the part of the man's family, or by the man himself, were considered as marriages, and the issue of such connections have all the privileges of legitimate children. In short nothing but a direct declaration of disinheriting such issue would cut them off from the privileges of legitimate children (b).

What constitutes a regular marriage is as follows:- The consent of the respective heads of the families, the countenance and sanction of the relations to the third or fourth degree on both sides to the union of the parties; that they must be of the same caste and of equal family, respectability and rank, which is chiefly ascertained by the families having previously intermarried; and where this has not been the case, they are particuarly scrupulous; and affluence and prosperity for the time being, on one side, will hardly induce an ancient family to deviate from this rule (c).

The offspring of a union which did not satisfy the above requirements were regarded as illegitimate.

Our Courts have not acknowledged any distinction between purely illegitimate children, such as the children of fornication, or the children of casual cohabitation, said to be no wedlock, and the recognized illegitimate children, the issue of a quasi marriage or concubinage (d).

In the year 1859 Ordinance No. 13 of 1859 was enacted to amend the law of marriage in the Kandyan Provinces. This Ordinance declared all forms of Polygamy illegal and set up a system of registration of marriage. It validated all existing marriages if contracted according to the forms institutions and customs in use among the Kandyans. It allowed all such existing marriages to be registered and declared that every marriage contracted or registered under that Ordinance under certain limitations, should render legitimate any child born of the parties thereto previous to their marri-

(b) P. A. 7. (c) S. D. 30. (d) Rankiri vs Ukku F B 10 N. L. R129.
(e) Kuma vs Banda F. B.21 N. L. R. 294. (f) Section. 8

age. It also declared that no future marriage should be valid unless registered in manner and form as in the Ordinance provided, and solemnized in the presence of the Registrar.

The law was in advance of the time. The Kandyan people had never really desired it, and were not even conscious of its existence. The result of this Ordinance was to familiarize the population with the new conceptions of bastardy, bigamy, and adultery. The effect of this Ordinance 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 (e).

This Ordinance was amended by Ordinance No. 3 of 1870. This Ordinance too declared that no marriage shall be valid unless registered. All marriages contracted before Ordinance No. 13 of 1859 came into operation were declared to be valid if they were contracted according to laws institutions and customs in force among the Kandyans (f). Marriages contracted since Ordinance No. 13 of 1859 came into force, according to laws institutions and customs in force in Kandy before that date, and which were void in consequence either of the want of registration or of invalid registration, were also declared good and valid (g).

Where, prior to 1870, a woman was according to Kandyan customs, duly conducted in diga to a man, lived with him till his death, bore a child to him, and the husband's family recognized such union, the marriage was a lawful one and it was not necessary to register same as it took place before Ordinance No. 3 of 1870. The presumption of legitimacy dispensed with the necessity of giving minute proof of the ceremonies attending the marriage (h).

Hence any marriage contracted before 1st January 1871 according to Kandyan customs is valid. But no marriage contracted after that date is valid unless registered in manner and form provided in the Ordinance. Consequently, children who might, under the ancient

(e) Kuma vs Banda FB 21 NLR 294 (f) Section 8 (g) Section 22 (h) Ukkuetana vs Punchirala 3 NLR 10

Kandyan Law be considered legitimate can no longer claim that status if the marriage of their parents has not been registered (e).

Act. No. 44 of 1952 has replaced the said Ordinance No. 3 of 1870. The object of this Act was to bring the procedure relating to the registration of Kandyan marriages into line with that relating to marriages under the General Marriage Registration Ordinance, which is applicable to all persons other than Muslims. This ordinance too declared that no marriage between persons subject to Kandyan Law shall be valid unless, it is solemnized and registered under this Act or under the Marriage Registration Ordinance of 1907 (i). It also declared that a valid Kandyan marriage shall render legitimate any children who may have been procreated by the parties thereto previous to such marriage and that children so legitimized shall be entitled to same and the like rights as if they had been procreated by the parties thereto subsequent to such marriage (j).

Marriages between Kandyans may be lawfully registered or solemnized according to the provisions of the Marriage Registration Ordinance No. 19 of 1907(k). In such a case, children who have been procreated between the parties, before the marriage, would be rendered legitimate, unless such children were procreated in adultery (l).

Ordinance No, 39 of 1938 Section 14 lays down :- "For the purpose of succession to the estate of any person who shall die intestate after the commencement of this Ordinance (1 st January 1939) the term "legitimate" shall mean born of parents married according to law and the term "illegtimate" shall mean born of parents not married according to law. Provided that a legal marriage between any parties shall have the effect of rendering legitimate any children who may have been procreated between the same parties before the marriage unless such children shall have been procreated in adultery".

(g) Section 22. (h) Ukku Etana vs Punchirala 3 N. L. R. 10.
(i) Section 3. (j) Section 7. (k) Section 2 of 14 of 1909.
(l) Section 20 of 19of 1907.

Prior to 1st January 1939, a marriage registered under the Kandyan Marriage Ordinance No. 3 of 1870 rendered legitimate any children who may have been procreated, by the same parties before marriage, in adultery or otherwise. If the marriage was registered under the General Marriage Ordinance No. 19 of 1907, the children born in adultery were not rendered legitimate by the subsequent marriage of the parents (m).

If the marriage was contracted on or after the 1st day of January 1939, whether under the Kandyan Marriage Ordinance No. 3 of 1870 or Act No. 44 of 1952 or under the General Marriage Ordinance of 1907, the children legitimated by such marriage would be children who may have been procreated by the same parties before marriage provided they were not procreated in adultery.

"Adultery is the carnal connection between a married person, whether husband or wife and any person other than his or her spouse. Adultery is committed either by twopersons who are each already married or by persons one of whom is married and the other unmarried" (n).

Legitimate children are born of married parents. To further marriage, the rule has been established that that child be considered legitimate who is born of a married woman, and that he be the father whom the marriiage indicates (o).

If the wife proved faithless to her wedded husband and had criminal intercourse with another man, and bore a child at that period, although the child's paternity was therefore doubtful, yet if the wedded husband did not discard his wife and disown that child, the latter will not be deemed illegitimate (p).

Our law on the subject is contained in Section 112 of the Evidence Ordinance which is as follows :- "The fact that a child was born during the continuance of a

(m) Punchirala vs Perera 21 N. L. R. 145. (n) W. P. 250.
(o) W. P. 167. (p) P. A. 34.

valid marriage between his mother and any man or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that such person is the legitimate child of that man unless it can be shown that that man had no access to the mother at any time when such child could have been begotten or that he was impotent".

As to the meaning of "access" there were two sets of conflicting decisions.

In one set of decisions it was held that the expression "access" means "actual intercourse". In the other set it was held that it means "no more than opportunity of intercourse".

In 1923 this question was considered in Ceylon by a Full Bench in the case of Jane vs Leo (q) and it was held that "access" means "actual intercourse". Subsequenty in 1946, Howard C. J. in Ranasinghe vs Sirianna (r), held that in view of the Privy Council decision in Karapaya Servai vs Mayandi (s), Jane Nona's case could no longer be considered as binding on him and that "access" should be interpreted as meaning "possibility" or "opportunity" of intercourse.

In 1948, however, Basnayake J. in Pesona vs Babonchi Baas (t), and in 1950 Swan J. in Kiribanda vs Hemasinghe (u) considering the Privy Council decision not binding on them, felt themselves free to revert to and follow the Full Bench decision in Jane Nona.

The language of this Section, though not purporting or intended to reproduce the English Law on this subject, was clearly influenced by the English legal outlook on the subject matter as disclosed in the authorities in the course of years in which the word "access" so frequently occurs.

For the present purposes the passage which is most useful is the one referred to by Basnayake J. in the case of Pesona vs Babonchi Baas where he quotes the words used by Lord Eldon in Head vs Head. It runs as follows:-

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(q) 25 N.L.R. 241. (r) 47 N.L.R 112.
(s) AIR 1934 P C 49 (t) 49 N.L.R. 442. (u) 52 N.L.R. 69.

"I take them to have laid down, so as to give it all the weight which will necessarily travel along with their opinion, although not a judicial decision, that where access according to the laws of nature, by which they mean,as I understand them, sexual intercourse has taken place between husband and wife, the child must be taken to be the child of the married person, the husband, unless on the contrary, it be proved that it cannot be the child of that person. Having stated that rule, they go on to apply themselves to the rule of law where there is personal access, as contradistinguished from sexual intercourse, and on that subject I understand them to have said, that where there is personal access, under such circumstances that there might be sexual intercourse, the law raises the presumption that there has been actually sexual intercourse, and that that presumption must stand till it is repelled satisfactorily by evidence that there was not such sexual intercourse".

The significance of the words "no access" is not fully conveyed by assigning a precise verbal definition to the word "access" itself. A test which considers merely the bare geographical possibility of the parties reaching each other during the relevant period must be rejected completely. Taken at its face value such a test could hardly ever exempt a husband from the onus of paternity and could work real injustice in many cases. "No access" would be established in any case in which, on the evidence available, it was right to conclude that at no time during the period had there been "personal access" of husband to wife in the sense given to that phrase in the passage from Lord Eldon's judgment which has been quoted above. On the other hand, if the evidence in a case did disclose that at any time during the period there had been such personal access- and it must be remembered that the section may often have to be applied when there has been no separation between the married pair- then "no access" would not be established unless the presumption that sexual intercourse had in fact resulted were rebutted by evidence that displaced the presumption. It is only necessary to add that, though the presumption arising from personal acess is, as has been

said, a rebuttable one, it is in the nature of things that nothing less than cogent evidence ought to be relied on for this purpose.

It is true that in delivering the judgment of the Board in Karapaya vs Mayandi, Sir George Lowndes said:- "It was suggested by Counsel for the appellants that "access" in the section implied actual cohabitation, and a case from the Madras Reports was cited in support of this contention. Nothing seems to turn upon the nature of the access in the present case, but their Lordships are satisfied that the word means no more than opportunity of intercourse".

This shows that their expression of opinion was purely obiter. Moreover the judgment does not define precisely what is meant by "opportunitv of intercourse" and certainly lends no support to the appellants test of bare geographical possibility.

As was said in the judgment of the Board in the recent case of Alles vs Alles :- "The issue remains whether on the whole of the evidence made available it can safely be concluded that there was no access at a time when the child could have been conceived".

The relevant facts of the last case were as follows:- The respondent was married about nine years before the hearing to one Mylvaganam. He left her after a few years—whether 2 or 4 is not clear - and went to live with another woman at a village called Annamalai some 3 or 4 miles from Kallar where the respondent was living at all material times. For 5 or 7 years before the hearing the respondent and her husband had been living apart and during this time three children were born to Mylvaganam's mistress.

Applying the test mentioned above to the facts as found by the Magistrate, their Lordships of the Privy Council held that it was clear that the absence of such personal contact as would give rise to the presumption of sexual intercourse was established and the Magistrate's order consequently justified and that his

finding would equally be unassailable if non access required positive proof of no actual sexual intercourse. See also the case of Fonseka vs Perera (59 N. L. R. 364) (v).

Section 120 of the Evidence Ordinance enacts that in all Civil proceedings the parties to the suit shall be competent witnesses. Therefore, under our law, the husband is a competent witness, and may himself give evidence that he had no access to the mother at the material time. Non access may be proved by means of such legal evidence as is admissible in every other case in which it is necessary to prove a physical fact (t).

Father's Property. Illegitimate children have **no right** whatever to **Paraveni** or ancestral lands of their father (w).

Illegitimate children are entitled to inherit the **acquired property** of their father who dies intestate as to those lands, subject to the widow's life interest, if any, and sharing with the legitimate children if any (y). The illegitimate children are entitled to succeed to the intestate's acquired property in preference to the intestate's mother and brothers and sisters, subject to the life interest of the widow if any (z). It is well known that illegitimate children are not altogether excluded even from paternal inheritance. There is no exception found in the text books with regard to illegitimate children who are also adulterine, and this is at least evidence that the Kandyan Law did not exclude them. Hence children born in adultery are not disqualified from succeeding to their father's acquired property as the Kandyan Law made no distinction between illegitimate children begotten in adultery, and merely natural children (a). It is settled law that where a Kandyan father leaves both legitimate and illegitimate children his acquired property is shared between them, each branch taking a moiety (y). When a father died leaving legitimate children and also a sole illegitimate child who was a daughter, the

(v) Kanapathipillai vs Parpathy Pr. C 57 N. L. R. 553. (w) P. A. 34; S. D. 10; N. N. 14; 3 N. L. R. 76; 6 N. L. R. 90. (y) Rankiri vs Ukku F. B. 10 N. L. R. 129. (z) Ranhamy vs Menik Etana 10 N. L. R. 153. (a) Punchirala vs Perera 21 N. LR. 145.

illegitimate daughter did not forfeit her right to her moiety of her father's acquired property by marrying in diga. This was a case before Ordinance No. 39 of 1938 (b).

Illegitimate children were entitled to inherit the movable property of their father subject to the life interest of the widow (c).

Mother's Property .If a woman died intestate leaving issue a son and a daughter, born out of wedlock, and if neither of the children have an acknowledged father, the whole of the mother's estate will devolve in equal shares to the son and daughter, and that even if, the daughter were married in diga (d). Property given to a concubine or acquired by her, if she dies intestate and without issue, follows the same rule of inheritance as the property of an unmarried woman; but if a concubine or a prostitute leave issue, they inherit their mother's property (e). The children of a woman married to a man of her own caste according to usual rites and customs, or of a woman who after cohabitation with a man of higher or lower caste than herself, and when still in an unmarried state has intercourse with a man who is not known, all inherit the estate equally. There are however, exceptions, viz:-if the parents of a woman marry her to a man in binna, and she bears a child to him, but afterwards cohabits with and bears a child to a man of lower caste than her own, the child born in proper wedlock as aforesaid inherits, by maternal right of inheritance, all the ancestral property of the mother, of which nothing goes to the child born to the low caste man.

However, putting aside this ancestral property, all the acquired property of this vile outcaste woman is divided equally amongst all her children (f) .

The illegitimate children succeed to all the property of their mother whether Paraveni or acquired. In case there be both legitimate and illegitimate children all the children would succeed to the estate of their mother.

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b) Mallawa vs Gunasekera F.B. 59 N.L.R. 157; see also 48 N.L.R. 217 ((c) Kalumenika vs Kiribanda 2 Cey. Law Rec. 191 (d) P.A. 83 (e) S.D. 21 (f) N.N.15

It is settled law that illegitimate children of a woman inherit her acquired property equally with legitimate children (g).

An illegitimate child is entitled to property, acquired by his mother before marriage, in preference to his mother's diga widower (h).

Grandparent's Property. An illegitimate son of a predeceased son is entitled to inherit from the grandfather, along with the surviving legitimate children, the acquired property (i).

An illegitimate child of a predeceased daughter is entitled to succeed to the acquired property of her grandmother (j). An illegitimate child of a predeceased daughter is entitled to succeed to the acquired property of her grandfather (k).

Ordinance No 39 of 1938 has amended the law with regard to illegitimate children.

Father's Property. Section 15 (a) lays down that illegitimate children shall have no right of inheritance in respect of the **paraveni** property of their father thus reenacting the old law.

Section 15 (b) lays down that illegitimate children shall, subject to the interests of the surviving spouse, if any, be entitled to succeed to the **acquired** property of their deceased father in the event of there being no **legitimate** child or the descendants of a legitimate child of the deceased.

Section 15 (c) lays down that illegitimate children shall, subject to the interests of the surviving spouse if any, be entitled to succeed to the acquired property of the deceased equally with a legitimate child or the legitimate children, as the case may be—

(1) if the deceased intestate had registered himself as the father of that child when registering the birth of that child; or (2) if the deceased intestate had in his lifetime been adjudged by any competent Court to be the father of that child.

(g) Menika vs Menika 25 N.L.R.6. (h) Ellen Nona vs Punchi Banda 26 C.L.W.70,, (i) Appuhamy vs Lapaya 8 N.L.R.328 (j) Raja vs Elisa Mod.510 (k) Asiriwathan vs Gunaratne 52 N.L.R. 73. (l) Section 14.

This section has brought about a substantial change of the law. Paragraph (c) provides that the illegitimate child or children referred to therein shall be entitled to succeed to the acquired property of the deceased, equally with his legitimate child or children. In a case to which this Ordinance applies the position therefore would be that there is no separate moiety which devolves on the illegitimate child or children, and there is, accordingly, no room for the application of the principle that in the absence of any other representative in the illegitimate line to inhert that moiety it would fall to an illegitimate daughter who has contracted a diga marriage even though she may otherwise have forfeited her right of inheritance to her father's acquired property. Hence where a Kandyan died intestate after 1st January 1939 leaving legitimate children and also an illegitimate daughter who was mrrried in diga, such illegitimate daughter had no right of inheritance to her father's acquired property (m). Before Ordinance No, 39 of 1938 the illegitimate daughter succeeded to a half share (b).

Section 22 has amended the law by depriving the illegitimate children of any rights to **movable** property in case there were legitimate children or the descendants of a legitimate child. In case there were no legitimate children, the illegitimate children and the widow if any, will succeed in equal shares. The section is as follows:- "Subject to the aforesaid right of the surviving spouse, if any, the movable property of any person who shall die intestate after the commencement of this Ordinance shall devolve in equal shares upon all his surviving children (the descendant or descendants of any deceased child being entitled to his or her or their parent's share by representation) whether male or female, legitimate or illegitimate married or unmarried, and if married whether the marriage be in binna or diga: provided that if the deceased was a male person, an illegitimate child shall not succeed if there be surviving any legitimate child or the descendant of a legitimate child".

(m) Ranmenika vs Nandohamy 57 N. L. R. 453

Mother's Property. (1) When a woman unmarried, or married in diga, or married in binna on her mother's property, shall die intestate after the commencement of this Ordinance leaving children or the desendants of a child or children, the estate of the deceased shall devolve in equal shares upon all such children (the descendant or descendants of any deceased child being entitled to his or their parent's share by representation) whether male or female legitimate or illegitimate, married or unmarried and if married whether the marriage be in binna or in diga. Provided that if the deceased was married in binna as aforesaid, an illegitimate child or children shall not be entitled to succeed to the **paraveni** property of the deceased. Provided further that the descendant of a deceased child shall be entitled to that child's share by representation whether or not he or she has been kept apart from the deceased intestate. (2) When a woman married in binna on her father's property shall die intestate after the commencement of this Ordinance leaving children or the descendants of a child or children, such child or children, and his or their descendants by representation, ,shall be entitled to succeed inter se in like manner and to the like shares as they would have become entitled out of the estate of their father. Provided that if the deceased was married in binna as aforesaid (on her father's property) an illegitimate child or children shall not be entitled to succeed to the paraveni property of the deceased (n),

Subject to the aforesaid right of the surviving spouse if any, the **movable** property of any female person who shall die after the commencement of this Ordinance shall devolve in equal shares upon all her surviving children (the descendant or descendants of any deceased child being entitled to his or her or their parent's share by representation) whether male or female, legitimate or illegitimate, married or unmarried, and if married whether the marriage be in binna or in diga (o).

Prior to this Ordinance No. 39 of 1938 illegitimate children were entitled to succeed to paraveni, acquired and movable property belonging to their deceased

(n) Section 18. (o) Section 22.

mother. Under this Ordinance the illegitimate children are declared not entitled to the **paraveni** property of their mother if she was married in binna either on her father's property or on her mother's property. In all other cases they are entitled to share equally with all the children.

The acquired property will as before devolve on all the children whether male or female, legitimate or illegitimate in equal shares.

The movable property will devolve on all the children male or female, legitimate or illegitimate and the surviving spouse if any in equal shares.

Grandparents and collaterals. Neither under the ancient Kandyan Law nor under Ordinance 39 of 1938 could an illegitimate child inherit from a collateral source. On the death of a legitimate daughter unmarried and issueless leaving no parents, the illegitmate children of her mother are not entitled to succeed to her property (p).

Under the new Ordinance illegitimate children are not entitled to inherit any property from the maternal or paternal grandfather. But the illegitimate children are still entitled to inherit property from their maternal or paternal grandmother. If the grandmother was married in binna on her mother's property or on her father's property the illegitimate grandchildren would inherit only the acquired property and movable property but not the paraveni property.

Custody of Children. In the absence of authority in the Kandayan Law which would enable the grand mother to claim preference over the father of an illegitimate child in regard to his custody, the Roman Dutch Law was applicable and that accordingly the father of an illegitimate child had no right to the custody of the child as against the grandmother on the mother's side (q).

Succession to illegitimate Children.

The mother inherits the property of her children at their death by filial right of inheritance,

(p) Ukku vs Horatala 50 N. L. R. 243.
(q) Kalu vs Silva 48 N. L. R. 217.

whether they were born in proper wedlock or in proper cohabitation, but if the mother has become an outcast, the usage is different. If a woman has a child by a legally married husband, and another by a man of lower caste than herself, on the death of the former child all its property devolves on its father, or on any near relation, but not on the outcast mother, though on the death of the child born to the man of inferior caste, the property which devolved upon that child may be inherited by the mother (r).

Procreate right gives a title to a legitimate child from the father, and to the father from a legitimate child, but it does not give a title to the father from an illegitimate child (s). On the death of legitimate children their father may inherit their property, but he can never, as their father, do this in the case of illegitimate children (t).

A father, who had transferred certain property to his illegitimate son, cannot inherit such property from the said illegitimate son where the latter had died unmarried and issueless. If this illegitimate child's mother was alive, she would have been his heir, and in her default his half sisters (children of his mother by a different father) were his heirs (u). The mother's half brother's (on the maternal side) daughter was declared entitled to an illegitimate child's property in preference to his father (v).

Maintenance. The father is bound to provide for the support of his illegitimate children (w). If there be no acquired property of the father. the children of the low caste wife will be entitled to temporary support from their father's hereiditary property (x). Even under the Roman Dutch Law the father of an illegitimate child was civilly liable to maintain it (y).

The foundation of the jurisdiction of a Police Court under tne Vagrants Ordinance No. 4 of 1841

(r) N. N. 15. (s) N. N. 13. (t) N. N. 15. (u) Banda vs Banda 19 N. L. R. 126. (v) Kuma zs Banda 21 N. L. R. 294. (w) P.A. 34 (x) S. D. 10 and XVIII (y) Voet 25. 3. 5.

as well as the Maintenance Ordinance No.19 of 1889 may have been this Civil liability already existing under both systems of Law.

Under the Vagrants Ordinance No. 4 of 1841 the failure to support his family was made an offence in the father. As there were many defects under this Ordinance, the Maintenance Ordinance No. 19 of 1889 was enacted to provide a simpler, more speedy and less costly remedy. Since this enactment it is no longer competent for a woman to bring a Civil action in this Colony to recover maintenance for herself and her children as a debt due to her and them from the father. The special rights and remedies created by this Ordinance No. 19 of 1889 must be held to have superseded the Common Law (z).

If any person having sufficient means neglects or refuses to maintain his ..... illegitimate child unable to maintain itself, the Magistrate may ..... order such person to make a monthly allowance for the maintenance of ..... such child at such monthly rate not exceeding One Hundred Rupees (Section 2). An application in respect of an illegitimate child should not be entertained unless made within twelve months from the birth of such child or unless it be proved that the man alleged to be the father had at any time within twelve months next after the birth of such child maintained it or paid money for its maintenance. No order should be made on any snch application on the evidence of the mother of such child unless corroborated in some material particular by other evidence to the Magis-trate's satisfaction (Section 6).

The proceedings should commence with an appli-cation in writing as prescribed by Section 13. Upon such an application the Magistrate is bound to comme-nce the inquiry by examining the applicant on oath or affirmation and such examination must be duly recorded, as prescribed in Section 298 of the Criminal

(z) Subaliya vs Kannangara 4 N. L. R. 121 and Ana Perera Vs Emaliano Nonis 12 N. L. R. 263.

Porcedure Code, and read over to the witness as required by Section 299 (1). An order to issue summons may be made only if the Magistrate forms the opinion that there is sufficient ground, and is designed to protect innocent persons from the ignominy and vexation of having to come into Court to answer groundless accusations (a).

The first question to be decided is whether the defendant is the father of such illegitimate child. The other question is whether the application is made within one year of its birth or whether the defendant has maintained the child within one year of its birth (b). Evidence of the failure of the putative father to refute allegations against him by a headman, on an occasion which demanded a denial or a protest, may amount to corroboration (c). Evidence of mere opportunity for intimacy between the mother and the defendant does not amount to corroboration, but a false statement by the defendant denying such opportunity may remove a doubt that may exist on the question of corroborative evidence (d). No corroboration of the plaintiff's evidence on the point as to whether the defendant had maintained the child within a year of its birth, is required. If the plaintiff's evidence is satisfactory the Magistrate can act thereupon (e). When the evidence of the mother is unreliable, the question of corroboration does not arise (f). The dismissal of a previous application whether for insufficiency of evidence or upon any other defect in the case, is a decision upon the merits and such decision bars a second application (g). There are circumstances in which the applicant may make a second or third or later application for maintenance in respect of the same child provided she comes into Court on every such occasion within the twelve months (h). Where an application was struck out without any inquiry the applicant may make a fresh application

(a) Rupasinghe vs Somawathie 61 N. L. R. 457 (b) Somawathie vs Fernando 55 N. L. R. 381. (c) Nanduwa vs Nandawatie 55 N. L. R. 188, (d) Warawita vs Jane Nona 58 N. L. R. 111 (e) Somasundaram vs Periyanayagam 54 N. L. R. 53. (f) Turner vs Liyanora 53 N. L. R. 310. (g) Rankiri vs Kirihatana F. B. I. C. L. Rep. 86. (h) Laisa vs Gardner 5 C. L. W. 73

provided the time limit set by Section 7 has not expired (i). Fresh proceedings in maintenance could be instituted even by a party whose case has been dismissed provided that the case had not been dismissed on the merits (j). Where an applicant, withdrew the case on the date of trial stating that she had not enough evidence to maintain paternity, she could not maintain a subsequent application (k). A Magistrate has jurisdiction to entertain an application for maintenance regardless of the parties or the place where the cause of action arises (l).

An order for an allowance for the maintenance of any child will not be valid after the child has attained the age of 16 years. Provided however the Magistrate may in the order or subsequently direct that the payment should continue until the child attains the age of 18 years. A Magistrate has no jurisdiction to extend the period of maintenance if the child had passed the age of 16 years on the date when the application, for extension was made (m).

The word "means" in Section 2 should be given a wide meaning and includes the capacity to earn money (n).

If the person against whom an order is made, neglects to comply with the order, the Magistrate may issue a warrant for the recovery of same, and may sentence such person to simple or rigorous imprisonment (n).

Regstration of Births. For the ascertainment of facts as to age, paternity etc, of children provision has been made by legislation for the registration of births. It was only after Ordinance No. 1 of 1895 was enacted that registration of births was made compulsory. This Ordinance has now been replaced by Ordinance No. 17 of 1951.

(i) Ana Perera vs Emaliano Nona 12 N. L. R. 263, (j) Beebie vs Mhamed 23 N. L. R. 123. (k) Punch vs Tikiri Banda 54 N. L. R. 210. (l) Saraswathie vs Kandiah 50 N. L. R. 22 and Dingiri Menika vs Kiriappu 52 N. L. R. 378. (m) Hinniappuhamy vs Wilisindahamy 54 N. L. R. 373 (n) Ramasamy vs Subbramaniam 50 N. L. R, 84. (n) Section 8.

The father or mother of every child born in Ceylon, or.....the occupier, or an inmate of the house in which such child is born should, within forty two days next after its birth, give information to the Registrar of the Division.....the several particulars required by the Ordinance to be known and registered touching the birth and name of such child and if called upon by the Registrar, sign the register of births (o).

The particulars required are the date and place of birth, name given to it, sex of child, the full name, date of birth, place of birth, race, rank or profession of the father, full name, date of birth, place of birth, race and age of the mother, whether the parents were married, if the grandfather was born in Ceylon, his full name, year and place of birth, if the father was not born in Ceylon and if great grandfather was born in Ceylon, the gread grandfather's full name and year and place of birth, the informant's full name, residence and in what capacity he gives information.

If the person referred to above cannot conveniently attend the office of the Registrar, he may send a written declaration containing such of the particulars of the birth specified in form D in the First Schedule to the Ordinance. Such declaration should bear a stamp of twenty five cents if it is sent to the Registrar of the Division or a stamp of fifty cents if it is sent to the Registrar of another Division. The Registrar may, however, by notice in writing, require the declarant to attend at his office within seven days of the receipt of the notice, and to supply such written or oral information as he may require (Section 16).

Where any living new born child is found exposed the person finding such child and any person in whose chargc such child is placed should within seven days, give to the appropriate Registrar information of such of the particulars required to be registered concerning the birth of such child.

(o) Sectlon 15.

Any such person may, instead of providing the information to the Registrar, give such information to the nearest Village Headman or to the officer in charge of the nearest Police Station (Section 17).

Where a birth has, from the default of the persons required to give information, not been duly registered, the Registrar of the Division, may, after, forty two days from the date of such birth, or in any case when a new born child is found, after seven days from the date of such finding, send a written requisition to any such person requiring him to attend personally at his office within such time not less than seven days from the date of receipt and not more than three months from the date of the birth or finding and give information of such of the particulars required to be registered under the Act. And such person is bound to comply with the requisition unless the birth is registered before the expiration of the time specified in the notice (Section 18).

Where a birth occurs on an estate (meaning any land of which ten acres or more are in cultivation and situated in a District declared under the Medical Wants Ordinance to be an Estates Medical District), information as aforesaid should be given to the Superintendent of the estate within seven days in the case of a birth and within twenty four hours in the case of a living new born child found exposed in the estate. The Superintendent should verify the information and within forty eight hours of the receipt of the information make a report to the nearest Medical Officer or Apothecary appointed under the Medical Wants Ordinance who should send that report forthwith to the District Registrar (Section 20).

In the case of an illegitimate child, no person as its father, is required to give information concerning its birth. The Registrar should not enter in the Register the name of any person as father of such child except at the joint request of the mother and of the person acknowledging himself as the father of the child, and unless such person signs the register together with the mother, or except upon an order of a competent Court which is summarized in the Register. After the

original registration of the birth of an illegitimate child, no change shall be made in same giving the name of any person as father except upon an order of a Competent Court (Section 21).

If the Registrar has reason to doubt the legitimacy of a child whose birth has been, or is to be registered he may demand from the person required to give information, a certified copy of the entry relating to the marriage of the alleged parents of the child, in the Marriage Register or such other proof as he may think fit. If such copy or other proof is not produced he should inform the appropriate District Registrar who may, after inquiry, take such steps as he may deem fit (Sechion 22).

In any case where the birth of any person is not registered, the Registrar General or District Registrar may order the person required to give information, or such person may, of his own motion attend personally at the office of the Registrar General or District Registrar and make a declaration of the particulars required to be registered. Such declaration, if made within a period of twelve months should bear a stamp of Five Rupees. If the declaration is made within a year, the District Registrar may make order directing the appropriate Registrar to register the birth. Where the declaration is made after the expiration of twelve months, the Registrar General may, if he is satisfied as to the truth of the matters in the declaration and if it is made not later than fifty years from the date of birth make order directing the appropriate Registrar to register the birth (p).

Where the birth of any person has been registered without a name being specified in the registration entry at the time of registration or if his name has been altered after that time, the Registrar General or the District Registrar, may, after inquiry, amend the birth registration by the substitution addition or insertion of particulars relating to his name. Such an application could be made by a parent or guardian if such person

(P) Sectlon 24.

is under 21 years of age, or by that person himself with the written consent of a parent or former guardian if he is over twenty one years of age. If the application is made by a parent or guardian and if such person is over seven years of age the Registrar General or District Registrar should satisfy himself that the altered name had been in actual use for a period which in his opinion is reasonable. If such person himself makes the application (that is, where such person is over twenty, one years of age) the Registrar General or District Registrar should cause notice of the application to be published in the prescribed manner at the place where that person's birth occurred and at his place of residence. The decision of the Registrar General or District Registrar should be published in the prescribed manner at the place where that person's birth occurred and at his place of residence. Any person aggrieved by such decision may appeal to the District Court within thirty days of the date of first publication and the decision of the District Court shall be final (q).

A person whose birth has been registered (whether under this Act or under any past Ordinance). or his parent or guardian, or a person aggrieved by any particulars in the entry relating to that birth, may apply to the District Court for an order directing:–

(a) the alteration or insertion of the name of the person whose birth was registered if, but only if, such person is not less than twenty one years, or

(b) the alteration of all or any of the particulars in the Register relating to the name, race, rank or profession of the father of such person or for the omission of such particulars or for the insertion of fresh particulars in any case where the original particulars had been falsely or improperly entered, or

(c) the insertion of the name of the father of such person, in any case where such name was omitted at the time of the original entry, or

(d) the alteration of the names of the parents of such person, in any case where such names have been altered since the original entry was made, or

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(q) Sectlon 27.

(e) the alteration, insertion or omission of particulars relating to the marriage of the parents of such person, and

(f) the making in the entry of any such consequential amendments resulting from such alteration: insertion or omission. Every order of the District Court shall be subject to an appeal to the Supreme Court (r).

The Registrar General or any person authorised by him, may correct any clerical error or supply any inadvertent omission in the registration entry (s). The Registrar General may, on the production of a declaration, or of his own motion,after such inquiry as he may think necessary, make or direct thc appropriate District Registrar or Registrar to make a note or endorsement on the margin or on the reverse side of the entry, specifying the nature of the irregularity in thc entry and the true facts relating thereto or amend or rectify the entry or direct the appropriate District Registrar to amend or rectify the entry, by the correction of errors or by the supplying of omissions or by the restoration of particulars that are missing, illegible or in danger of becoming illegible or make such other order as he may think fit, where there has been a fictitious registration, or the registration of the same event more than once, or the registration in a wrong division, or the registration of the information of an unauthorised person or the registration of events without the prescribed procedure being followed or where registration entries have been left unsigned or where there is any other error or omission of fact or substance which can be amended under the provisions of this Aci (t).

Registration of deaths. The said Ordinance No. 17 of 1951 makes provision for the registration of deaths too.

When a death occurs in a house or building it is the duty of the nearest relativcs present at the death or in attendance during the last illness of the deceased, and in the absence of such relatives, every other relative of the deceased dwelling or being in the same

(r) Section 28. (s) Sectin 51. (t) Section 52.

Registrar's Division as the deceased, ... each person present at the death and the occupier of the house in which the death took place, ... the person causing the body of the deceased to be buried or cremated, to give to the appropriate Registrar within five days, information of the particulars relating to the death required to be registered. When a death takes place in a place other than a house or building, every relative of the deceased,.....every person present at the death, the person taking charge of the corpse, and the person causing the corpse to be buried or cremated should within five days give information to the appropriate Registrar. Any such person may make a written Declaration in Form I in case he connot conveniently attend the Registrar's Office. The particulars required are name and residence of the deceased, date and place of death, sex and race, age, rank or profession, full name of both parents, cause of death, place of burial or cremation, declarant's name, address and capacity for giving information and name of Registered Medical Practitioner whose certificate as to cause of death is annexed (u).

Where death occurs on an estate, information should be given within twenty four hours to the Superintendent of the estate who should, after verifying the information, make a written report forthwith to the nearest Medical Officer or Apothecary appointed under the Medical Wants Ordinance who should forthwith send same to the District Registrar (v). In case the death is not registered within three months, the Registrar General or District Registrar may notice the person required to give notice to attend personally at his office and make a declaration or such person may of his own motion attend personally at the office of the Registrar General or of any District Registrar and make such declaration (w).

Whenever a birth or death occurs in a Government Hospital or in a public institution, the Medical

(u) Sections 29, 30 and 31. (v) Section 34. (w) Section 36.

Officer in charge of the Hospital or the person for the time being in charge of such institution should give information to the Registrar (x).

In certain areas (namely Municipal Council, Urban Council and Town Council areas) defined by the Minister under an order published in the Gazette no burial or cremation could take place unless there has been obtained (a) a certificate from the appropriate Registrar to the effect that notice of death was given to him, or (b) a certificate of registration under section 42, that is a certificate of registration of death from the Registrar and written permission for removal obtained from the proper authority under the Cemeteries and Burials Ordinance, or from the Assistant Government Agent or Magistrate of the area, in a case where the corpse is being removed outside that area for burial or cremation in any place except a cemetery or burial ground established or registered under the Cemeteries and Burials Ordinance, or (c) a certificate from the Village Headman or Police Officer in the division stating that information of death was given to him, or (d) the duplicate of the certificate of a Medical Practitioner stating cause of death, or (e) a certificate from an Inquirer into Deaths who has held an inquiry into such death, or (f) in the case of a death on an estate, a certificate from the Superintendent stating that he had authorised the burial or cremation of the corpse (y).

From such an area aforementioned, no corpse should be removed for burial or cremation in any place except a cemetery unless the person required to give notice of death has also given information of death to the appropriate Registrar and obtained from him a certificate of death and also obtained written permission from the proper Authority or the Assistant Government Agent or Magistrate within whose jurisdiction such area is situated (z).

Every person who registers or causes to be registered after the expiration of three months except upon

(x) Rule 29 (y) Section 41 (z) Section 42.

an oder by the Registrar General or the District Registrar, a birth, death or still birth is guilty of an offence punishable with a fine not exceeding Rs. 100/– (a). Upon the conclusion of the trial of a person for giving false information or for not giving information to the Registrar concerning a birth, death or still birth the Magistrate or President of the Rural Court trying such person should issue to the appropriate Registrar a certificate giving the particulars necessary for the Registration of the birth, death or still birth, and in case such birth, death or still birth has been previously registered the particulars necessary for making any amendments or variations (b).

A certified copy or a certified extract or a registration entry issued under this Act shall be received as prima facie evidence of the birth, death or still birth to which that copy or extract relates, if that entry purports to have been made in accordance with the provisions of this Act, and that copy or extract purports to have been made under the hand of the Registrar General, or an Assistant Registrar General or the appropriate District Registrar (c). Such entries whether original or as amended under Sections 27, 28, 51 or 52 are not conclusive evidence and the correctness of any registration or entry could be questioned in any proceedings in any Court (d).

An application to the District Court for any relief aforementioned is governed by the provisions of Chapter 24 (Summary Procedure) of the Civil Procedure Code. The Court has power to grant an order for costs. The procedure in regard to appeals is regulated by the provisions of the Criminal Procedure Code. The Petition of Appeal should be stamped with a Five Rupee Stamp (f).

A disputed question of paternity should not be decided in a summary way under this Act but the parties should be referred to any remedy they might have by instituting a properly constituted action (g).

(a) Section 64. (b) Section 49. (c) Section 57. (d) Section 55. (f) Section 28. (g) Saminathan vs Registrar General 37 N. L. R. 289 (F. B.)

The statements in a birth certificate afford prima facie proof of the fact of brith, of the date of birth and of the identity of the person registering the birth. Where the declaration is made by the father, it has a genealogical value under Section 32 (5) of the Evidence Ordinance (h).

Entries were made by a man and woman (A and B) in the birth register of a child that they were unmarried and that they were the parents of the child. At the time when the entries were made the lawful husband of the woman C was alive. These entries were not per se sufficient to rebut the presumption of the child's legitimacy under Section 112 of the Evidence Ordinance and the Court held that such child was a legitimate child of B and C (i).

CHAPTER III.

AGE AND MENTAL OR CORPOREAL INCAPACITY IN RELATION TO CIVIL STATUS

Persons are either of full legal capacity or are more or less incapacitated by subjection to others (a). The former are Danna Aya (literally nacents,) adults, those who have attained the age of full sixteen years,– the age of majority, and the latter are Nodanna Aya (literally innocents) infants, those who are under that age (b).

The latter are chiefly minors and those who suffer from some mental or corporeal infirmity (c).

Under the ancient Kandyan Law, the age of puberty was the age of manhood and discretion, and as a young man was capable of marriage at the age of sixteen years, so was he competent to contract debts,

(h) Silva vs Silva 43 N. L. R. 572 (i) Fonseka vs Perera 59 N. L. R. 364. (a) W. P. 184. (b) P. A. I. (c) S. D. 25, P. A. 2

and was answerable at law for all his deeds executed and contracts entered into after the end of his sixteenth year. But should a youth sell his lands, his cattle, or his goods before the end of his sixteenth year, he can break the bargain and resume the possession of his lands, cattle or property, on refunding the value, which he may have received for the same.

The same rules applied to females as to males (c)

The age of majority for all persons in Ceylon has been laid down by Ordinance No. 7 of 1865 as follows:–

Whereas it is expedient that the same period of majority should be fixed for all persons whatsoever: It is enacted as follows:–

1. "From and after the passing of this Ordinance all persons when they shall attain or who have already attained the full age of twenty one years shall be deemed to have attained the legal age of majority, and except as hereinafter excepted, no person shall be deemed to have attained his majority at an earlier period, any law or custom to the contrary notwithstanding" (d).

2. "Nothing herein contained shall extend or be construed to prevent any person under the age of twenty one years from attaining his majority at an earlier period by operation of law" (e).

Under the Roman Dutch Law a person attains majority by marriage. There is no trace in the Kandyan Law of any rule by which marriage before the age of sixteen conferred majority. As the said Ordinance No. 7 of 1865 had substituted twenty one years of age as the legal age, a woman over sixteen years of age but under twenty one years did not become a major on her marriage (f).

A male who had completed his eighteenth year or a female who had completed her sixteenth year

(d) Section 1. (e) Section 2. (f) Vand (1871) 251, Muttiah Chetty vs Dingira F. B. 10 N. L. R, 371; Haturusinghe vs Ukkuamma 45 N. L. R. 399; 46 N. L. R. 377

were entitled to contract a marriage under Ordinance No. 3 of 1870. Under the New Kandyan Marriage and Divorce Act No. 44 of 1952, a male over sixteen years or a female over twelve years can contract a marriage. But a Kandyan under twenty one years of age cannot bind herself by a preliminary agreement to marry (g).

Uuder the ancient Law a minor at the age of ten years may will or bequeath his or her property, but to validate such a deed, it must be proved that the minor was fully aware of the import of the same and of the consequence of the transaction, and further, that there were sufficient grounds for cutting off the inheritance of the heir or heirs at law (c).

Ordinance No. 21 of 1864 has laid down the age at which a person may make a will :–

"No will made by any male under the age of twenty one years, or by any female under the age of eighteen years shall be valid, unless such person shall have obtained Letters of Venia Aetatis or unless such person shall have been lawfully married (h).

The Governor General shall have and enjoy all such rights and powers in respect of granting letters of Venia Aetatis as are now possessed by him within the Maritime Provinces (i).

Hence all Kandyans under the age of twenty one years are minors unless they have obtained Letters of Venia Aetatis.

A minor's sale of immovable property is not absolutely void but voidable, and could be avoided on repayment of the purchase money and probably and equitably the value of the improvements. Where a Kandyan married minor sold her immovoble property with the knowledge and consent of her husband and died after attaining majority without in any way repudiating the transaction, her executor could not repudiate it (j). In every case, except gift and suretyship, a contract by a minor is voidable and not void. In the case of gift and suretyship,

(g) Navaratna vs Kumarihamy (1927) 29. N.L.R, 408. (h) Section 2 (i) Section 3 (j) Dissanayake vs Edwin 12 N. L. R. 291.

the absence of any benefit by a minor is manifest and the contract is void ab initio (k). A bond entered into by a minor, for her benefit is binding on her (l). A minor who had falsely represented himself as a person of full age, is bound by a contract entered into by him (m).

Under the ancient law a person may on his deathbed charge another with the care of his child and enjoin that person to render assistance to and maintain that child. Not only laymen but even priests may be so constituted guardians. On the death of the child's father, the mother is entitled to take charge of the child and its paternal estate and all other property. If it shall appear that the bad character of the mother is calculated to bring shame and disgrace on the child in the future, the relations on the father's side can take the child from the mother's care (n).

A widow may appoint a guardian for her child or children with right to inherit their property, in the event of their dying in minority and without issue. Children, being minors and left orphans, provided they have not been placed specially under the guardianship of anyone by their parents, fall to the guardianship of their maternal grandfather or grandmother; and failing them to that of their maternal uncles or aunts; failing them to the guardianship of their paternal grandfather or grandmother; and failing them to that of their paternal uncles and aunts and failing them, to that of an adult brother or sister (o).

Section 71 of the Courts Ordinance which applies to all persons resident in the Island enacts that every District Court should have the care of the persons of minors and wards and the charge of their property situated within its jurisdiction. Chapter 40 of the Civil Procedure Code which has similar application provides for the appointment of guardians and curators by the District Court. A guardian is

(k) Silva vs Mohamadu (1916) 19 N. L. R. 426. (l) Attorney General vs Costa 24 NLR 281. (m) Shorter vs Mohamed 39 N. L. R. 113 (n) N. N. 44. (o) S. D. 37.

appointed to take charge of the person of a minor. A curator is appointed to take charge of the minor's property.

A father may manage his minor son's property for his son's advantage but cannot alienate it without the leave of Court (p).

A widow having the administration of her deceased husband's estate may, in the minority of her children from necessity, mortgage the landed property; but it must be clearly to satisfy the most necessary and urgent wants of the family, otherwise the children might not be held liable to pay the debt. But in all cases where the children are grown up to fourteen or fifteen years of age, their consent is necessary to such a mortgage being valid against them and their lands (q).

A widow left by the husband's death with young children was the head of the house and family until her sons grew up to manhood. On her devolved the duty of paying her husband's debts. Hence she had the right to alienate or charge the property of her deceased husband in order to pay the debts of the deceased (r). She had the right to mortgage the estate of her deceased husband for the payment of his debts (s). The widow has the right to sell her husband's paraveni property as well during the minority of her children for the payment of the debts of her deceased husband without the sanction of Court (t). Where a Kandyan widow leased without the sanction of Court, for a period of forty years, a land belonging to her husband, over which she had a life interest, the lease was held to to be invalid so far as it exceeded the term of her life interest, as there was not sufficient evidence to prove that the lease was effected for the payment of the debts of the husband (u).

(p) Juwan Appu vs Helenahamy (1901) 2 Br. 19. (q) S. D. 23 (r) Appuhamy vs Kirahenaya 2 N. L. R. 157. (a) Bandara Menike vs Imbuldeniya 50 N. L. R. 476. (t) Kiri Banda vs Chettiyar (1948) 50 N. L. R. 490. (u) Lebbe vs Christic F. B. 18 N. L. R. 353.

A mother is by law the natural guardian of her infant children, and is entitled to look after them and to have the custody of them as against all other people, after the death of the father. It is unnecessry for a mother to apply to Court for authority to be guardian. The only thing neeessary in her case is to obtain the management of the property of the infant children. She is entitled to do this by applying to Court and obtaining Letters of Curatorship (v).

A Curator appointed by Court has no power to alienate or encumber the minor's property without the special sanction of Court (w).

A minor has not the capacity to appear in Court. He cannot be arrested for debt. Generally those subject to the power of Curators cannot be arrested (x).

Chapter 53 of the Civil Procedure Code which too applies to the whole Island lays down the procedure to be adopted in the case of actions by or against minors as follows:–

"Every action by a minor should be instituted in his name by an adult person, who in such action should be designated in the plaint as the next friend of the minor (y). Any person of sound mind and full age, provided his interests are not adverse to that of the minor, may be appointed by Court as next friend of the minor (w). Where the defendant to an action is a minor, the Court on being satisfied of the fact of the minority, should appoint a proper person to be his guardian (z).

A minor may prosecute any proceedings in a Court of Requests for the recovery of any money due to him for wages or piecework, or for work as a servant artificer or labourer, in the same manner as if it were of full age (a).

For the purpose of instituting or defending an action, a minor is deemed to have attained full age or majority on his attaining the age of twenty one years, or on marriage or on obtaining Letters of Venia Aetatis (b).

(v) Croos vs Vincent (1920) 22 N. L. R. 151. (w) Mahawroof vs Marikkar (1928) 31 N. L. R. 65. (x) W. P. 188 (y) Section 476. (z) Section 479. (a) Sectioh 492. (b) Section 502.

No next friend or guardian for the action should without the leave of the Court, enter into any agreement or compromise on behalf of a minor with reference to the action in which he acts as next friend or guardian. Any such agreement or compromise entered into without the leave of the Court shall be voidable against all parties other than the minor (c). The leave of Court referred to in this Section is a special leave to be applied for by the guardian and different from the general sanction applied for by all the parties for the approval of the Court to the terms of the settlement. So that a compromise entered into by the guardian, without the special leave of Court is not binding on the minor (d).

Section 69 of the Courts Ordinance enacts that every District Court should have the care and custody of the persons and estates of all idiots and persons of unsound mind and others of insane and non-sane mind resident within its district, and may appoint guardians and curators over such persons and their estates and make order for the maintenance of such persons and the proper management of their estates.

When a person has been adjudged to be of unsound mind and incapable of managing his affairs, the District Court shall appoint a manager of the estate (e). Whenever a manager is appointed, the Court shall appoint a fit person to be guardian of the person of the person of unsound mind (f). For the purposes of the appointment of a manager of the estate, it is not necessary to prove complete insanity rendering the alleged lunatic incapable of looking after himself. It is sufficient to show that he is so far unsound in mind as to be incapable of managing his affairs (g). The Court is entitled, when the cricumstances warrant it, to appoint some person other than the husband as the guardian of the person or as the manager of the estate of a wife, who is of unsound mind. The Court should not presume lunacy from intrinsic cricumstances or act on the

(c) Section 500. (d) Bandara vs Elapatha (1922) 23 N. L. R. 411, 30 N. L. R. 106. (e) Section 567 C. P. C. (f) Section 568. (g) Uduma Lebbe vs Uduma Lebbe (1912) 16 N. L. R. 29

admission of parties (h). A manager has no power to sell or mortgage the estate or any part thereof or to grant a lease of any immovable property for any period exceeding five years without the authority of the District Court previously obtained (i).

The manager of the estate of a lunatic is not entitled to institute an action on behalf of the estate without first obtaining leave of Court to sue as next friend of the lunatic (j).

A Kandyan wife is in the eye of the law a femme sole and enjoys all the rights which a married woman in England has under the Married Women's Property Act. The husband cannot prevent the wife from instituting proceedings in her own name (k).

The order in Council of 1931 granted Universal Franchise to the people of Ceylon thus giving women not only the right to elect members of the State Council but also the right to enter the State Couucil as members duly elected by the voters. This right was later granted in respect of Municipal Councils, Urban Councils, Town Councils and Village Committees. Ordinance No. 25 of 1933 declared that a woman should not be disqualified by reason only of her sex (l) from being admitted and enrolled, or, from practising as an Advocate or Proctor, or (2) from being authorized to practise as a Notary Public, or (3) from being appointed, or from functioning as a Commisioner of Oaths.

In no case whatever could a Court issue a warrant for the arrest or imprisonment of a woman in execution of a decree for money (1).

Servants Agencies are prohibited from recruiting as servants, women under the age of twenty years.

Any public or private industrial undertaking is prohibited from employing any woman during the night subject however to certain exceptions (m).

(h) Alwis vs Gunatilleke (1920) 22 N L R 303 (i) Section 571 C. P. C. (j) Meurling vs Bultjens (1931) 32 N. L. R. 332. (k) Mohottiappu vs Kiribanda (1923) 25 N. L. R. 221. (l) Section 298 of the C. P. C. (m) Section 2 of Act No. 47 of 1956

It is an offence for any person having the care custody or charge of a girl under sixteen years of age to cause or encourage her seduction, prostitution or unlawful carnal knowledge. A Magistrate is empowered to order security from parents and guardians of girls under sixteen years of age who knowingly permit them to be exposed to the risk of seduction or prostitution. There is also provision for the detention maintenance and control of girls under sixteen years of age in places of safety when charges for offences under the Vagrants Ordinance are being considered or have been proved (n).

CHAPTER IV.

MARRIAGE IN RELATION TO CIVIL STATUS.

By marriage, we understand, the union of man and woman for the purpose of having and rearing children and who are to continue united as one person for the rest of their lives through good and bad fortune (a).

Marriage among the Kandyans consists of two kinds, as regards civil immunities sanctioned by the conventional or common law of the country, namely:-

1. Marriage in deega.
2. Marriage in binna.

A marriage in deega 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. This is the most common of the two.

A marriage in binna is when the bridegroom is received into the house of the bride, and according to certain stipulations abides therein permanently. This occurs only in cases where the bride is an heiress, or the daughter of a wealthy family in which there are few sons (b),

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(n) Vagrants Ordinance No. 4 of 1841 (a) V. D. L. 1. 3. 1. (b) P.A. 5.

Requisites for marriage. Under the original Kandyan Law, marriage was contracted in various ways. Its validity depended not so much on the observance of any special rites or customary ceremonies, but on the status of the contracting parties and on family consent (c).

For a marriage to be in accordance with the proper customs of the country, the following five customary festivities should be observed, and for persons of rank the marriage ceremonies are as follows:-

(1) On the choice being made of a bride, the bridegroom's kinsmen give intimation thereof to some of the bride's friends, who consult her parents or guardians or other relations, and if they approve of the proposed match the bridegroom's friends are informed thereof. Whereupon some of the latter pay a visit in form to the bride's family, and having seen the bride and received assurance that the suit was sanctioned, they return, after being treated with rice and betel.

(2) Afterwards a relation of the bridegroom goes to the bride's with presents of cakes etc., and returns thence with her nativity or horoscope; this is compared with the bridegroom's to ascertain whether the union of the two persons will be happy and fortunate. If the nativities are accordant and compatible, an auspicious day is appointed for the wedding and the bride's parents or guardians are apprised thereof.

(3) On the day appointed, presents of betel, cakes, fruits etc., are forwarded to the bride's, and then the bridegroom's father proceeds thither in state, followed by the bridegroom's mother with proper attendance likewise; and lastly comes the bridegroom. On the party approaching the bride's residence, a brother and a sistsr, or an uncle and an aunt of the bride, go out to meet them in similar form and state and conduct them to the house. When they arrive at the outer gate of the house and have stepped on the cloth spread for them to walk upon into the interior of the house, a coconut is smashed into pieces in the name of Ganeswara, or the God of Wisdom, and on the

(c) Kuma vs Banda F. B. (1920) 21 N. L. R. 294.

parties entering the apartments prepared for their reception, the ceremony of invoking long life is performed and the God of Wisdom is again propitiated by breaking of coconut.

(4) Previous to the auspicious moment of solemnizing the marriage, the bridegroom's mother delivers a valuable cloth as a Kirikada Hela (white cloth) to the bride's mother, with another cloth and a set of jewels, and the bride's father gives a suit of apparel to the bridegroom. The happy moment being arrived, the bridegroom throws a gold chain over the bride's neck, and then presents her with a complete set of apparel and ornaments, and the bride being arrayed therewith, steps up along with the bridegroom on the "Magul Poruwa" or wedding plank (platform) which is covered with a white cloth. The bride's maternal uncle or some other near relation then takes a gold chain and therewith ties the little finger of the bride's right hand with that of the bridegroom's left, and the couple then turn round upon the plank (platform) three times from the right to left. The chain is then taken off, and the bridegroom moves to a seat prepared for him. The "Magul Pata", or wedding plate is then brought in, from which the director of the cermonies takes rice and cakes, and making balls of them, gives the same to the bride and the bridegroom, who make a reciprocal exchange thereof in token of conjugality. The guests and the rest of the company are then served with victuals, betel and sandal. On the couple quitting the bride's to go to the bridegroom's house, they are accompanied by a kinsman of thc former with proper attendance. On approaching the bridegroom's residence, they are met by a kinsman of the latter attended with talipots, torches etc., who greets the bride's kinsman and conducts the party in. Here also a coconut is smashed on the ground in the name of Ganeshwara, and the ceremony of wishing longevity is repeated. After suitable entertainment the bride's kinsman and the other guests depart.

(6) On the seventh day after the last mentioned ceremony, the festival of bathing the head takes

place. The young wife's uncle and aunt or other relations, repair to the house of the newly married couple in due style and are formally welcomed. The open space near the apartment allotted to them is enclosed on all sides and covered with cloths, a plank (platform) being placed on the ground within, the young couple stand upon the plank (paltform) side by side with their heads covered with cloth. New earthen pots filled with water are then brought, and some person on behalf of the husband drops a rupee, or a gold pagoda into each of them, and presents a gold ring to the wife's uncle, who, having awaited the auspicious moment, takes up the water pots and empties them upon the heads of the young couple. After the ceremony, the visitors are feasted and permitted to depart. After the lapse of some days or months, the wife's parents pay a formal visit to the young pair, attended by followers etc. On this occasion they bestow, according to their means, a dowry on their daughter, consisting of goods, land, etc. And after the lapse of some time again, the newly married couple pay a ceremonious visit to the wife's parents. The washer employed to decorate the bride's house with white cloth on the wedding day, receives five ridis from the bridegroom; he also receives five ridis for spreading the cloth on the 'Magul Poruwa' and the person who conducted the bride to the bridegroom's house after the marriage ceremony pays five ridis to the washer who decorated the bridegroom's house for the occasion. This constitutes a diga marriage with the five ceremonies. If it is a binna marriage the husband is received into the house of the bride's family with similar ceremonies (d).

Thus a lawful and regular marriage was solemnized by the "Magul Paha" or the five feasts. The first is given, when the bride has been solicited, and the suit is approved by her parents or guardians. The second is given, on the day on which the horoscopes of the bride and bridegroom are examined, and compared, with a view to ascertaining whether their stars prognosticate a happy union. The third is given on the day on which

(d) Doyly 82. P. A. 129, N. N. 17.

the bridegroom presents the bride with a suit of apparel. The fourth is the wedding feast when the marriage contract is ratified by the ceremony of the ligature (i. e. tying with a thread the little finger of the bride's right hand to the little finger of the bridegroom's left hand), and by the bride and bridegroom interchanging victuals, The fifth is given on the seventh day of the nuptials, when a ceremony of pouring water on the heads of the bride and the bridegroom is performed by some near relative (e).

What constitutes a regular marrirge is as follows:- The consent of the respective heads of the families; the countenance and sanction of the relations to the third or fourth degree on both sides to the union of the parties; that they must be of the same caste and of equal family, respectability and rank, which is chielfy ascertained by the families having previously intermarried; and where this has not been the case, they are particularly scrupulous; and affluence and prosperity for the time being on one side, will hardly induce an ancient family to deviate from this rule.

To prove a regular marriage will be to make it appear that the usual ceremonies were observed, such as the making of presents by the family of the bridegroom to the family of the bride; that the proper messages established by custom, and the replies thereto, passed between the heads of the families on both sides; that the horoscopes of the parties to be united duly examined and found to be compatible with each other so as to secure an auspicious union; that the bride was conducted home to the house of the bridegroom in due form by his relatives, as must be the case in a deega connexion when the bride quits the house of her own family to go and live in the house of her husband, or that the husband was received into the house of the bride's family with similar ceremonies; that his family attended the marriage feast at the house where the newly married couple were to reside, whether that was at the family house of the bride, as in a binna connexion or at the house of the bridegroom, as in a deega connexion (f).

(e) P. A. 5. (f) S. D. 30. (g) P. A. 6.

As the above formalities and ceremonies could be properly observed only by the higher and influential classes, they were not always considered necessary to constitute lawful wedlock. Therefore 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. 3. If the alliance was sanctioned and countenanced by their parents. Their cohabitation would then be deemed a lawful union (g).

There was also a third form of union, in which no special ceremonies were observed, but in which the parties simply cohabited together.

Polygamy and Polyandry. Polygamy as well as Polyandry was allowed without limitation as to the number of wives or husbands.

The wife could not, however, take a second asscciated husband without the consent of the first husband, though the husband could take a second wife into the same house with his first wife, without her consent. The wife, however, had the power of refusing to admit a second associated husband, at the request of her first husband, evcn if he was the brother of the first. If the proposcd second associated husband was not a brother of the first, the consent of the wife's family to the double connection was required (h).

Amendment of Marriage Laws. In the year 1859 Ordinance No. 13 of 1859 entitiled. "An Ordinance to amend the law of marriage in the Kandyan Provinces" was enacted. This Ordinance declared all forms of polygamy illegal and set up a system of registration of marriage. Section 2 of this Ordinance declared that no future marriage should be valid unless registered in manner and form as in the Ordinance provided, and solemnized in the presence of the Registrar. By section 28 validated all existing marriages contracted according to the forms institutions and customs in use among the Kandyans.

In the year 1870, the law was again amended by Ordinance No. 3 of 1870 which re-enacted the old

(h) P. A. 9.

Ordinance (No. 13 of 1859) preserving its main lines and retaining the crucial section which declared "no marriage shall be valid unless registered". All marriages contracted before and after Ordiance No. 13 of 1859 were validated if they were contracted according to the laws, institutions and customs in force amongst the Kandyans (Sections 8 and 25).

Clause 11 provides that "except as is hereinafter provided, no marriage since No. 13 of 1859 came into force or to be hereinafter contracted shall be valid unless registered". The words "except as hereinafter provided" prevent conflict between clauses 11 and 25. What the Ordinance intended was to require all marriages since Ordinance No. 13 of 1859 to be registered, but to save the rights of issue and to prevent questions, it generally legalized such marriages. All parties living together should be encouraged to register their unions, and the District Registrar may register them, observing the forms and notices prescribed by the Ordinance as in the case of new marriages. No risk will be incurred as to children already born, whose rights could be saved by clause 25. But if they do not register their marriages they will be still legal under clause 25, if they had been contracted according to the Kandyan customs and subject to the proviso in that clause (i).

Ordinance No. 13 of 1859 which came into operation as from 7th December 1859 declared all forms of polygamy illegal. Hence an associated marriage contracted after the said date is illegal. Marriages that are validated by section 25 of Ordinance No. 3 of 1870 are marriages which are void for want of registration and not marriages which were void as being against the policy of the law which had been expressly forbidden by law (j).

The Kandyan Marriage Registration Ordinance No.3 of 1870 was applicable to Kandyans only. Therefore Low Country Sinhalese, Tamils and others though resident in the Kandyan Provinces, could not contract

(i) Circular by Crown Advocate reproduced in 18 N. L. R. 182.
(j) Hetuwa vs Gotia (1900) 4 N. L. R. 93; Mohottihamy vs Menika (1919) 2. N. L. R. 449.

a marriage under this Ordinance (k). This was the decision of the Supreme Court. But under the interpretation given to Section 37 read with Section 4 (2) of the Kandyan Succession Ordinance No. 23 of 1917 (Chapter 98) it was possible for even non Kandyans such as Burghers to marry under the Kandyan Law. As the continuance of such a provision in law intended to apply exclusively to the Kandyans is considered undesirable the New Kandyan Marriage and Divorce Act No. 44 of 1952 enacts that the New Ordinance should have application only to persons subject to the Kandyan Law.

Ordinance No. 3 of 1870 has been repealed and its place has been taken by the said Kandyan Marriage and Divorce Act No. 44 of 1952.

The principal object of this Act was to bring the procedure relating to the registration of Kandyan Marriages into line with that relating to marriages under the General Marriage Registration Ordinance No. 19 of 1907 (Chapter 59) which is now applicable to all persons other than Muslims.

Marriages between Kandyans may be lawfully registered or solemnized according to the provisions of the Marriage Registration Ordinance No. 19 of 1907. Marriages so solemnized or registered between Kandyans should as regards the capacity of the parties to contract marriage, the grounds on which the marriage may be dissolved, and in all other respects, be governed by the provisions of the said Ordinance of 1907. But the circumstance that a marriage between Kandyans has been solemnized or registered under the said Ordinance of 1907 will not affect the rights of the parties, or the rights of persons claiming title from or through them to succeed to property according to the rules of Kandyan Law (l).

It was the intention of the Legislature that the special Kandyan Marriage law and the general law of Ceylon should run concurrently and alternatively in the Kandyan Provinces (k).

(k) Sophia Hamine vs Appuhamy F. B. 23 N. L. R. 353.
(l) Section 2 of Ordinance No. 14 of 1909.

Validity of Marriage. Therefore no marriage contracted after 31 st December 1870 is valid or legal unless it is registered under the 'Kandyan Marriage Registration Ordinance of 1870,' the Kandyan Marriage and Divorce Act 44 of 1952, or the general Marriage Registration Ordinance of 1907. Registration is the sole test of the validity of a marriage contracted after the said date.

Marriages contracted before 1st January 1871, though not registered, are valid provided they were contracted according to the laws, institutions and customs in force in Kandy before 1859. When, prior to 1870, a woman was, according to Kandyan customs, duly conducted in deega to a man, lived with him till his death, bore a child to him, and the husband's family recognized such union, the Supreme Court held that there was no necessity to give minute proof of the ceremonies attending the marriage (m). Some proof however slight, must be given of the observance of the laws, institutions and customs aforesaid (n).

The validity of a marriage depends on the will and capacity of the parties to make it, and on its being made in the manner and with the solemnities required by law (o).

The requisities of a legal Marriage are:–

I. That the parties who are about to enter into the state of wedlock are capable to enter into this state generally or with each other (p).

II. Consent of parents.

III. Consent of parties.

IV. The observance of formalities required by law.

I. That the parties who are about to enter into the state of wedlock are **capable to enter** into this state generally or with each other.

Persons generally incapable are:-

1. Persons already married. Under the ancient law polygamy as well as polyandry was allowed. Ordinance No. 13 of 1859 declared all forms of polygamy

(m) Ukku Etana vs Punchirala (1897) 3 N. L. R. 10. (n) Mohottihamy vs Menike (1919) 21 N. L. R. 449. (o) W. P. 213. (p) V. D. L. 1. 3. 6.

illegal. Any marriage contracted during the life of a former husband or wife is illegal and void except when the party to such second marriage has been divorced from the bond of the first marriage, or when the first marriage has been declared void by the decree of some competent Court (q).

(2) Marriage was also prohibited between persons who were too nearly **related in blood or affinity** (o). Under the ancient law there were three principles of prohibition viz:- (1) Members within the same family group could not marry each other. (2) Children who are under a system of polygamy and polyandry between groups of brothers and groups of sisters, may have had a common parent, were prohibited from marrying each other. (3) A person could not marry a descendant or collateral.

Marriage cannot be contracted between parties in any nearer degree of relationship than that of first cousins, being the children of a brother and sister. This, however, is the most common, and is considered the most becoming matrimonial union that has been made. But the children of two brothers cannot intermarry, nor can the children of two sisters, their offspring being considered respectively brothers and sisters to each other. Incestuous marriages, and such intercourse between the sexes are penal, but such matters were not inquired into publicly. If the parties were of superior rank, the King inquired into them privately and reprehended the parties or awarded punishment, without assigning the reason. The Chiefs pursued the same course with similar cases among the commonalty in the Provinces. The marriage of a man with a woman of superior caste to himself is prohibited; and even carnal conversation between the sexes of different castes is penal, specially the connexion of a higher caste woman with a lower caste man. When a woman degraded herself, by having connexion with a man of a lower caste than her own, her criminality cast a stain on her family, which formerly could only be obliterated by the family putting her to death, but this they could not do without

(q) Section 6 of 44 of 1952

permission from the King. However, in the late reigns, this extremity was avoided, the King taking the woman to himself as a slave and sending her to one of the Royal villages as such (r).

Ordinance No. 3 of 1870 (Chapter 96), the New Kandyan Marriage and Divorce Act No, 44 of 1952 and the General Marriage Ordinance No. 19 of 1907 (Chapter 95) have laid down the prohibted degrees as follows:–

"No Kandyan marriage shall be valid– (a) if either party thereto is directly descended from the other; or (b) if the female party thereto is the sister of the male party thereto either by the full or the half blood, or the daughter of his brother or of his sister by the full or the half blood, or a descendant from either of them, or the daughter of his wife by another father or his son's or grandson's or father's or grandfather's widow; or (c) if the male party thereto is the brother of the female party thereto either by the full or the half blood, or the son of his brother or of her sister by the full or the half blood, or a descendant from either of them, or the son of her husband by another mother, or her deceased daughter's or granddaughter's or mother's or grandmother's husband." No marriage or cohabitation shall take place between persons who, being subject to Kandyan Law, stand towards each other in any of the degrees of relationship specified above. In the event of any marriage or cohabitation between such persons, each such person, shall be guilty of an offence (s).

No Kandyan Marriage shall be valid (a) if one party thereto has contracted a prior marriage, and (b) if the other party to such prior marriage, is still living, unless such prior marriage has been lawfully dissolved or declared void (t).

(3) **Persons under age:** Under the ancient law the age of puberty was the age of manhood and discretion; and a young man was capable of marriage at the age of sixteen years (u).

(r) S. D. 35. (s) Section 11 of 3 of 1870, Section 5 of 44 of 1952 & Sec. 15 of 19 of 1907. (t) Section 6. (u) P. A. 2.

The Marriage and Divorce Act No. 44 of 1952 has laid down the age for marriage as follows:- "No Kandyan marriage shall be valid if, at the time of marriage, (a) the male party thereto is under the lawful age of marriage; or (b) the female thereto is under the age of lawful marriage; or (c) the male and female parties thereto are both under the lawful age of marriage.

Notwithstanding anything in sub-section 1, a Kandyan marriage shall be deemed not to be or to have been invalid under that sub-section by reason of both parties thereto being, at the time of marriage, under the lawful age of marriage, (a) if both parties thereto cohabit as husband and wife for a period of one year after they have attained the lawful age of marriage, or (b) if a child is born of the marriage before the party aforesaid has attained the lawful age of marriage" (v).

Lawful age of marriage (a) in relation to the male party to a marriage means sixteen years of age; (b) in relation to the female party to a marriage means 12 years of age (w).

(4) Marriage was also prohibited between persons of different castes. Under the ancient law the parties must be of the same caste and of equal family, respectability and rank (x). But so far back as 1848 the Supreme Court has held that difference of castes does not render a marriage null and void (y).

II. Consent of Parents:- Under the ancient law, the alliance had to be countenanced by the respecitve heads of the families and also by the relations to the third or fourth degree on both sides (z). This consent is no longer necessary. The consent of a competent authority is hereby required to the marriage under this Act of a minor subject to Kandyan Law.

Competent authority in relation to a minor, means,(a) the father of a minor; or (b) if the father is dead, or is under any legal incapacity, or unable to give or

(v) Section 4. (w) Section 66. (x) S. D. 30. (y) Austin 235. (z) S. D. 30

refuse consent by reason of absence from Ceylon, the mother of a minor; or (c) if both the father and mother of the minor are dead, or under any legal incapacity, or are unable to give or refuse consent by reason of absence from Ceylon, the guardian or guardians of the minor appointed by the father, or, if the father is dead or under any legal incapacity, by the mother or, if the mother is dead, or is under any legal incapacity, by a competent Court; or (d) if both the father and mother of the minor are dead, or are under any legal incapacity, or unable to give or refuse consent by reason of absence from Ceylon, and if further, no guardian or guardians of the minor has or have been appointed by the father, mother or a competent Court or guardian or guardians so appointed is or are dead, or is or are under any legal incapcity, or is or are unable to give or refuse consent by reason of absence from Ceylon, the District Registrar for the District in which the minor resides (a).

Minor means a male person under eighteen years of age or a female person under sixteen years of age(w).

The District Registrar, may after summary inquiry give or withhold his consent to such marriage (b). An appeal against the refusal of a competent authority to give his consent to the marriage of a minor shall be to the District Court having jurisdiction in the area in which the minor resides (c). The decision of a District Court on any such appeal is final and conclusive (d). But if the marriage is sought to be registered under the General Marriage Ordinance of 1907 the consent of the father, mother or guardian is necessary when one or both parties are under the age of twenty one years. If the person whose consent is necessary unreasonably witholds such consent the District Judge of the District within which the minor is resident may, after summary inquiry, give such consent. A consent given by a District Judge to the marriage of a minor is not a judgment decree or order within the meaning of section 75 of the Courts Ordinance (e).

(a) Section 8. (b) Section 10. (c) Section 11 (d) Sectlon 12.
(e) Fernando vs Fernando (1908) 5. C. W. R. 156.

III. Consent of parties. The will or consent of the parties is the very essence of this contract. Hence a marriage which takes place under the influence of fraud force or fear is ipso facto void; but the subsequent voluntary cohabitation of persons when the fear or force no longer exists will give validity to the marriage. There is also an absence of will or consent, when either party marries under the influence of error or mistake, circa substantia, as in respect of person or sex, not when it regards the name, fortune or personal qualities (f).

IV. Formalities required by Law. As already stated only marriages between persons subject to the Kandyan Law can be solemnized and registered under the Kandyan Marriage Divorce Act No 44 of 1952. The registration of a marriage under this Act between persons either of whom is not a person subject to the Kandyan Law is prohibited. Marriages between Kandyans can also be registered under the General Marriage Ordinance of 1907.

Under the Kandyan Mrriage Ordinance.

(1)**Notice of Marriage.** Under the Kandyan Marriage and Divorce Act, notice of a prospective Kandyan Marriage has to be given as follows:-

Section 16 (1). Where both parties thereto have resided in the same division for a period of not less than ten days reckoned from the date of service of the notice, one party thereto shall serve notice thereof on the Divisional Registrar for that division or on the District Registrar for the district in which that division is situated.

(2) Where both parties thereto have resided in different divisions for the period referred to, in paragraph (1) of this section, each party thereto shall serve notice thereof on the Divisional Registrar for the division in which that party so resided or on the District Registrar for the District in which that division is situated.

Provided that where both such Divisions are situated in the same District, notice of marriage shall, instead of being served by each party thereto on the

(f) W. P. 215.

District Registrar for that District under the preceding provisions of this section, be served by one such party on that District Registrar.

(3) Where only one party has resided in any division for the period referred to in paragraph (1) of this section, that party shall serve notice thereof on the Divisional Registrar for that Division or on the District Registrar for the District in which that Division is situated.

(4) Where both parties thereto have not resided in any Division for the period referred to in paragraph (1) of this Section, one such party, being a party who has resided in a Division for a period of not less than four days reckoned from the date of service of the notice, shall serve notice thereof on the Divisional Registrar for that Division or on the District Registrar for the District in which that Division is situated.

(5) In the event of the absence from Ceylon of one party thereto the other party may give notice thereof under paragrph (3) or paragraph (4) of this section in anticipation of the arrival in Ceylon of such party.

Section 18. In any case where notice of a prospective Kandyan Marriage has been served on a Registrar under this Act:–

(1) The Registrar shall, upon application made in that behalf by a party thereto, issue to that party a certificate (herein after referred to as a "Marriage Notice Certificate") in respect of the marriage.

(2) The Registrar shall not issue the Marriage Notice Certificate (a) if any lawful impediment or other lawful hindrance to the issue thereof has been shown to him; or (b) if being a District Registrar, any objection to the issue thereof has been made to him under this Act, unless an order overruling that objection has been made by him under section 21; or (c) if, being a Divisional

Registrar, any such objection has been made to him, except upon the receipt by him of a certified copy of an order under Section 21 overruling that objection.

(3) Where the provisions of paragraph (1) or paragraph (3) or paragraph (4) of Section 16 apply in the case of the marriage, the Registrar, (a) if he is a District Registrar, shall not issue the Marriage Notice Certificate:– (i) before the expiry of a period of twelve days reckoned from the date of the marriage notice made by him in respect thereof, unless a party thereto makes application in that behalf and also makes and subscribes the declaration required by paragraph (5) of this Section; or (ii) after the expiry of a period of three months reckoned from that date; and (b) if he is a Divisional Registrar, shall not issue the Marriage Notice Certificate:– (i) before the expiry of a period of twelve days reckoned from the date of the marriage notice entry made by him in respect thereof except under the authority of a special licence issued under section 19; or (ii) after the expiry of three months reckoned from that date.

(4) Where the provisions of paragraph (2) of Section 16 apply in the case of the marriage, the Registrar (a) if he is a District Registrar in whose District both parties thereto resided for the period referred to in that paragraph, shall not issue the Marriage Notice Certificate– (i) before the expiry of a period of twelve days reckoned from the date of the Marriage Notice entry made by him in respect thereof, unless a party thereto makes application in that behalf and also makes and subscribes the declaration required by paragraph (5) of this section, or (ii) after the expiry of a period of three months reckoned from that date; and (b) if he is a Divisional Rcgistrar shall not issue the Marriage Notice Certificate–(i) except upon the production of a certified copy of the notice thereof served on any other Registrar under that paragraph; or (ii) before the expiry of a period of twelve days reckoned from the date of the

Marriage Notice entry made by him in respect thereof or from the date of the Marriage Notice. Entry made by such other Registrar in respect thereof, which ever date is later except under the authority of a Special Licence issued under Section 19 or upon the production of a Marriage Notice Certificate issued by such other Registrar in respect of the marriage; or (iii) after the expiry of a period of three months reckoned from the earliest of the two dates referred to in the last preceding sub-paragraph of this paragraph; and (c) if he is a District Registrar in whose District only one party thereto resided for the period referred to in that paragraph, shall not issue the Marriage Notice Certificate- (i) except upon the production of a certified copy of the notice thereof served on any other Registrar under that paragraph; or (ii) before the expiry of a period of twelve days reckoned from the date of the Marriage Notice entry made by him in respect thereof or from the date of the Marriage Notice entry made by such other Registrar in respect thereof, which ever date is later, unless a party thereto makes application in that behalf and also makes and subscribes the declaration required by paragraph (5) of this section or produces a Marriage Notice Certificate issued by such other Registrar in respect of the marriage; or (iii) after the expiry of a period of three months reckoned from the earlier of the two dates referred to in the last preceding sub-paragraph.

(5) Any party to the marriage who desires to obtain a marriage Notice Certificate from a District Registrar before the expiry of a period referred to in paragraph (3) (a) (i) or paragraph (4) (a) (i) or paragraph (4) (c) (2) of this section shall appear in person before that Registrar and make and subscribe a declaration to the following effect:–

(i) that there is no lawful impediment or other lawful hindrance to the marriage; and

(ii) that the consent of any person to the marriage is required by this Act and that such consent has been obtained or that the consent of any person to the marriage is not required by that Act.

The declaration shall bear a stamp or stamps of the prescribed value which shall be supplied by the party making the declaration.

(6) A Marriage Notice Certificate issued by a Registrar under this sectton— (a) shall be in the prescribed form; (b) shall contain the prescribed particulars; and (c) shall be signed by the Registrar.

Section 19 (i) .The following provisions shall apply in the case of a prospective Kandyan Marriage in respect of which a special licence is required for the issue of a Marriage Notice Certificate before the expiry of the period referred to in paragaph (3) (b) (i) of section 18:- (a) Where the notice of the marriage has been served upon the Divisional Registrar for a Division under paragraph (1) or paragraph (3) or paragraph (4) of section 16, a party to the marriage may apply to the District Registrar in whose district that division is situated for a Special Licence authorising such Divisional Registrar to issue the certificate before the expiry of that period. (b) Subject as hereinafter provided the District Registrar shall, upon the receipt of the application, issue the licence. (c) The District Registrar shall not issue the licence:- (i) if any lawful impediment or other lawful hindrance to the issue of the certificate has been shown to him; or (ii) if an objection has been made under this Act to the issue of the certificate, unless an order has been made under section 21 overruling that objection. (d) The District Registrar shall not issue the licence except upon the production of a certified copy of the notice served on the Divisional Registrar. (e) The District Regstrar shall not issue the licence unless the applicant therefor makes and subscribes the declaration required by sub-section (3) of this section.

(2) The following provisions shall apply in the case of a prospective Kandyan Marriage in respect of which a Special Licence is required for the issue of Marriage Notice certificates before the expiry of the period referred to in paragraph (4) (b) (ii) of section 18; (a) where notice of the marriage

has been served upon two Divisional Registrars under paragraph (2) of section 16, a party to the marriage may apply to the District Registrar in whose District the Division of either such Divisional Registrar is situated for a Special Licence authorizing each such Divisional Registrar to issue a certificate before the expiry of that period. (b) Subject as hereinafter provided, the District Registrar shall, upon the receipt of the application, issue the licence. (c) The District Registrar shall not issue the licence:– (i) if any lawful impediment or other lawful hindrance to the issue of either such certificate has been shown to him; or (ii) if any objection has been made under this Act, to the issue of either such Certiricate, unless an order has been made under section 21 overruling that objection. (d) The District Registrar shall not issue the licence except upon the production of a certified copy of the notice served on each such Divisional Registrar. (e) The District Registrar shall not issue the licence unless the applicant therefor makes and subscribes the declaration required by sub-section (3) of this section.

(3) Before a special licence is issued by the District Registrar under this section the applicant shall appear in person before the Registrar and make and subscribe a declaration to the following effect:- (a) that there is no lawful impediment or other lawful hindrance to the marriage; (b) that the consent of any person to the marriage is required by this Act and that such consent has been obtained or that the consent of any person to the marriage is not required by this Act; and (c) that no objection to the issue of the certificate has been made under this Act or that any such objection has been made but has been overruled by order made under section 21.

The declaration shall bear a stamp or stamps of the prescribed value, which shall be supplied by the party making the declaration.

(2) **CAVEAT. Section 20 (1)** .... Any person – (a) being a person whose consent to a Kandyan Marriage is required by this Act; or (b) being a person who is interested in such marriage, may object in writing to the issue of a Marriage Notice Certificate in respect thereof.

(3) **Solemnization and Registration:** Section 22 (1). A Registrar on whom notice of a prospective Kandyan Marriage has been served under this Act, shall unless there is any lawful impediment or other lawful hindrance to the marriage, solemnize the marriage in the manner hereinafter provided upon the production by the parties to the marriage, of the following document or documents, as the case may be:- (a) Where the provisions of paragraph (1) or paragraph (3) or paragraph (4) of section 16 apply in thc case of the marriage upon the production of the marriage notice certificate issued by such Registrar. (b) Where such Registrar is a District Registrar and where both parties to the marriage resided in different Divisions (being Divisions situated in his District) for the period referred to in paragraph (2) of section 16, upon the production of the Marriage Notice Certificate issued by him. (c) Where such Registrar is a District Registrar and where both parties to the marriage resided in different Divisions (one of which is not situated in his District) for the period referred to in paragraph (2) in section 16, upon the production of the following Marriage Certificates namely, the Marriage Notice Certificate issued by such Registrar and the Marriage Notice Certificate issued by any other Registrar on whom notice of the marriage was served under that paragraph. (d) Where such a Registrar is a Divisional Registrar and where the provisions of paragraph (2) of section 16 apply in the case of the marriage, upon the production of the following Marriage Notice Certificates namely the Marriage Notice Certificate issued by such Registrar and the Marriage Notice Certificate issued by any other Registrar on whom the notice of the marriage was served under that paragraph.

Section 23 (1). Immediately after the Solemnization of a Kandyan Marriage by a Registrar under the last preceding section, the Registrar shall comply with the following provisions:– (a) The Registrar shall register accurately in his Marriage Register the following particulars relating to the marriage:-(i)Name in full, age, Civil Condition (whether unmarried, widowed or divorced) occupation or calling and place of residence of each party to the marriage; (ii) the nature of the marriage (whether in binna or diga) which the Registrar is hereby required to ascertain from the parties thereto prior to making the entry; and (iii) the name in full occupation or calling and place of residence of each witness to the marriage. (b) The Registrar shall cause the marriage registration entry to be signed by both parties and the witnesses to the marriage, and himself append his own signature to the entry.

Under the repealed Ordinance No. 3 of 1870, the parties had to be resident for at least twenty one days and the marriage could be solemnized and registered after the expiration of twenty one days from the date of notice of marriage. But under the new Act No. 44 of 1952 parties have to be resident for at least ten days before notice and the marriage could be registered only after the expiration of twelve days from the date of Notice of Marriage thus bringing the Procedure in line with the General Marriage Ordinance. There is also provision for the Registration of Marriages by Special Licence as in the General Marriage Ordinance.

Summary,. If both parties have been resident in the same Division for a period of not less than ten days, one of the parties should give notice to the Divisional Registrar for that Division or to the District Registrar of the District in which such Division is situated. If the parties have dwelt in different Divisions then each party should give notice to the Divisional Registrar or to the District registrar of the Division in which he or she has dwelt for not less than ten days next preceding the giving

of such notice. If one of the parties, has not been resident in the island for ten days next immediately preceding the giving of notice, then notice should be given by the other party, who has been so resident to the Divisional Registrar of the District. If neither party has been resident for ten days in the Island, notice may be given to the Divisional Registrar or the District Registrar. The notice given by one party, may be given in anti-. cipation of the arrival of the other party from abroad (g)

Every such notice may be given to the Registrar at any place within his Division and should be in the prescribed form. Such notice should state the name in full, race, age, profession, civil condition, and dwelling place of each of the parties intending marriage, and if the case be so that the other party is absent from the Island or has not been resident for ten days in any part of the Island, and also name in full and rank or profession of the father of each party, and the nature of the marriage whether in binna or diga. The notice should bear on the face of it or have attached thereto the written consent of any person whose consent is required by law. The party giving the notice should make a declaration in writing on the body or at the foot of the notice that he or she believes that there is no legal impediment or other lawful hindrance to the said marriage and that he or she has for the space of ten clear days or other prescribed period immediately preceding the giving of such notice dwelt within the Division of the Registrar to whom such notice is given, and that the consent of the person or persons whose consent is required by law has been given. Every such notice and declaration should be signed and subscribed in the presence of the Registrar and two respectable witnesses. The witnesses should be personally acquainted with the party giving the notice, and (in the event of the party not being known to the attesting officer) also with the attesting officer, and should sign the notice. The full names, rank or profession and place of abode of the witnesses should be entered in the notice. At the foot of the notice and declaration, the attesting officer should make

(g) Section 16.

a certificate substantially as in the final column of the prescribed form. Such a notice should bear a stamp of Thirty Rupees where one of the parties only has been resident in the Island for four days. In all other cases such notice must bear a stamp of Ten Rupees.

Where notice is given to two Registrars, each of them should furnish a copy of the notice to the party by whom notice was served,

At any time not less than twelve days nor more than three months from thc entry of the notice the Registrar, or where notice has been given to two Registrars, each of them is bound, upon application of the party giving notice, and on receipt of the certified copy of the notice, if any, given to the other Registrar, to issue a certificate referred to as the Marriage Notice Certificate, provided that in the meantime, no lawful impediment to the issuing of such certificate has been shown to the Registrar and provided that the issuing of such Certificate has not been forbidden by a Caveat entered as provided in the Ordinance. **Special Licence.** Provision is also made enabling parties to have a marriage registered by Special Licence.

The District Registrar of the District within which notice has been given, may upon the production of a certified copy of such notice issue at any time, after the entry of the notice, a licence under his hand, authorising the Registrar to whom notice has been given, to issue his Marriage Notice Certificate, provided that in the meantime no lawful impediment to the issuing of such certificate has been shown to the satisfaction of the District Registrar, and provided that the issue of such certificate has not been forbidden, or a Caveat entered in the manner herein after provided. Where the parties have given notice to two Registrars, the District Registrar, within whose jurisdiction one or both of such notices have been given, may upon the production of certified copies of each notice, issue a licence to each such Divisional Registrar authorizing the issue of the Marriage Notice Certificate. Before the issue

of such licence, one of the parties should appear personally before the District Registrar and make and subscribe a declaration to the effect that there is no lawful impediment or other lawful hindrance to the marriage, and that the consent of any person to the marriage is required by this Act and that such consent has been obtained or that the consent of any person to the marriage is not required by this Act. This declaration should bear stamps of the value of Rupees Thirty. A Marriage Notice Certificate issued by the Registrar should be in the prescribed form, should contain the necessary particulars and should be signed by the Registrar. Where the issue of the Certificate is authorised by Special Licence, the Registrar should certify that he was authorised to issue same by licence of the District Registrar (i).

Caveat. Any person whose consent to a marriage is required or any person who is interested in such marriage may object to the issue of a Marriage Notice Certificate in respect thereof. The District Registrar is empowered to hold a summary inquiry and make order upholding or overruling such objection (j).

Solemnization and Registration. A Registrar on whom notice of a prospective Kandyan Marriage has been served, should solemnize the marriage upon production, by the parties, of the Marriage Notice Certificate issued by such Registrar. Where notice has been given to two Registrars then the Marriage Certificates issued by both Registrars should be produced. It is only a Registrar on whom notice has been served that can solemnize a marriage. Immediately after the solemnization, the Registrar should register the marriage by causing an entry to be made in the Marriage Register. Such entry should be signed by both the parties, the witnesses and by the Registrar (k).

Under the General Marriage Ordinance

Notice. The notice that has to be given under this Ordinance is similar to that under the Kandyan

(i) Section 19. (j) Section 50. (k) Sections 22 and 53.

Marriage and Divorce Act. The notice can be attested by the Registrar, a Justice of the Peace, or a Notary or a Minister. But under the Kandyan Act the notice should be attested by the Registrar only.

Special Licence. The procedure is the same as that under the Kandyan Marriage Act.

Caveat. The procedure here too is the same as under the Kandyan Marriage Act. In the event of a marriage being forbidden or of a Caveat being entered the Registrar shall frothwith report to the District Judge. The District Judge is empowered, after summary inquiry, to order the certificate to issue or not to issue. Under the Kandyan Act the District Registrar is the authority who will inquire and make the order.

Solemnization and Registration. Here, a Registrar to whom notice has been given, can solemnize and register the marriage. On the production of the certificate or certificates, a Minister may solemnize and register such marriage.

As already stated no marriage contracted after the thirty first day of December 1870 is valid or legal unless it is registered uuder the Kandyan Marriage Ordinance of 1870, or the Kandyan Marriage and Divorce Act No. 44 of 1952 or under the General Marriage Ordinance of 1907. Hence registration is the sole test of the validity of a marriage.

Although the formalities and ceremonies observed under the ancient law are now not necessary for the validity of a marriage, yet in most cases these ceremonies are performed before or after the registration of a marriage.

Best Evidence of Marriage. The entry in the register of marriage is deemed to be the best evidence of the marriage contracted (o). If it does not appear in the register whether the marriage was contracted in binna or diga, such marriage should be presumed to have been contracted in diga until the contrary is shown (p).

(o) Section 28 of No. 44 of 1952 and Section 38 of 19 of 1907.
(p) SecIion 28 of 44 of 1952.

As between, or as against the parties, or their respective representatives in interest, the register of the marriage is conclusive of the intention with which the marriage was celebrated, unless the case is shown to be one of mistake or fraud, or can otherwise be brought within the equitable exceptions of section 92 of the Evidence Ordinance. Persons not parties, however, are not bound by the register, but are entitled to show that the true character of the marriage was not in fact such as it is represented to be.

(A marriage in diga is when a woman is given away, and is, according to the terms of the contract, removed from her parent's abode, and is settled in the house of her husband.)

(A marriage in binna is when the bridegroom is received into the house of the bride, and according to certain stipulations, abides therein.)

From this it would seem that the definitions include not only the contract of marriage between the parties, but also the subsequent carrying out of the terms of the contract, relating to residence. The entry in the marriage register cannot be conclusive in matters of fact not existing at the time of entry. In the absence of evidence, there would be a presumption that the terms of the contract relating to residence have been carried out. There is no reason for excluding oral testimony relating to the carrying out of this term of the contract, which was not a matter of fact occurring at the time of the contract (q).

The only consequence of a diga married daughter preserving or subsequently acquiring binna rights is that the forfeiture of the rights of paternal inheritance does not take place, but she inherits as though she was married in binna. It does not alter the character of the marriage itself. The husband does not cease to be a diga married husband and begin to be a binna married husband (r).

By Ordinance No. 39 of 1938 the Legislature has enacted that a marriage registered (after the commencement of that Ordinance viz; after the thirty first day

(q) Mampitiya vs Wegodopala (1912) 24 N. L. R. 129.
(r) Chelliah vs Tea Co. 34 N. L. R. 89.

of December 1938) as a diga marriage should be deemed to be a diga marriage, and a marriage registered as a binna marriage should be deemcd to be a binna marriage (s).

Action to compel Marriage. In Ceylon no suit or action shall lie in any Court to compel the solemnization of any marriage by reason of any promise or contract of marriage, or by reason of the seduction of any female, or by reason of any cause whatsoever. No such promise or contract, or seduction shall vitiate any marriage duly solemnized and registered under this Ordinance. Nothing herein contained shall prevent any person aggrieved from suing or recovering in any Court damages which are lawfully recoverable for breach of promise of marriage, for seduction, or for any other cause. Provided that no action shall lie for the recovery of damages for breach of promise of marriage unless such promise of marriage shall have been made in writing (t). This provision was embodied in the earlier Ordinance No, 2 of 1895 too.

Breach of Promise. The Privy Council has held that an action does not lie in Ceylon, for every breach of promise to marry. A restriction is imposed by section 19 which enacts that no action shall lie for the recovery of damages for breach of promise of marriage, unless such promise shall have been made in writing. The policy of the Legislature has been to limit the cases in which an action can be brought to those in which the promise itself is in writing. It may be contained in one or two or more documents. Documentary evidence which does not in express or unequivocal terms contain a promise to marry is insufficient even though it may afford evidence of an oral promise to marry.

Some confusion seems to have arisen in this case, with regard to the meaning of such words as "evidence in writing" and "confirmation". The distinction which must always be borne in mind is between writing which contains the promise to marry and writing which may afford corroboration of a previous oral promise. The latter, which is sometimes described as writing "which

(s) Section 9. (t) Section 19 of Ordinance No. 19 of 1907.

evidences a previous oral promise" is insufficient to support an action for breach of promise. The writing required to satisfy the Ordinance must contain an express promise to marry or confirm a previous oral promise to marry, i.e. admit the making of the promise and evince continuing willingness to be bound by it. An illustration of writing which, while not containing in itself a promise to marry, might be put forward as affording evidence in writing of an oral promise to marry is to be found in the case of a writing which says, "I assure you I will carry out the promise I made last month". On such a writing the question at once arises, was it a promise to marry or a promise to lend money or some other promise. The writing by itself only establishes that a promise was made. If it were possible to establish by oral evidence that the "promise made last month" was a promise to marry, the conflicts and uncertainties which may arise would be almost as much, if not quite as much, as in a case resting on oral testimony alone. In answer to oral evidence that it was a promise to marry, a contesting defendant may say it was a promise other than a promise to marry. Such a writing is insufficient to satisfy the Statute. In Jayasinghe vs Perera (u) the plaintiff and the defendant had promised to marry each other, and plaintiff at the request of her father, wrote to the defendant asking for a written promise of marriage. In reply the defendant wrote as follows:- "I am not agreeable to what papa says, for this reason, that is, if I trust darling should not darling trust me? If they have no faith in my word I cannot help it. If they don't believe my word, I am not to blame". The Supreme Court had held that this letter was sufficient compliance with the requirements of the Ordinance. The Privy Council was of opinion that this decision could not be upheld as the statements in the letter were in effect saying, "you must rest content with such remedy as is offered you by an oral promise, and is an express refusal to give what the Ordinance required (v). The act of giving notice of marriage or

(u) 9 N. L. R. (v) Udalagama vs Iranganee Boange Pr. c. 61 N. L. R. 25.

of causing the banns to be published cannot, even on the most elastic construction of the term be held to amount to a promise of marriage in writing (w). "If ever I marry anybody, I assure you that it will be you. If by any mischance, I fail to do so I will remain single as I am" is not a promise to marry (x).

The plaintiff and the defendant had verbally agreed to marry and the defendant wrote the following words:- "I won't tease you till we get married, shall we fix the happy day for 8th April". It was held that the letter amounted to a written promise and that the previous verbal agreement did not prevent plaintiff from relying on the promise in the letter (y). A marriage settlement contained the recital that "marriage between the parties had been arranged and was shortly to be solemnized and that in consideration of the said intended marriage, the plaintiff and her mother had agreed to convey to the defendant certain properties and that the transfer was to take effect after the solemnization of the marriage". The document, which was signed by the plaintiff and her mother and the defendant, was held to be a writing as required by the Ordinance (z). The signing of the Bethrothal Register before a Priest is a valid promise (a).

Where it was proved that the plaintiff, up to a short time before the marriage contract, had a woman, of a disreputable character living with him as his concubine by whom he had two natural children and where the defendant became aware of the fact, only after the contract had been entered into, the defendant was entitled to repudiate the contract (b). A minior cannot bind himself by a preliminary agreement to marry (c). An action for breach of promise cannot be founded on a promise made by a man who was already married. Since a subsisting marriage is an absolute impediment

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(w) Misinona vs Arnolis 17 N. L. R. 425:Abilinu Hamine vs Appuhamy 21 N. L. R. 442. (x) Philip vs Weerasinghe 38 N. L. R. 261. (y) Beling vs Vethacan I. A. C. Rep. 1: (z) Cooray vs Cooray 30 N. L. R. 310. (a) Ana Fernando vs Jokins 30 N. L. R. 274. (b) Vand. 177. (c) Navaratne vs Kumarihamy 29 N. L. R. 408.

to marriage, a married person cannot contract a valid engagement even if the agreement contemplates fulfilment only after the impediment had ceased to exist (d).

Damages. On the question of damages, the poverty of the defendant should be considered, so that he may not be left totally destitute, while, at the same time, the amount should be such as to make it his interest, in case the plaintiff would still accept him, to make atonement for his misconduct (e).

The fact that it was the plaintiff who induced the defendant to promise to marry her is surely an item of evidence to be taken into account in derermining whether exemplary damages should be awarded. The fact that both parties knew before the engagement that there was a serious obstacle in their way namely the improbability of the defendant's mother consenting to the marriage, and the breach was due to this anticipated cause, should be taken into consideration in deciding upon the quantum of damages (f),

A wife could maintain an action for damages against persons inducing the husband to refrain from cohabitation, that is to desert his wife and to deprive her of the consortium of her husband (g).

(2) **Seduction.** Seduction or deflowering of a virgin even with her consent would form the ground of an action for reparation. If the seducer does not marry her, he could be compelled to pay compensation for loss of honour. To maintain this action she must make oath that she never had carnal connection with any other man. Therefore a widow cannot maintain this action. In case she is with child he must pay lying in charges and in case of the death of the child, the cost of burial. When a man is ready to declare upon oath (to which he is bound in all cases when he denies the charge) that he has never had carnal connection with the woman, and she is not prepared to show cause why his oath should not be admitted, his oath has the pre-

(d) Chandrasena vs Karunawathiə 57 N. L. R. 298 (e) Naget vs Quaker Ram 20-33, 52 (f) Kuruppu vs Iranganee Gunasekara 47 N. L. R. 505. see also 23 C. L. W. 107. (g) Mohottiappu vs Kiribanda 25 N L R 221.

ference (h). The Roman Dutch Law action for seduction gives two remedies alternatively. The first was the marriage of the plaintiff by the defendant; the second was the giving by him of damages in the nature of dowry (i).

The essence of the action for seduction is the deflorarion of a virgo intacta (untouched virgin), and the action might be brought at once on the completion of the first act of intercourse (j). This action lies even where the woman was a consenting party (k).

The Supreme Court has held that a seduced girl, who knew at the time that the seducer was a married man, cannot maintain an action for damages. (l). But in South Africa it has been held by a Full Court that such knowledge was no bar to the maintenance of an action for damages (m).

Where the defendant denies the seduction, the plaintiff's evidence must be corroborated in some material particular, that is to say, (1) by evidence as to some fact or state of things pertaining to the view that the relationship or conduct of the parties supports the allegation of the plaintiff that it resulted in sexual intercourse, or (2) by evidence as to the conduct or action on the part of the defendant which constitutes an acknowledgment by him that the situation and relationship between him and the plaintiff was such as the plaintiff deposes to (n). Any false denial by the defendant may properly be considered to lend some corroboration to the woman's story (o). The defendant's false denial of irrelevant matters, does not constitute corroboration of plaintiff's story. The defendant falsely denied that his hand-writing appeared in an exercise book. But there was no proof whatever that the book belonged to the

(h) V. D. L. 1. 16. 4 (i) Fernando vs Fernando (1920) 3 Cey Law Rec. 45. (j) Lucinahamy vs Diashamy (1908) 11 N. L. R. 242 (k) Rosahamy vs Carolishamy (1924) 26 N L R 319 (l) Meenatchipillai vs Sanmugam (1916) 19 NLR 209 (m) Benzemon vs Barton (F. B. South Africa (1919) 1 Cey. Law Rec. 98 (n) Orange vs Perera (1929) 31 N L R 85 (o) Vedin Singho vs Nancy Nona (1949) 51 N L R 209.

plaintiff or had ever been in her possession. This false denial did not amount to corroboration. A false denial by the defendant of his receipt of a letter from the plaintiff would not be corroboration if it was written after the time of conception and after intimacy had admittedly ceased. Such a letter cannot be considered as a former statement of the writer for purposes of section 157 of the Evidence Ordinance (p).

In the assessment of damages, therefore, even where the conduct of the defendant is such that he deserves no sympathy, the Court should not grant merely vindictive damages without taking into consideration the dowry which the plaintiff would have received on an ordinary marriage (i).

The foundation of the Roman Dutch Law action for seduction of a virgin arises from the injury to herself. Therefore the section governing the claim is section 10 of Ordinance No. 22 of 1871, which enacts that no aclion shall be maintainable for any loss, injury or damages unless the same shall be commenced within two years from the time when the cause of action shall have arisen. Hence a claim for damages arising from seduction is prescribed in two years from the date of defloration (q).

Consequences of Marriage. There is no permanent community of goods between the husband and wife and their respective estates remain distinct from each other. In a diga marriage, whatever property the wife brings with her in the shape of dowry, and even what she acquires independently of the husband, after marriage, he has no power over it; but the wife, in the absence of the husband, is considered to be the manager of her husband's affairs, and, therefore, under such circumstances, she may make use of his property for the maintenance and benefit of the family. She may sell the produce for this purpose and even mortgage the lands, if necessary, to procure subsistence though she cannot sell them; but the

(p) Somasena vs Kusumawathie (I958) 60 N. L. R. 355
(q) Abeydeera vs Podisingho (I926) 28 N. L. R. 158.

husband can make no such use of the wife's property without her special consent. The husband married in binna has no privileges in his wife's house; he has no power over her property; he may be expelled or divorced by the wife or by her parents at any moment.

Whether the marriage was contracted in diga or in binna, the husband is not thereby invested with any power over his wife's estate, and has no authority to dispose of any part of that estate, by gift or bequest, or sale or mortgage, without the wife's special consent and sanction. The wife's goods are not subject to seizure on account of the husband's debts, whether such debts were contracted previous to the marriage or during coverture. But if the wife had authorised her husband to contract a debt, then the wife is equally bound. The wife's property is not subject to confiscation on account of her husband's treason against the State (r).

A Kandyan wife by the common law which regulates her rights is, and has always been, in a stronger position than her English sister. She was in the eye of the law a femme sole and enjoyed all the rights which a married woman in England has under the Married Women's Property Act of 1882 and more specially, if she was married in binna. A Kandyan wife could maintain an action for damages against persons inducing her husband to refrain from cohabitation, that is, to desert his wife and to deprive her of the consortium of her husband (s).

She could deal with her property without the consent or concurrence of the husband.

Dissolution of Marriage. Marriage is dissolved in two ways:- (1) By Divorce; (2) By death.

Under the ancient law, divorce may be effected with or without a just cause, on the part of the husband or wife, whether the marriage was contracted in binna or diga. A marrriage may also be dissolved by parents,

(r) S. D. 31. P A. 9. (s) Mohottiappu vs Kiribanda (1923) 25 N. L, R. 221,

brothers, or other near relations; and sometimes, for special reasons, by children of a former bed. A dissolution of marriage was effected as follows:- If the husband having sent back his diga wife to her parents or relations did afterwards espouse another woman; or if when he sent away his wife he delivered up to her or to her parents all the goods that she had brought in dowry. Or if the diga wife left her husband's house of her own accord, and then took another husband. Or if the woman's parents disapproving of the marriage contracted of her own accord, or induced by force or fraud to contract, protest and bring their daughter back home; or if the mother had sent away the husband of her daughter married in binna from her house (t). The husband married in binna may be expelled or divorced by the wife or her parents at any moment. But if the binna husband was called to the wife by her parents, in that case, after the parent's death, the binna husband cannot be expelled from the house by the brothers of the wife, without the wife's consent (u).

Ordinance No. 13 of 1859 amended the laws of mariage. It also made important changes in the law of divorce. Under section 31 of that Ordinance the grounds for divorce were:- (1) Adultery by the wife after marriage. (2) Adultery by the husband after marriage, committed with any person within the prohibited degrees of consanguinity. (3) Adultery by the husband, accompanied with gross cruelty. (4) Complete and continued desertion for the space of two years. (5) On proof that the parties to the suit mutually consent to such dissolution. Section 30 enacted that no marriage could be dissolved except by the decree of a District Court.

The law enacted by this Ordinance was in advance of the time. The Kandyan people had never really desired it, and were not even conscious of its existence. In so far as they were conscious of it, they, for the most part ignored it. The people did not trouble to register their marriages. They declined to recognize the new fetters on their dissolubility. They continued

(t) P. A. 12. (u) S. D. 34

to dissolve them as they had done before, and to contract fresh unions which they sometimes registered. The very fact that a marriage was only dissoluble by a suit in the District Court, and only on specified grounds of itself, deterred the populace from registration (v).

The Kandyan Marriage and Divorce Ordinance No. 3 of 1870 (Chapter 96) replaced the Ordinance No. 13 of 1859. With regard to dissolution the Legislature declined to follow the recommendations of Mr. Berwick and the Judges of the Supreme Court to restore the old law, but, instead, substantially enlarged the grounds of divorce, allowing a dissolution by mutual consent, or upon actual separation from bed and board for a year, and they provided that divorces should take place before the Registrar, and should not require a Judicial decree by the District Court (v).

Kandyan Marriage Ordinance. The Kandyan Marriage and Divorce Act No. 44 of 1952 has taken the place of Ordinauce No. 3 of 1870 which has been repealed. The procedure for dissolution is the same as in the Ordinance No. 3 of 1870. Section 32 of the new Act is as follows:-

The dissolution of a Kandyan marriage shall be granted on any of the following grounds:- (a) Adultery by the wife after marriage. (b) Adultery by the husband, coupled with incest or gross cruelty. (c) Complete and continued desertion by the wife for two years. (d) Complete and continued desertion by the husband for two years. (e) Inability to live happily together, of which actual separation from bed and board for a period of one year shall be the test. (f) Mutual consent.

Either party who has a right to apply for dissolution may make such application to the District Registrar of the District in which the party applicant resides.

The District Registrar should, after summary inquiry, dispose of the application by granting the dissolution or refusing the dissolution of such marriage. In making an order the District Registrar (1) should,

(v) Kuma vs Banda F. B. 21 N. L. R. 294.

if both parties have agreed upon any compensation to be made to either or both of the parties, embody the terms of such agreement in his order at the request of the parties; (2) may, in his discretion, provide in the order that the husband should pay a certain sum of money periodically, or make other provision for the maintenance of his wife (if, but only if, the order does not embody any agreement for compensation to be made to her); and (3) may, in his discretion, provide that the husband should pay a certain sum of money periodically or make other provision for maintenance of his children (Section 33).

Any party aggrieved by an order made by a District Registrar may appeal against such order to the District Court of the District in which such party resides. The appeal should be filed within thirty days of the service on such party of the order of the District Registrar (Section 34). Under the repealed Act, the appeal had to be preferred to the Governor.

The registration of the dissolution would be the best evidence of such dissolution before all Courts and in all proceedings in which it may be necessary to give evidence of such dissolution (Section 36).

Where the husband is ordered to pay a certain sum of money periodically or make other provision for the maintenance of wife or children, such order may be enforced, discharged, modified or suspended, and if discharged or suspended, be revived by a District Court as though it were a like order made by that Court under Chapter 42 (Matrimonial actions) of the Civil Procedure Code. No order for maintenance of a wife should be discharged except upon proof that she has been habitually cohabiting with any man since the date of dissolution of marriage (Section 35).

Where a wife obtains an order for maintenance against her husband on dissolution of their marriage, a temporary reunion between them subsequently with a view to remarriage does not amount to a waiver of her right to future maintenance if the contemplated remarriage does not take place (w). It is not obligatory

(w) Wimalawatihie vs Imbuldeniya 55 N. L. R. 13.

on the District Registrar to make an order for the payment of a certain sum of money periodically for the maintenance of his wife and children. But if he has made an order for maintenance for the wife or children, then such order may prevent the Magistrate's Court from making an order again under the General Maintenance Ordinance of 1889. Where no such order has been made, the general provisions of the Maintenance Ordinance, so far as the children are concerned, will still apply (x). The District Registrar has no power to enquire into disputed questions of legitimacy. If the husband denies paternity, the District Registrar is justified in refusing to make an order for maintenance. Such refusal is no bar to an application under the Maintenance Ordinance (y). Where a certificate of dissolution states that the parties had agreed that compensation should be made by the husband to the wife by the transfer of a certain land in favour of one of the minor children of the marriage, such agreement will in no way interfere with the rights of a child entitled to maintenance, for whom the compensation does not make express provision. The compensation referred to in Section 33 (7) (i) is in the the nature of compensation to the spouse to whom it is made for the loss of conjugal society (z). Section 35 gives the same force to an order for maintenance made by a District Registrar as an order made by a Magistrate under the maintenance Ordinance. But it can now be enforced by a District Court as though it were a like order made by that Court under Chapter 42 of the Civll Procedure Code.

When an application for dissolution under the Ordinance No. 3 of 1870 was pending before a Registrar at the time when that Ordinance was repealed and was heard and concluded under the new Act No. 44 of 1952, an order for maintenance made in the application was enforceable by a Magistrate's Court acting under section 20 (5) of the repealed Ordinance (a).

(x) Punchi Amma vs Mudiyanse (1920) 21 N. L. R. 477. (y) Sanchi vs Allisa (1926) 28 N. L. R. 199. (z) Manika vs Naide (1916) 19 N. L. R. 351. (a) Kiribanda vs Bisomenika 60 N. L R. 94; see also 60 N. L. R. 66.

General Marriage Ordinance. As already stated marriages between Kandyans may be lawfully solemnized and registered according to the provisions of the Marriage Registration Ordinance of 1907 (Chapter 95). Under this Ordinance no marriage could be dissolved during the lifetime of the parties except by judgment of divorce a vinculo matrimonii pronounced in some competent Court. Such judgment should be founded either on the ground (1) of adultery subsequent to marriage, or (2) of malicious desertion, or (3) of incurable impotency at the time of such marriage (b),

Adultery is the carnal connection between a married person, whether husband or wife, and any person other than his or her spouse. Adultery is commited either by two persons who are each already married, or by persons one of whom is married, and the other unmarried (c).

Jurisdiction. Any husband or wife may file an action for divorce in the District Court within whose jurisdiction he or she resides (d).

(1) Adultery subsequent to Marriage. When an action is filed by the husband where adultery of the wife is the cause or part of the cause of action, the alleged adulterer must be made a co- defendant, unless the husband is excused from doing so on one of the following grounds:-

(1) that the defendant is leading the life of a prostitute and that the plaintiff knows of no person with whom the adultery has been committed;

(2) that the name of the alleged adulterer is unknown to him though he has made due efforts to discover it;

(3) that the alleged adulterer is dead.

He may also include a claim for pecuniary damages against the co-defendant (e).

On the other hand, a wife who brings an action for divorce against her husband, on the ground of

(b) Section 19 of Ord. No. 19 of 1907. (c) W. P. 250. (d) Section 597 C. P. C. (e) Section 598 C. P. C.

adultery, is not entitled to make the woman with whom the adultery was committed, a co-defendant or claim pecuniary damages from her (f).

Merely inserting in the plaint, the name of the alleged adulterer as a co-defendant, no process being served on him and no steps being taken to bring him into the action is not a sufficient compliance with the requirements of Section 598 (g). The provisions of sections 598 and 599 of the Civil Procedure Code are imperative. Where a plaintiff sues for divorce on the grounds of adultery of the wife but does not make the alleged adulterer a defendant nor apply for an excuse in terms of Section 599 the plaint should be rejected (h). Where the action was brought by the wife on the ground of malicious desertion by the husband and the latter claimed a divorce on the ground of adultery of the wife, the alleged adulterer should be made a party to the proceedings (i).

Where a person filed a plaint praying for divorce and embodied in the plaint a prayer to be excused from naming the alleged adulterer as co-defendant, an order by the Judge that the plaint has been accepted is wide enough to include an allowance of the special prayer in the plaint (j). In an action brought by the wife, the husband filed the answer denying the plaintiff's allegation and accusing plaintiff of misconduct with three persons A, B and C. He claimed a divorce on the ground that the plaintiff was living in adultery with D. He did not make the adultery of his wife with those whom he has not made parties to the action the cause or part of the cause of action. He is under no obligation therefore to make them parties to the action. A husband is free to condone his wife's adultery with any person against whom he does not wish to proceed. For everyone is allowed by our law to renounce his right and forgive the person at whose hands he has suffered the injury. What the law does not allow him to do, except in the circumstances stated in

(f) Alice Perera vs Manuel Perera 2 Cey. Law. Rec. 82. (g) Zeigan vs Zeigan 1 S. C. R. 4 (F. B.) (h) Jasline nona vs Samaranayake 40 N. L. R. 381. (i) Annakadde vs Myappen 33 N. L. R. 198. (j) Amarasekera vs Amarasekera 6 Cey. Law. Rec. 119.

Section 598, is to obtain a decree for divorce on the ground of his wife's adultery with any person whom he does not bring in as a party to the action (k).

In case the District Court is satisfied on the evidence that the case of the plaintiff has been proved and does not find that the plaintiff has been in any manner accessory to or conniving at the act or conduct which constitutes the ground upon which the dissolution is prayed for, or has condoned the same, or that the plaint is presented or prosecuted in collusion with either of the defendants, the court should enter a decree declaring such marriage dissolved. But the Court is not bound to pronounce such decree if it finds that the plaintiff, has during the marriage, been guilty, of adultery,or if the plaintiff has been guilty of unreasonable delay in presenting or prosecuting such plaint, or of cruelty towards the other party or of having deserted or wilfully separating himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct of or towards the other party as has conduced to the adultery. No adultery should be deemed to have been condoned unless conjugal cohabitation has been resumed or continued (l). If the defendant opposes the relief sought on any ground which would have enabled him or her to sue as plaintiff, the Court may give the defendant the same relief which he or she would have been entitled to in case he or she had presented the plaint (m).

In actions for divorce the Court must demand the same general standard of proof beyond reasonable doubt as is required to support a conviction in a criminal Court. Even in the absence of an issue as to condonation of the alleged adulterer, the trial Judge is put upon inqury as to whether there has been condonation or not if the evidence discloses that the parties had resumed living together under circumstances which would justify the belief that a reconciliation had taken place. Conjugal cohabitation can be

(k) Karunatilleke vs Karunatilleke 52 N. L. R. 300. (l) Section 602.
(m) Section 603.

resumed even without a renewal of sexual intercourse between the spouses after reconciliation (n). The fact that a wife, after knowledge of her husband's adultery shares his bed is not strong or conclusive proof of condonation; still less the fact that she merely resided in the same house with her husband. There should be in addition proof of forgiveness, and the reinstatement of the offending spouse (o). The parties may continue to live under the same roof by force of circumstances and not as a result of a true reconciliation. Since reconciliation involves a mutual intention on the part of both spouses to restore what was surrendered, an invitation by the innocent spouse to have intercourse which is rejected by the guilty spouse does not constitute condonation of adultery (p).

If the Court finds that the plaintiff has during the marriage, been conniving at the act or conduct which constitutes the ground upon which the dissolution is prayed for it should dismiss the plaint. Where the plaintiff connived at and was accessory to the adultery on the part of his wife, his action should be dismissed. In such an action the Court has no power to award the plaintiff damages against the defendant (q).

The mere admission of the parties is not sufficient for a decree of divorce (r). The conscience of the Court must be satisfied by proof that a case has been made out for its interposition (s). In an action for divorce on the ground of respondent's adultery the Court may act on the admission of respondent, provided it had no reason to doubt the genuineness of the admission. In this case there was the confession of the respondent in three letters written to the plaintiff. The Court may in a proper case, act on such evidence. In each case the question would be, whether all reasonable ground for suspicion is removed (t).

(n) Jayasinghe vs Jayasinghe 55 N L R 410 (o) Dias vs Mensaline Hamine 46 N L R 193 (p) Baptist vs Selvaraja 59 N L R 284 (q) Dissan Appu vs Babahamy 10 N L R 343 (r) Nell 170 (s) 4 S. C. C. 107 (t) Kandiah vs Sivakannupillai 44 N. L. R. 497.

A person who suspects collusion between parties for the purposes of obtaining a divorce and who intervenes under Section 606 is entitled to rely on collusion that has taken place after the decree nisi was entered (u).

He who seeks to be released from the matrimonial tie must himself be free from matrimonial offence. The rule may only be relaxed in exceptional cases and where the relief prayed for may be granted without prejudice to the interests of public morality (v). It is not enough that the adultery of the plaintiff was more or less pardonable or capable of excuse, but the Court must find as a fact, that the misconduct of the plaintiff was caused directly by the matrimonial offence of the defendant. The plaintiff turned his wife out of doors for a trivial reason and shortly after he was the defendant in a maintenance case which he settled on payment of Rs. 25/-. It is clear that it was the conduct of the plaintiff that conduced to the misconduct of the defendant rather than the misconduct of the defendant that conduced to that of the plaintiff (w).

Communication of Venereal disease by a husband to his wife, if wilful constitutes legal cruelty. Wilfulness may be presumed from the surrounding circumstances, from the condition of the husband and from the probabilities of the case after such explanation as he may offer, and that prima facie the husband's state of health is presumed to be within his knowledge. The plaintiff sued his wife, the first defendant for divorce on the grounds of malicious desertion and adultery with second defendant. The Supreme Court refused to grant a decree for divorce though the adultery was proved, as the plaintiff was guilty of cruelty to his wife in as much as he had communicated venereal disease to her (x).

(2) Malicious Desertion. Long absence and an intention not to return, or a man's refusal to live

(u) Nelson vs Foenander 41 N. L. R. 452. (v) Seneviratne vs Panis Hamy 29 N. L. R. 97. (w) Appuhamy vs Manikhamy 15 N. L. R. 100. (x) Appuhamy vs Julihamy 16 N. L. R. 83.

with his wife, upon some pretext which will not bear examination, will constitute malicious desertion (y). Desertion to be a ground of divorce must be malicious, that is to say, it must be deliberate and conscientious, definite and final repudiation of the obligations of the marriage state. It must be sine animo revertendi. Divorce should only be granted if the desertion complained of was a repeated desertion, and the offending spouse has contumaciously refused to return to married life. Even after judgment for desertion and separation attempts should be made to bring about concord to the full extent to which this is possible (z). Simple desertion is not sufficient to entitle a party to claim a divorce. The desertion must be malicious. It is not a mere departure from the house, but a departure for such a length of time and under such circumstances as to show that the spouse does not intend to return (a). Where there was no consummation of the marriage, owing to the wilful refusal of the husband to copulate, the wife is entitled to have the marriage dissolved on the ground of malicious desertion (b). Where a woman leaves her husband, finally against his will and without legal justification, her desertion would in law be malicious (c). Where a husband suspected without reasonable grounds that his wife had committed adultery and ordered her to leave the house and refused to be reconciled to her unless she gave a written confession of adultery the Supreme Court held that there was malicious desertion on the part of the husband (d). There were many disputes between husband and wife because the wife insisted that her brother should remain in the house contrary to the desire of the husband. There was evidence that the husband was assaulted on two occasions by the wife's brother and that on the second occasion the husband left the home. In the circumstances

(y) Sinnatankam vs Vairamuttu 2 Br. 138. (z) Silva vs Misinona 26 N. L. R. 113. (a) Pavalamma vs Arumugam 10 Cey. Law Rec. 2. (b) Mohotti Appu vs Kiribanda 25 N. L. R. 221, and 47 N. L. R. 324. (c) Rameliagam vs Ramalingum 35 N. L .R. 174. (d) de Mel vs de Mel 54 N. L. R. 91.

the husband's departure from home did not constitute malicious desertion on his part. The legal concept of constructive malicious desertion was not involved in a husband's alleged lack of interest in a mutual matrimonial obligation which his wife herself admittedly disdained (e).

(3) Incurable impotency at the time of such marriage. This provision was introduced by the marriage Ordinance. Under the Roman Dutch Law this was a ground for nullity of marriage.

Separation a mensa et thoro. Besides the divorce, which entirely dissolves the marriage, there is also with us a kind of provisional separation, introduced from the Canon Law, termed a separation of bed board, cohabitation and goods. This can, no more than a divorce be effected by the mere agreement of the parties. Lawful reasons must be set forth in the application tending to show, that the continuing to live together is dangerous or at least insupportable (f). An application for separation may be made to the District Court.

A Court has no authority to enter a decree for separation a mensa et thoro based entirely on the consent of parties (g).

It is not necessary that there must be proof of cruelty or harshness or display of personal violence as to give rise to a reasonable apprehension that life, mind or health would be endangered if separation was not decreed. Among other grounds, continuous quarrels, and dissensions or other equally valid reasons, which render the living together of the spouses insupportable, will justify a judicial separation. Although a wife or husband may reasonably be expected to bear with occasional outbursts of ill temper, yet occasional assaults however slight, accompanied by habitual intemperance, will make cohabitation insupportable. The danger to life was an alternative ground to perpetual

(e) Sinnathamby vs Annammal 55. N. L. R. 349. (f) V. D. L. 1. 3. 9. (g) Joseph vs Joseph 42. N. L. R. 119.

quarrels and dissensions, excessive cruelty and harshness (h). Cruelty need not be physical, moral cruelty will suffice, It would be sufficient for a wife to show that her husband has been guilty of conduct which has impaired her health and made it intolerable for her to continue to live with him and that such condition of things was caused and created by misconduct on the part of the husband. She is entitled to ask only for a judicial separation, even if the greater relief of a divorce would have been justified upon the evidence (i). A judicial separation my be obtained on the same grounds as a divorce. The larger remedy of divorce includes separation a mensa et thoro and if the injured party is satisfied to ask for the smaller remedy, it is difficult to see on what grounds it could possibly be refused. This separation may be prayed for by a party even where a divorce a vinculo might have been asked, and the Court could not, in such case give more than a judicial separation, for the suit is founded upon the prayer of the party injured and not actually upon the injury, as if it were a trespass or a penalty. Besides the Law loves to leave a door ajar for reconciliation, and will prefer to decree judicial separation rather than a divorce a vinculo (j). A suit for restitution of conjugal rights cannot be maintained in our Courts (k).

Marriages that are null and void. Any husband or wife may present a plaint to the District Court, praying that his or her marriage may be declared null and void. Such decree may be made on any ground which renders the marriage contract between the parties void by law applicable to this Colony (1). As already stated, a marriage which takes place under the influence of fraud, force or fear is void. A husband is entitled to a declaration of nullity of marriage on the ground that his wife was pregnant at the time of marriage and that she fraudulently concealed the fact of her pregnancy (m). The plaintiff married the defendant acting under the

(h) Orr vs Orr 22 N L R 57; Vethachan vs Arumugam 13 Cey. Low Rec. 242. (i) Wijesinehe vs Wijesinghe 57 N. L. R. 489. (k) Wright vs Wright 9 N L R 31 (l) Section 607 C. P. C. (m) Sivakolunthu vs Rasamma (1922) 24 N L R 89

mother's influence and hoping to avoid consequences, but was aware that she was contracting a marriage. She is not entitled to a declaration of nullity of marriage unless she could prove compulsion (n).

Consequences of Divorce. A woman who was formally and finally diovrced from her husband, will not after the death of the divorced husband be recognized as his widow. She shall therefore have no claim on his estate in that character. Yet her right of Daroo Urume will not be prejudiced by that divorce and therefore in the event of the death of her child, born to her husband from whom she had been divorced, the property which that child had inherited from the father, as well as any other property which belonged to that child, may in some cases devolve on that mother. She is entitled to carry away with her all the property she had brought with her at her mrrriage, as well as the property she may have individually acquired during coverture. Any landed property she may have originally had, or which she may have acquired during coverture, remains under her own management and at her disposal. If the wife separates herself from the husband contrary to his wish she is not entitled to anything from her husband. She must even leave her wearing apparel which she had received from her husband. But if the husband repudiated his wife without a sufficient cause she is entitled to retain the wearing apparel which her husband had given her.

If the wife was with child at the time of the divorce, and if she was divorced by the husband without good cause, then the wife will be entitled to maintenance, untill the child should be old enough to be delivered over to the father. But if the divorce took place in opposition to the husband's will and the wife left him without a just cause, or if the wife's parents took her away and dissolved the marriage without good reason for so doing, the husband is not bound to provide for her maintenance (o).

Where a Court decrees separation or declares a marriage null and void, the wife would from the date

(n) 3 Law Rec. 157. (o) P. A. 13, 14.

of such order, and while the separation continues, be considered as unmarried with respect to property of every description which she may acquire or which may come to or devolve upon her (p).

Act No. 44 of 1952 and Section 614 of the Civil procedure Code provide for the payment to the wife by the husband of a certain sum of money periodically for her maintenance.

Interests of Children. A legitimate child's interests in the father's estate are not affected by the divorce of the parents, whether that child was born before or after the divorce (q).

In the event of a binna marriage being dissolved by divorce, the children will remain with the mother, and shall have no claim for maintenance from the father. If the marriage had been at first contracted in deega, and if the husband and wife had subsequently settled in binna, and in the wife's house, then in the event of divorce, the husband may remove the children born during the period of deega coverture, or he may allow one or more of the said children to remain under the mother's care, and in either case, he must provide for their maintenance (r),

Act No. 44 of 1952 Maintenance Ordinance No. 19 of 1889 and Section 619 of the Civil Procedure Code make provision with regard to the maintenance of children. A father is bound to maintain his children until they attain the age of sixteen years.

CHAPTER V.

LATHIMI, THE RIGHT OF ACQUISITION.

This right namely, Lat Himi, or right of acquest to property is acquired by Gift or Bequest, by purchase by prescription or otherwise. Gifts or Bequests may consist of movable or immovable property— may be made orally or in writing (conditionally or unconditionally) and are revocable or irrevocable (a).

(p) Section 609 C.P.C. (q) P. A. 36. (r) P.A. 15. (a) P. A. 90.

The proprietor or rightful owner may dispose of his property as he pleases, by sale, gift, bequest or otherwise and such disposal will be deemd valid and legal, although at the date thereof the property was not actually in his custody or possession (b). The proprietor has the power of giving or bequeathing his landed property or any part thereof as well as his goods to any person or persons; he may give his estate to some kinsman distantly related, or to an illegitimate child, or even to a stranger to the exclusion of his own father or his legitimate child or grandchild. But if the gift or bequest of landed property was in the nature of a dedication or endowment in favour of some temple, or in favour of the Buddhist Priesthood, the same will be invalid unless the dedication had been sanctioned by the king or by some other competent authority (c).

Written deeds of any kind respecting rights of property were not common before the Reign of King Kirthisri.

Deeds for the transfer or bequest of property which do not express that the property has been transferred or bequeathed in paraveny (perpetuity), and which have not the imprecations (by which according to ancient form and still prevailing superstition, a judgment or curse is invoked against the person executing the deed, his heirs and relations) against the executor of the deed himself, his heirs and his relations, in the event of the possessor being disturbed in the possession, were considered of inferior validity. The same imprecations were necessary to be pronounced in a verbal gift, transfer, or bequest of landed property, and the same when a ketta or token was given. It was never customary for the witnesses to sign the deed. It was the general practice for the executor of the deed to make a mark by a mere scratch, or by writing one letter on the leaf, before it was written upon. This was commonly done before it was delivered to the writer by the person who was to execute it; but its being marked or signed by the executor was not considered essentially necessary to its validity, if it was completed and read to him

(b) P. A. 93. (c) P. A. 94.

before his death. It was common, when a writer could not be procured at the moment, for the person making the bequest or transfer to sign or mark the talpot or ola upon which the deed was ultimately to be written. A deed proved to have been so marked, when blank, by the disposer of the property to which it referred, was considered a good and valid deed. It was not necessary that all the witnessess mentioned in the deed should be present. It was only necessary that they should have been informed by the executor of the deed that he had executed such a deed, or intended to execute such a deed, and that its contents express his will or intention, declared at the time he marked the leaf. Even a voucher which had been written on a declaration made without a scratched leaf of any kind being given, would, if it were proved that it contained the last verbal declaration of the person transferring or bequeathing the property, be held to be valid. In short, all that was necessary was to prove the will or intention of the disposer of the property. The customary ceremony on such occasions was for the person, who was making the transfer or bequest to deliver the talpot, ola, or ketta into the hands of the person, in whose favour the transfer or bequest was made, who received it with reverence and respect after which, he carried it round to the bystanders, and delivering the deed or ketta to each of them, received it back in a congratulatory manner from each. When no deed or ketta was given, on a bequest being made, it was customary for the person making the bequest to lick the right hand of the donee and declare the bequest in his or her favour. The strict observance of all such ceremonies gave the greater validity to the act and the deed. But a deed being written in the handwriting of the person in whose favour it was drawn was considered sufficient to invalidate the same and this was certainly a necessary precaution where the execution of deeds was done in so loose a manner (d).

Execution of deeds. By proclamation dated 28th October 1820 it was ordered that no transfer,

(d) S. D. 24.

mortgage, or bequest of land or lease thereof for any term exceeding one year or one season made, or purporting to be made after 11th April 1820 should be good in law or admitted in any suit before a judicial authority unless the same was in writing signed by the party and attested by the signature of two or more witnesses.

Later by Ordinance No 7 of 1840 it was enacted that no sale, purchase, transfer, assignment or mortgage of land or other immovable property, and no promise, bargain, contract or agreement for effecting any such object.....shall be of force or avail in law unless the same was in writing and signed by the party making the same in the presence of a Notary Public and two or more witnesses and unless the execution of such deed was attested by such Notary and witnesses. It was also enacted that no will, testament or codicil containing any devise of land or other immovable property..... shall be valid unless it was in writing signed by the Testator in the presence of a Notary Public and two or more wttnesses, or if there be no Notary, then in the presence of five or more witnesses.

Disinherison of heirs. If a son proved undutiful, or brought diagrace on his family, and the father thereupon resolved to disinherit him and to constitute his other son sole heir to his estate, he then in the presence of witnesses uttered imprecations against the reprobate son, and declared him disinherited, ratifying such doom by striking a hatchet against a tree and a rock, and at the same time declaring his other son sole heir to his estate; such proceeding accompanied by gift of a blank ola (marked or signed by the father) to the chosen heir, had full efficacy in former times, but in later times, an act of disinherison of that nature was deemed invalid without a regularly executed Talpot deed (in favour of the chosen heir) containing the proper formula of disinherison, and valid reasons for the procedure (e). The reasons for disinherison were :– failure to render assistance, undutiful conduct, ill treatment or generally such conduct as was displeasing to the grantor (f).

(e) P. A. 98. (f) Austin 25.

A statement of the cause of disinherison had long ceased to be regarded as essential to the validity of such a deed. No particular formula was required or insisted upon so long as there appeared in the deed language which disclosed an intention to disinherit the heir (g).

A clause of disinherison was necessary only where the proprietor by the disposition under consideration, parted with all the property to which he was entitled (g).

A clause in a deed of gift which said that none of the donor's heirs, excutors, administrators or assigns should make any dispute with regard to the gift had the effect of a special clause of disinherison (h).

Gifts under the Kandyan Law being revocable and in practice freely made and freely revoked, it was apparently thought to be necessary that a Court should be satisfied, in the case of a deed of gift by a parent of all his property, that it was the donor's intention that the grant should operate as a final disposition of his property and not merely as a gift revocable at will before such a deed was given the full effect of an absolute and irrevocable conveyance. Such an intention had to be manifested by the presence in the deed of a clause of disinherison, and this requirement as a result of the gradual development of the law, is now satisfied if the deed contains language which sufficiently mainfests an intention to disinherit the heir (g).

It is settled law that where a donor makes a deed of gift and by that very deed renounces his right of revocation, the gift becomes absolute and irrevocable. It is a logical and necessary consequence of the law that the requirement of a cause of disinherison must be limited to cases in which the donor has not expressly renounced his right of revocation or mainfested an intention that his grant was to have the effect of an absolute and irrevocable disposition (g).

The Kandyan Law as to disinherison does not apply to the case of a testamentary disposition (h).

(g) Gunarathamy vs Manuel Appuhamy (1927) 28 N. L. R. 329.
(h) Komali vs Kiri (1911) 15 N. L. R. 371.

Formerly, the law was the same with regard to deeds and wills; but Ordinance No. 21 of 1844 has changed the law with regard to wills. All bequests are good, even though they in fact disinherit the children of the testator and deal with all his property without containing any express clause of disinherison (i). A Kandyan as well as any other person in this Colony may, by will make any disposition which he thinks fit of his property, to take effect after his death, and the disposition will be operative against, and will override, all claims to the property by inheritance (j).

The position therefore was, that while a Kandyan may, by last will disinherit his heirs by omitting from the will, he could not by deed convey his property away from his heirs without expressly disinheriting them.

This anomaly has now been removed by Ordinance No. 39 of 1938 which declares that any deed or instrument executed after the thirty first day of December 1938 will be of full force and effect notwithstanding the absence therein of any clause providing expressly or otherwise, for the disinherison of the heirs of the person executing such deed or instrument (k).

Gifts to Temples and Priests. Under the ancient law, if the gift or bequest (of landed property) was in the nature of a dedication or endowment in favour of some temple, or in favour of the Buddhist Priesthood, the same was invalid unless the dedication had been sanctioned by the King or by some other competent authority (l). By proclamation of 18th September 1819, it was enacted and declared that it had not been, nor should be hereafter, lawful to any inhabitant of the Kandyan Provinces, to make either a donation, or a bequest of any land whatsoever to or for the use of any temple without a license from the Governor. The Buddhist Temporalities Ordinance No. 3 of 1889 also prohibited temples from acquiring any land or any interest in land of more than a limited value without a license from the Governor. Ordinance No. 8 of 1905

(i) Vand (1871) 165. (j) Snudra vs Peries (1878) 3 C. L. R. 81.
(K) Section 3 (l) P. A. 94.

which repealed Ordinance No, 3 of 1889 re-enacted this prohibition as follows:— "It shall not be lawful for any temple or for any person in trust for, or on behalf of any temple, to acquire, any land or immovable property of the value of fifty rupees or upwards unless the license of the Governor under the Public Seal of the Island be obtained". Ordinance No. 8 of 1905 was repealed by the Buddhist Temporalities Ordinance No. 19 of 1931. This Ordinance does not contain any prohibition against the acquisition of immovable property by, or on behalf of, or for the benefit of any temple.

Hence a dedication or endowment of any immovable property in favour of any Buddhist temple, or the Buddhist priesthood, could now be made without the sanction or authority of Government.

Right to repurchase. In former times the vendor had in some cases a right to repurchase the land which he had even absolutely sold in paraveny (m). A proprietor who had definitely sold his land, may resume possession at any time during his lifetime, after paying the amount which he received and the value of any improvements (n).

But this right was annulled by proclamation dated 14th July 1821 which enacted that all sales of land made in writing according to the provisions of proclamation dated eighth day of October 1820 in the Kandyan provinces shall be final and conclusive and that neither the seller nor his or her heirs shall have any peculiar right to repurchase the same, unless an express stipulation reserving such privilege shall be inserted in the deed of sale. This was done with the object of giving the purchaser an immediate and permanent interest in the property and inducing him to improve it.

Revocable Deeds. All deeds of gift excepting those made to priests and temples, whether conditional, or unconditional are revocable by the donor in his lifetime (o).

In Kandyan times, almost all land was held subject to and on condition of the performance of onerous

(m) P. A. 109. (n) Doyly 60. (o) P. A. 90

services which, as a rule, could be performed only by men in the prime of life. The young and the old, infirm men and women, could not do the work for services required by the king and the Dissawe, and if their work was not done, the land was taken from them and given to others who could do it. Hence it was common for men to give deeds of gift on condition that the donee should perform the services and support and maintain the donor. Such deeds of gift were always revocable, and were revoked whenever the donee proved ungrateful and when he too ceased to do service, or when the donor himself recovered strength (p).

It is impossible to reconcile all the decisions as to the revocability or non–revocability of Kandyan deeds, but the Supreme Court thinks the general rule is that such deeds are revocable, and also that before a particular deed is held to be exceptional to the rule, it should be shown that circumstances which constitute non-revocability appear most clearly on the face of the deed itself. The words "services continued to be rendered by the donee" contained in a deed were held to be insufficient to debar revocation (q).

A gift in consideration of services to be rendered is revocable though services have been rendered up to date (r). A gift containing a clause renouncing the right of revocation is revocable if the donee fails to observe the stipulations subject to which the gift was made (s).

A Kandyan deed of gift was given by reason of the love and affection of the donor to the donees, and of divers other good reasons, and also with the object of obtaining assistance and succour, and also in consideration of the sum of Rs. 100/–, which was about a tenth of the value, paid by the donees. The deed did not contain a clause renouncing the right of revoking the donation. The said deed was

(p) Appuhamy vs Kirmenika (1894) 3 C. L. R. 81. (q) Bolange vs Punchi Mahatmaya Ram. 63-68, 195; see also Romanis vs Heramanisa (1950) 51 N. L. R. 575. (r) Wijesinghe vs Mohotti 1943 44 N. L. R. 549, 56 N L R 511 (s) Banda vs Hetuhamy (1911) 15 N. L. R. 193.

held to be revocable (t). Where a gift given in consideration of services to be rendered in the future granted "all the right, title and interest of me the said donor in and to the premises for ever". The donor did not renounce the right of revocation by the use of the words "for ever" (u). In a deed of gift executed by a father in favour of his daughter in consideration of services already rendered, the donor enjoined on the donee the performance of future services not merely during his lifetime but also after his death. It was a revocable deed as there were further services to be rendered and it was thus solely within the discretion of the donor to revoke his gift. There was also nothing whatever on the face of the deed to make it exceptional to the general rule of revocability (v).

A gift executed with the object of securing succour and assistance from the donee can be revoked if no succour or assistance was given (w). A land was gifted with the object of getting services and work performed duly and faithfully on any occasion when any festivity or mourning shall occur in connection with either of the donors. Here we have a gift for services to be rendered. The donees had performed the services contracted for, but there were further services to be performed by them in future. There was no renunciation of the right of revocation. The deed was revocable but the donee was entitled to compensation for improvements effected by him in terms of section 6 of Ordinance No. 39 of 1938 (x). A gift containing a clause renouncing the right of revocation is revocable, if the donee fails to observe the stipulations subject to which the gift was made (xx). A gift in consideration of assistance to be rendered to the donor is revocable subject to compensation for assistance actually rendered (y).

(t) Mudiyanse vs Banda (1912) 16. N. L. R. 53. (u) Gunadasa vs Appuhamy (1934) 36 N. L. R.t 122. (v) Podimenike Kumarihamy vs Abeykoon Banda (1956) 59 N. L. R. 543 (w) Appuhamy vs Holloway (1943) 44 N. L. R. 276. (x) Wijesinghe vs Mohotti (1943) 44 N. L. R. 549. (xx) Banda vs Hetuhamy 15 N.L.R 193. (y) Lokubanda Aratchy vs Mohamed (1954) 56 N. L. R. 511

Irrevocable Deeds. As already stated the general rule is that all deeds of gift (except those made to priests and temples) are revocable. Before a particular deed is held to be exceptional to this rule, it should be shown that the circumstances which constitute irrevocability appear most clearly on the face of the deed.

A deed of gift is a contract and there is no rule of law which makes it illegal for one of the parties to the contract, to expressly renounce a right which the law would otherwise give him. A gift which expressly renounces the right of revocation, and which is not dependent on any contigency is irrevocable (yy). When a contract is in writing–a deed of gift is a contract–the intention of the parties must be gathered from a consideration of the terms of the writing and not from extrinsic circumstances (z). The tendency of recent decisions is in the direction of denying to a donor the right to exercise a power of revocation which he has renounced (a). The renunciation should be in express and unmistakable language. Where the donor declares in most clear language that the deed is irrevocable, he is not entitled to go back on it (b).

The following gifts have been held to be irrevocable:–

1. A gift to an individual priest with the succession to it vested in his sacerdotal pupils (c).
2. A gift in consideration of services rendered and money advanced by the donee to the donor (d).
3. A gift in consideration of past and future services containing a clause renouncing the right of revocation (e).
4. A gift in consideration of past services containing a clause renouncing the right of revocation (f).

(yy) Kirihenaya vs Jotiya (1922) 24 N. L. R. 149. (z) Ukku Banda vs Paulis Singho (1926) 27 N. L. R. 449. (a) Kirinaide vs Menika (1926) 8 Cey. Law Rec. 93. (b) Molligoda vs Sinnatamby (1878) 7 S. C. C. 118 see also 62 N. L. R. 68. (c) Appuhamy vs Sundara Banda 1 Times 281. (d) Henaya vs Rana (1878) 1 S. C. C. 47. (e) Kirimenike vs Gamarala (1858) 3 Lor. 76. (f) Tikiri Kumarihamy vs de Silva (1906) 9 N. L. R. 202.

5. A gift for valuable consideration such as:-

(i) A gift which was given as an act of reparation for the fact that the donor had by the exercise of undue influence induced the donee to transfer the same property to him (g).

(ii) A gift excuted in favour of the donor's wife and child for their maintenance on the occasion of the donor's separation from his wife as it is was a deed of settlement for a consideration (h).

(iii) A gift in consideration of marriage. A deed of gift executed by the husband's father in favour of his son and daughter-in-law in consideration and in contemplation of a valid marriage being effected between the grantees was held to be irrevocable. The promise was made before the marriage, but the deed was executed after its registration (i). A donation made by a person in favour of his daughter-in-law in contemplation of her marriage with the donor's son was held to be revocable. In this case the donee was a party to the second deed and her action in so doing amounted to an acknowledgment by her of the donor's right to revoke and a waiver of her own right to object to the revocation (j). If a deed of gift is given in consideration of something to be done by the donee in the future, and that thing is done by him, being induced thereto by the giving of the deed, it would, to say the least, be inequitable to allow such a deed to be revoked. But where a deed is given as a return for something already done by the donee for the donor, or in consideration so to say, of a marriage that has already taken place, or even in contemplation of a marriage, the donor being under no legal liability to give it, such a deed is obviously a deed of gift in the real sense of the term as there is no consideration in law but a mere inducement or motive actuating the donor to exercise his generosity. A gift executed by the donor after the marriage, in consideration of a promise made at the marriage of his daughter that he would give her certain

(g) Beligaswatta vs Ukku Banda (1942) 43 N. L. R. 281. (h) Punchirala vs Punchirala 1 Bal. 190. (i) Ukku vs Dintuwa (1878) 1 S. S. C. 80. (j) Dingiri Menika vs Dingiri Menika (1906) 9 N. L. R. 131

lands was held to be revocable as there was nothing to show that the promise made was wholly or partially the inducement to contract the marriage (k). Where the parents give a deed as dowry, before or at the time of marriage, or even after the marriage, if it be in pursuance of a promise made before marriage, the deed should be regarded as a deed for valuable consideration, and so irrevocable. In such a case, the donees need not be called upon to prove that the deed operated as an inducement for the marriage (1). In other words such a deed is irrevocable not for the reason that it is a donation of a kind that is an exception to the rule as to revocability, but because it is not a donation at all. Where a parent donates immovable property to his daughter sometime after the latter's marriage, the gift is revocable if there is no evidence that it was given in pursuance of a promise before the marriage. In such a case it is a deed of gift in the real sense of the term, as there is no consideration in law but a mere inducement or motive actuating the donor to exercise his generosity. The mere fact that the deed describes the gift as dowry can make no difference for a dowry may be a spontaneous and free will gift by a parent to the contracting parties (la).

Where a Kandyan deed of gift is given in consideration of services to be rendered in the future and the services are duly performed, the deed cannot be revoked (m).

Method of Revocation. The mere resumption of the land by the donor was sufficient to render a gift null and void (n). The last bequest or transfer of property supersedes all which may have preceded (o). An express revocation of a deed of gift is not necessary. The execution of a later and absolutely inconsistent disposition has the effect of revoking an earlier deed (p). It is well settled law that a gift is revoked

(k) Ran Menika vs Banda Lekama (1912) 15 N. L. R. 407 (l) Kandappa vs Charles Appu (1926) 27 N. L. R. 433; 4 Times 65. (la) Kirihamy vs Sadi Kumarihamy (1959) 60 N. L. R. 532. (m) Hapumali vs Ukkuwa (1944) 45 N. L. R. 346. (n) Grenier 1874, 24. (o) Doyley 61. (p) Taldena vs Taldena (1903) 3 Bal. 133; 7 S. C. C. 117

by the donor executing a later and inconsistent deed (q). **Compensation for Revocation.** If the owner (for he must be called so still) be dissatisfied with the assistance afforded, he can at any time revoke the gift and make over his property to another person, who thereupon reimburses the first acceptor for expenses incurred (o). The donee must be indemnified on the gift being revoked to the full amount of what the acceptance of the gift may have cost him (r). He is entitled to recover compensation for improvements made to the land (s). He is also entitled to be indemnified for disbursements made by him for the benefit of the donor's estate (t).

In respect to the claims for indemnification by the donee, on the gift being revoked, this is only to be understood to apply to gifts made to strangers or other persons, not heirs by law to the donor; for gifts to children if revoked, give such a donee no claim to compensation. But if a parent having several children makes a donation to one of his children those lands burdened at the time with debts, as by mortgage or otherwise and the donee pays the debts or dismortgages the property that had been given, should the parent afterwards revoke such gift and bequeath his lands equally among his children or legatees, the former donee who paid the debts must be indemnified by the other heirs or legatees, provided the former donee had not already derived so much profit from the property, as was adequate to indemnify him for his expenses (u). The rule requiring payment of compensation is only to apply when the gift is made to a stranger or other person who is not an heir at law(v). An heir at law will be entitled to compensation in case he had paid off any debt or mortgage as aforesaid.

The law with regard to revocation of deeds of gift has been amended by Ordinance No. 39 of 1938 (which came into operation as from 1st January 1939).

(q) Lokubanda Arachy vs Mohamed (1954) 56 N. L. R. 511. (r) P. A. 90. (s) Punchibanda vs Mutumenike (1919) 6 C. W. R. 192; Mudiyanse vs Banda (1912) 16 N. L. R. 53. (t) Banda vs Hetuhamy (1911) 15 N. L. R. 193. (u) P. A. 90 (v) Tikira vs Tikira (1929) 30 N. L. R. 435.

"Gift" means a voluntary transfer, assignment, grant, conveyance, settlement or other disposition inter vivos of immovable property made otherwise than for consideration in money or money's worth (section 2).

A conveyance by a Kandyan may be in the form of a gift not expressed to be irrevocable, yet it would be open to the grantee to adduce evidence under the first proviso to section 92 of the Evidence Ordinance to establish the true consideration for the transfer. The defendant, father of plaintiff transferred certain immovable property to plaintiff from whom he obtained a retransfer by undue influence. The defendant thereupon gifted the property to plaintiff as an act of reparation for the undue influence exercised against her. Under the circumstances the gift was held to be irrevocable (w). Where several deeds form part of one transaction and are contemporaneously executed each deed must speak only as part of the one transaction. By deed No. 3597 Kirimenika transferred to her father certain immovable property for a consideration in money paid by the father. By a separate deed No. 3598 executed on the same day, the father purported to make a fidei commisary gift to Kirimenika of the same property. On the evidence and from the deeds it is clear that in return for the money which the father paid as consideration, he agreed not to retain the whole of the beneficial interests but only a life interest, upon the termination of which Kirimenika was to enter into possession as a fiduciary. The said two deeds must be regarded as a single transaction and that when they are read together the gift 3598 does not fall within the definition of the word "gift". Kirimenika has relied on the first proviso to section 92 of the evidence Ordinance to show the true consideration for the conveyance 3598 (x).

Could a voluntary transfer be proved to be a gift? The necessity for proving a transfer to be a gift is (i) to enable an alleged donor to revoke an

(w) Beligaswatte vs Ukkurala (1942) 43 N. L. R. 281
(x) Dirgiri naide vs Kirimenika (1955) 57 N. L. R. 559.

alleged gift under section 4 and (ii) to prove that the property is paraveny property in terms of section 10 (i) (b).

(1) To enable an alleged donor to revoke an alleged gift. It is the transferor or the alleged donor that will be interested in proving that the transfer was a gift. Section 92 of the evidence ordinance has enacted as follows:– " When the terms of any contract, grant, or other disposition of property, or any other matter required by law to be reduced to the form of a document have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms. Proviso (1). Any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto, such as fraud intimidation, illegality, want of due execution, want of capacity in any contracting party the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law."

In every transfer there is a recital to the effect "in consideration of the sum of rupees–of lawful money of Ceylon well and truly paid to the transferor by the said purchaser the receipt whereof the transferor doth hereby admit and acknowledge". In every such transfer the notary states in the attestation (1) "that the consideration was paid before me" or (2) "that the consideration was acknowledged to have been previously paid" or (3) "that the consideration did not pass in my presence".

Hence the transferor can, under the proviso, prove failure of consideration, in which case he is entitled to institute an action for the recovery of the consideration (y). He has no right whatever under the said section to vary the terms of the document by proving that it was a gift and that there was no consideration in money or money's worth.

(y) Nona Kumara vs Abdul Cader (1946) 47 N. L. R. 457.

It is never open to a party who executes a conveyance which is unambiguously a deed of sale to lead parol evidence to show that in reality it is a deed of mortgage and not of sale (z). A Bench of five Judges held that in the absence of any allegation of fraud or trust, it is not open to a party who conveys immovable property for valuable consideration by a deed which is ex facie a contract of sale to lead parol evidence of surrounding circumstances to show that the transaction was not a sale but a mortgage (a).

Even the purchaser has no right, under the section to prove that, in truth the transfer was a gift. But in Equity, the purchaser (and not the transferor) is entitled to prove by oral evidence that the deed of transfer was, in fact, a deed of gift. This is allowed in a case where plaintiff comes into court repudiating a statement with regard to the payment of the consideration. If the transferor is allowed to prove failure of consideration, the purchaser should be allowed to show the real nature of the transaction. The question will be fully discussed in the chapter on Paraveni and Acquired Property. Even if the transferor has the right to prove that the transfer was in fact, a deed of gift, he would have to first get a declaration from court to that effect. Even a court will not make a declaration to that effect without finding out whether other parties would be effected. A bona fide purchaser will not be affected by the revocation of such an alleged gift.

Subject to the provisions hearinafter contained, a donor may during his lifetime and without the consent of the donee or any other person, cancel or revoke in whole or in part any gift whether made before or after the commencement of this Ordinance and such gift and any instrument effecting the same shall thereupon become void and of no effect to the extent set forth in the instrument of cancellation or revocation. Provided that the right, title or interest of any imovable property shall not, if such right, title or interest has accrued before the commencement of this Ordinance

(z) Setuwa Vs Ukku (1955) 56 N. L. R. 337 (a) William Fernando Vs Roslyn Coory (1957) 59 N. L. R. 169.

be effected or prejudiced by reason of the cancellation or revocation of the gift to any greater extent than it might have been if this Ordinance had not been enacted [section 4 (i)]. No such cancellation or revocation of a gift effected after the commencement of this ordinance shall be of force or avail in law unless it shall be effected by an instrument in writing declaring that such gift is cancelled or revoked and signed and executed by the donor or by some person lawfully authorized by him in accordance wlth the provisions of Ordinance No. 7 of 1840 or of Ordinance No. 17 of 1852 [section 4 (2)].

Irrevocable Deeds. Notwithstanding the provisions of section 4 (1), it shall not be lawful for the donor to cancel or revoke any of the following gifts where any such gift is made after the commencement of this Ordinance (1st January 1939):-

1. Any gift by virtue of which the property which is the subject of that gift shall vest in the trustee or the controlling viharadipati for the time being of a temple under the provisions of section 20 of the Buddhist Temporalities Ordinance 1931, or in any Bhikku with succession to his sacerdotal pupil or pupils or otherwise than as pudgalika for the benefit of himself and his heirs, executors, administrators or assigns.

2. Any gift in consideration of and expressed to be in consideration of a future marriage, which marriage has subsequently taken place.

3. Any gift creating or effecting a charitable trust as defined by section 99 of the Trusts Ordinance No. 9 of 1917.

4. Any gift, the right to cancel or revoke which has been expressly renounced by the donor, either in the instrument effecting that gift or in any subsequent instrument by a declaration containing the words "I renounce the right to revoke" or words of substantially the same meaning or if the language of the instrument be not English the equivalent of those words in the language of the instrument. Provided that a declaration so made in any such subsequent instrument shall be of no force or effect unless such

instrument bears stamps to the value of Rupees Five and is executed in accordance with the provisions of Ordinance No. 7 of 1840 or Ordinance No. 17 of 1852 (Sectron 5 (1)).

Nothing in this section shall affect or be deemed to affect the revocability of any gift made before the commencement of this Ordinance (section 5 (2).

Upon the cancellation or revocation of any gift, the donor shall be liable to pay to the donee compensation in such sum as shall represent the cost of any improvements to the property effected by the donee, after deducting the rents and profits received by him, and the expenses incurred in the fulfilment of the conditions, if any, attached to the gift, provided that if the donee has made default in the fulfilment of any such conditions, no compensation shall be payable to him in respect of the improvements or otherwise. Such compensation shall be payable to any donee otherwise entitled thereto whether or not he would be an heir at law of the donor in the event of such donor dying intestate. In this section "donee" includes any person who has succeeded to the title of the donee under the gift (section 6).

A gift executed before Ist January 1939 could be revoked only if such deed is revocable according to the law prevailing prior to Ordinance No. 39 of 1938. A gift executed on or after such date could be revoked only if it does not come within the provisions of section 5.

It is settled law that the words in a deed are to be construed most strongly against him who uses them, if so doing works no wrong (b).

Revocable Deeds. All deeds of gift executed on and after the first day of January 1939 which do not fall within tho exceptions mentioned in section 5 of the said Ordinance are revocable.

Method of Revocation. The revocation of a gift effected on or after 1st January 1939 should be made by the donor during his lifetime by a notarially attested deed. The consent of the donee is not necessary. A subsequent

(b) Kumarasamy vs Bakda (1959) 62 N. L. R. 68.

deed inconsistent with an earlier deed and executed on or after 1st January 1939, will not have the effect of revoking the former deed. So long as a revocable deed remains unrevoked in the manner prescribed, it will be effective in law.

Compensation. The distinction which had been drawn between a stranger and an heir has been removed. Upon the cancellation or revocation of any gift the donor is liable to pay compensation to the donee whether he be an heir or a stranger. If the donee has made default in the fulfilment of any conditions in such gift, he will not be entitled to compensation in respect of improvements or otherwise (c).

Fidei Commissa. The text books on Kandyan Law do not specifically treat of Fidei Commissa or gifts subject to similar conditions. Gifts in the nature of Fidei Commissa are not contrary to the spirit of the Kandyan Law. There is no principle of the Kandyan Law, which prevents a Kandyan from giving a limited interest to one person, and providing that at the termination of that interest the property should vest in another person (d). Although we may resort to the Roman Dutch Law to ascertain whether the deed creates a valid Fidei Commissum or not, yet to ascertain who the lawful heirs are, we have to resort to the Kandyan Law (e). The creation of Fidei Commissum by a Kandyan deed of gift does not by itself affect its revocability. No valid reason can be formulated for holding that while a gift simpliciter can be revoked one which is subject to restrictions becomes irrevocable (f).

(c) Wijeesinghe vs Mohotti (1943) 44 N. L. R. 549. (d) Assistant Government Agent vs Kalubanda (1921) 23 N. L. R. 26 (e) Menika vs Banda (1953) 25 N. L. R. 207 (f) Thepanis vs Haramanisa (1953) 55 N. L. R. 516; see also 57 N. L. R. 559

CHAPTER VI.

PARAVENI AND ACQUIRED PROPERTY.

The division of property into "inherited" or "paraveni" and "acquired" is one of the greatest importance in the law of intestate succession and is indeed, the pivot on which the whole law of succession turns. In short, the inheritance of immovable property depends largely on the question whether the property is "paraveni" or "inherited" property or "acquired" property. The Kandyan law of succession aims at preserving the ancestral lands in the hands of the male members of the family. In the absence of direct descendants the rule is that property reverts to the source from which it came (a).

The distinction between things inherited and acquired is one which, as we shall see, is of considerable moment in the law of succession. For ths purpose, it would seem that the term "acquired property" has a relative signification, varying in accordance with the classes of heirs who claim a share; for whereas any property descended from a man's father is inherited property for the purpose of distribution amongst his widow and children, when the contest is between maternal uncles and paternal uncles the former are entitled to the deceased's acquired proprety, which in that case includes property newly acquired by the deceased's father which has descended to the deceased. This modification is a logical one; for when such heirs, as father's brothers, succeed to part of the estate, on the ground not so much of true succession, but rather by virtue of the principle that lands must revert to the source whence they came, there is no reason for assigning to them an interest in property which was acquired separately by their deceased brother and never formed part of the family lands of themselves or their father. One may safely assume that, conversely, a gift or death bed devise of ancestral lands by a father to his son, wonld not convert such estate into acquired property in the event of the

(a) K. C. R. 17.

son's death without issue so as to prevent the reversion to the father's family. It has however been held on several occasions that a gift or sale by a father to his son constitutes the subject of the gift "acquired property" of the son whatever its previous nature (b).

The Kandyan law classifies the property of an individual with reference to the manner in which he became entitled to that property into three classes, viz:- (1) Daa himi, paternal or procreate right; (2) Wadaa himi, maternal or parturiate right; and (3) Lat himi, right of acquest (c).

"Paraveni" in one sense means property over which the owner has disposing power, but in the present discussion "Paraveni" is synonymous with "ancestral", that is to say, property coming by descent from an ancestor (d). The classification referred to above appears to proceed upon the principle that all property acquired otherwise than by inheritance falls into one class, whereas inherited property is classified into two main heads, paternal or maternal.

The broad distinction, therefore, would seem to be between inherited, and property acquired otherwise than by inheritance (e). Our Coutts have always regarded paraveni property as meaning ancestral property which has descended by inheritance, property derived by any other source of title or by any other means being regarded as acquired property (f). Property coming by intestacy from a collateral cannot be called ancestral property or inherited property. Such property then, will fall under the other cetegory of acquired property (g). A gift or sale, by a father of his inherited property, to his son constitutes such property the acquired property of the son (h). Where a Kandyan who was vested with title to property by inheritance, donated same to his son, and was subsequently declared entitled to such property in terms of a partition decree, such property was deemed to be acquired property (e).

(b) Hayley 221. (c) P. A. 49. (d) Dingiri Banda vs Medduma Banda (I914) 17 N. L. R. 201. (e) Kalu Banda vs Mudiyanse 1926) 28 N. L. R. 463. (f) Lebbe vs Banda (1929) 31 N. L. R. 28. (g) Appuhamy vs Wijetunge (1935) 14 Cey. Law Rec. 114. (h) Ukkuwa vs Banduwa (1916) 19 N. L. R. 63

To give effect to the correct meaning of the term "paraveni property" the Kandyan Declaration Ordinance has defined same as follows:-

" 10 (1) The expressions "paraveni property" or "ancestral property" or "inherited property" and equivalent expressions shall mean immovable property to which a deceased person was entitled (a) by succession to any other person who has died intestate, or (b) under a deed of gift executed by a donor to whose estate or a share thereof the deceased would have been entitled to succeed if the donor had died intestate immediately piror to the execution of the deed, or (c) under the Last Will of a Testator to whose estate or a share thereof the deceased would have been entitled to succeed had the testator died intestate.

Provided, however, that if the deceased shall not have left him surviving any child or descendant, property which had been the acquired property of the person from whom it passed to the deceased shall be deemed acquired property of the deceased.

(2) Where the paraveni property of any person includes a share in any immovable property of which that person is a co-owner, any divided part of or interest in that property which may be assigned or allotted to that person by any deed of partition executed, or by any decree for partition entered by a Court, after the commencement of this Ordinance, shall for all purposes be and be regarded as paraveni property of that person.

(3) Except as in this section provided, all property of a deceased person shall be deemed to be "acquired property".

(4) The expressions "paternal paraveni" and "maternal paraveni" and similar or equivalent expressions shall, be deemed to mean paraveni property as hereinbefore described derived from or through the father or from or through the mother, as the case may be".

This section defines paraveni property. Subsection 1 demonstrates that the character of "Paraveni" that is superimposed on property is dependent entirely upon

the mode or manner in which a person becomes entitled to it, and it indicates three different modes by which a person becoming the owner of property would throw the mantle of paraveni on property the subject of such ownership. It is an essential requisite of paraveni that the property should pass to the person from one to whose intestate estate he would be an heir; provided this requisite is satisfied, then if the property passes by (l) succession or (2) gift inter vivos or (3) devise under a last will, the property becomes paraveni. The character of paraveni, it must be noted, is not something that the property acquires at the time of the death of the owner, but on the contrary it is a character that the property assumes at the time that a person becomes the owner of the property. But in certain circumstances paraveni property may become acquired property in the hands of the person in whom it was paraveni, and that during his lifetime. Subsection 2 recognizes such a possibility for it provides that where the paraveni consists of an undivided interest and that undivided interest is converted into divided ownership either by amicable partition or by decree of Court, such divided portion is to be regarded as paraveni property provided such division takes place after the commencement of the Ordinance. Section 26 of the Ordinance expressly enacts that its provisions shall not have and shall not be deemed or construed to have any retrospective effect except where express provision is made to the contrary.

The connotation of the term "**acquired property**" is indicated in Section 10 but no attempt has been made to define it directly or affirmatively. Subsection 3 of the section enacts:– "Except as in this section provided all property of a deceased person shall be deemed to be acquired property". The proviso to section 10 (1) next proceeds in certain circumstances to convert what the main provisions– Section 10 (1) (a), (b) and (c)– declare to be paraveni into acquired property, and, this it does by imposing the fulfilment of certain conditions specified therein. There are two conditions which are antecedently predicated, (1) that the propositus should

not have left him surviving a child or descendant, and (2) that the property should have been acquired property of the person from whom it passed to the propositus. The difficulty that is created arises by the use of the term "acquired property" both in the proviso and in subsection 3. The Ordinance is not entirely declaratory, for it is also an amending piece of legislation. Where the Ordinance provides that property vesting by succession ab intestato on an heir is paraveni, it enacted nothing new. But when it says that a gift by a deed inter vivos or a devise under a Last Will of property belonging to a person dying after the commencement of the Ordinance is to be paraveni property it enacts new law which cannot be given retrospective effect. The term "acquired property" as used in the proviso to subsection (1) has not the same meaning as that term has in subsection (3) and that clauses (b) and (c) of section 1 are not retrospective in their operation. The term "acquired proprety" in the proviso must be determined having regard not to the provisions of the Ordinance or in particular to Section 10, but having regard to what the law was at the date the property became vested in the person from whom it passed to the propositus. Menikhamy gifted certain immovable property to his son Ukkuhamy in 1908. Ukkuhamy gifted same in 1917 to his son Punchi Banda. Punchi Banda died in 1943 intestate and issueless. According to the law that governed this transaction at the date it took place, the said property was acquired property in the hands of Ukkuhamy though it was a gift by his father. In this view of the matter, it must follow that the property in dispute is the acquired property of Punchi Banda (i). The proviso to section 10 (1) was intended to deal with cases where the Court has to consider the nature of the property in order to decide, for instance, the conflicting claims of the widow and the maternal and the paternal relations of a deceased person. This proviso appears to have been inserted to give effect to the "relative signification" of the term "acquired property" under the

(i) Ausadahamy vs Tikiri Banda (1950) 52 N. L. R. 314.

Kaṇdyan law referred to in the following passage of Hayley's Sinhalese Laws and Customs (page 221):- "It would seem that the term acquired property has a relative signification, varying in accordance with the classes of heirs who claim a share; for whereas any property descended from a man's father is inherited property for the purpose of distribution amongst his widow and children, when the contest is between maternal uncles and paternal uncles, the former are entitled to the deceased's acquired property, which in that case includes property newly acpuired by the deceased's father which has descended to the deceased. This modification is a logical one; for when such heirs as the father's brothers succeed to part of the estate, on the ground not so much of true succession, but rather by virtue of the principle that lands must revert to the source whence they came, there is no reason for assigning to them an interst in property which was acquired separately by their deceased brother and never formed part of the family lands of themselves or their father" (j).

The proviso to section 10 (1) is in truth declaratory of the earlier law. The Nitiniganduwa at page 103 states as follows:- "If on the death of a man, his father's brother and his mother's brother be living, the lands newly acquired by the deceased's father, the lands of the deceased by the mother's side, the lands acquired by the deceased and his movable property, will all be inherited by the mother's brother, while the paternal lands of the deceased will be inherited by the aforesaid father's brother". This reference indicates that when a Kandyan dies intestate and issueless, any property which had previously passed to him by inheritance as the "newly acquired" property of his deceased father would not fall within the category of paternal or paraveni property. On the contrary, it must be regarded as his "acquired property" although in fact it had come to him by inheritance from his father.. Such property is classed as acquired property for the purpose of succession by the collaterals of the father

(j) Setuwa vs Sirimalee (1947) 48 N. L. R. 391.

and mother of the deceased, although such property would have been deemed paraveni property for the purpose of succession by his widow or children, if he had left any. The reason, apparently, is that when a person dies issueless, a broad distinction is drawn between his property which had previously belonged to his father by paraveni right and property which his father had acquired by purchase or other means. This distinction has in a slightly different context been recognized in Ukkurala vs Tillekeratne (k). When the direct line of descent is broken, the so called newly acquired property of the deceased's father is not regarded as having at any time formed part of the family lands (l).

The words "child" or descendant in the proviso to section 10 (1) have been used by the Ordinance to mean a wider class than the legitimate issue and these words cover both the legitimate and illegitimate issue. The rule of interpretaton is that, in the absence of a contrary intention either expressed or deducible by necessary inference, all provisions respecting "children" contained in any laws or instruments having a legal operation, refer exclusively to legitimate children. But a study of the provisions of the Ordinance shows that the word "child, is used to mean a child, legitimate or illegitimate. By right of purchase Puncha was the owner of certain immovable property. Puncha died leaving as his heir Nanduwa. Nanduwa died leaving the plaintjff an illegitimate child. Under section 10 (1) the property would be paraveni property unless it comes under the proviso. This proviso does not apply to the property in question as Nanduwa left an illegitimate child. Dingirimenika was the owner of certain immovable property by right of purchase. On the death of Dingirimenika the same devolved on her son Ranhamy Vedarala who died leaving an illegitimate son Kirihamy and his full brother the defendant. For the purpose of this case the deceased is Ranhamy Vedarala and the person from whom it passed to the deceased is Dingiri Menika. In the hands of Dingirimanika it

(k) 5 S. C. C. 46 (F. B.) (l) Sonnandara vs Dingiri Etana (1956) 57 N. L. R. 333.

was acquired property. In the hands of Ranhamy Vedarala it was paraveni property in terms of section 10 (1) unless it came under the proviso. As the words "child" or "descendant" relate to issue both legitimate and illegitmate and as there is an illegitimate child of Ranhamy Vedarala, the property in question must be regarded as paraveni property which passed to the full brother, the defendant (m).

The Kandyan Declaration and Amendant Ordinance came into force as from 1st January 1939. Prior to this date, our Courts regarded paraveni property as meaning ancestral property which had descended by inheritance, property derived by any other means being regarded as acquired property.

After the new Ordinance came into force Paraveni property means immovable property to which a deceased person was entitled (a) by succession to any other person who had died intestate, or (b) under a deed of gift executed by a donor to whose estate or a share thereof the deceased would have been entitled to succeed if the donor had died intestate immediately prior to the execution of the deed, or under the Last Will of (c) a testator to whose estate or a share thereof the deceased would have been entitled to succeed had the testator died intestate.

(a) **Property vesting by succession ab intestato.** This provision is merely declaratory laying down the law as it was.

(b) and (c) **Property vesting under a deed of gift or a devise under a Last Will.** Prior to the Ordinance property vesting under a deed of gift or a devise was held to be acquired property. But the Ordinance creates new law by declaring such property to be paraveni property. These provisions cannot be given retrospective effect.

A gift has been defined as a voluntary transfer, assignment, grant, conveyance, settlement, or other disposition of immovable property made otherwise than for consideration in money or money's worth (section 2).

(m) Mohideen vs Punchi Banda (1947) 48 N. L. R. 318; Setuwa vs Sirimalee (1947) 48 N. L. R. 391; see also 17 N. L. R. 201.

Could a voluntary transfer be proved to be a gift? The necessity for proving a transfer to be a gift is (1) to enable an alleged donor to revoke an alleged gift under Section 4 and (2) for a person interested to prove that the property conveyed is paraveni property in terms of Section 10 (1) (b) for the purposes of succession. In an earlier chapter we have already dealt with the question as to whether the transferor could prove a transfer to be a gift to enable him to revoke same.

Section 10 (1) (b) of the Kandyan Declaration and Amendment Ordinance lays down that any immovable property to which a deceased person was entitled under a deed of gift executed by a donor to whose estate or a share thereof the deceased would have been entitled to succeed if the donor had died intestate immediately prior to the execution of the deed, should be regarded as paraveni property.

If a deceased person was entitled to any immovable property on a transfer executed by a person to whose estate or share thereof the deceased would have been entitled to succeed, any person interested to have such property declared parveni property would have to prove that such transfer was a voluntary grant made otherwise than for consideration in money or money's worth.

As we have already stated, every deed of transfer has a recital to the effect that the consideration has been paid. In the attestation the Notary states that "the consideration was paid in my presence" or "that the consideration was acknowledged to have been previously paid" or "that the consideration did not pass in my pecsence."

Section 92 of the Evidence Ordinance now contains the law as to the admissibility of parol evidence, when the terms of any contract, grant, or other disposition of property have been reduced to the form of a document. In such a case it enacts, subject to certain provisos, that no evidence of any oral agreement or statement shall be admitted for the purose of contradicting, varying. adding to, or

subtracting from the terms of the document. Proviso (1). however, allows any fact to be proved "which would invalidate any document, or which would entitle any person to any decree or order relating thereto" and among the facts that may be so proved is "want or failure of consideration"' Under this proviso it is open to a vendor to prove that the consideration was not paid, though the deed may contain an acknowledgement of its reccipt. But if he seeks to do so. and to go behind his own acknowledgement. the vendee must be allowed also to show the actual agreement between the parties (n). The rules of evidence, and the law of Estoppel, forbid any addition to, or variation from, deeds or written contracts, The law, however, furnishes exceptions to its own salutary protection; one of which is, when one party for the advancement of justice, is permitted to remove the blind which hides the real transaction, as for instance, in cases of fraud, illegality, and redemption, in such cases the maxim applies, that a man cannot both affirm and disaffirm the same transaction, show its true nature for his own relief, and insist on its apparent character to prejudice his adversary (o). This maxim is founded, not so much on any positive law , as on the broad and universally applicable principles of justice. The principle of English equity was that he who sought equity must do it. If a plaintiff who comes into Court repudiating a statement with regard to the payment of the consideration is allowed to put that forward, he ought also to suffer the person whom he attacks to show the real nature of the transaction. The necessity for the application of this principle arises only where a Court allows a party to lead oral evidence to vary the terms of a written contract. In those circumstances, the equitable principle referred to comes into operation and enables the opposing party to lead oral evidence to meet the claim put forward by the first party who has been allowed to vary a statement in a written contract. Where

(n) Kiribanada vs Marikkar (1917) 20 N. L. R. 123.
(o) Nadarajah vs Ramalingam. (1918) 21 N. L. R. 38

the plaintiff sued the defendant, to recover the consideration due or a deed of transfer of immovable property, which contained an express recital "that the transferor had received the purchase price in full" it was open to the defendant to prove by oral evidence that the deed of transfer was, in fact a deed of gift (p).

It is never open to a party who executes a conveyance which is unambiguously a deed of sale to lead parol evidence to show that in reality it is a deed of mortgage and not a sale (q). A bench of five Judges has held that in the absence of any allegation of fraud or trust, it is not open to a party who conveys immovable property for valuable consideration by a deed which is ex facie a contract of sale to lead parol evidence of surrounding circumstances to show that the transaction was not a sale but a mortgage (r).

Even the purchaser has no right, under Section 92 of the Evidenee Ordinance to prove that in truth, the transfer was a gift. But in Equity, the purchaser would be allowed to prove by oral evidence, the true nature of the transaction only where the transferor is allowed to remove the blind which hides the real transaction.

The proviso to Section 10 (1) of the Kandyan Declaration Ordinance which, in certain circumstances, converts what the main provisions declare to be paraveni into acquired property is also declaratory as it enacted the existing law.

CHAPTER VII.

RIGHTS BY MARRIAGE.

Rights of a widow. When a man dies intestate leaving a widow and children, the widow has only a life interest in the landed estate of the deceased husband; and that the widow of a husband dying

(p) Nolagoda vs Molagoda (1944) 45 N. L. R. 481. (q) Setuwa vs Ukku (1955) 56 N. L. R. 337. (r) William Fernando vs Roslyn Cooray F. B. (1957) 59 N. L. R. 169.

childless has the same life interest, and that only in her husband's landed property whether hereditary or acquired as the widow of a husband, who has died leaving issue (a). A widow loses her rights and life interest in her husband's estate by taking a second husband contrary to the wish of her first husband's family; or by disgraceful conduct, such as, glaring profligacy, or adultery; or by squandering the property of her deceased husband. Any of these being proved against her by the children would subject the widow to expulsion from the house of her late husband and deprive her of any benefit from his estate (b). A widow, who quits the house of her deceased husband, leaving her children by her deceased husband to the care of their father's relations, to form another marriage loses not only her own immediate rights in her first husband's estate, but the right to inherit the property of her children born to her deceased husband and abandoned by her (c). The widow will be entitled to support from the produce of her deceased husband's lands during the remainder of her life provided she remained single after the husband's death and that she will be liable to forfeit her claims to maintenance, if she should contract a subsequent marriage. The widow may either receive from the deceased's heir at law, a portion of the produce of the deceased husband's lands or she may have the temporary possession and usufruct of a suitable portion of the said land, it being premised that the said portion of land temporarily assigned to the widow formed part of the deceased's paraveny or ancestral estate and not a recent acquisition by purchase (d). If the deceased husband left other landed property besides his paraveny or ancestral lands, that is to say, lands acquired by purchase, in such case the widow may have possession of the whole of such acquired land, for the remainder of her life provided she remained single, and in the event of her death, or of her contracting a subsequent marriage the said land will revert to her deceased husband's heir at law (e). The property however which the husband had inherited

(a) S. D 1. (b) S. D. 3. (c) S. D. 36. (d) P. A. 17. (e) P. A. 18.

from his parents is generally claimed by his nearest kindred, and the widow has no share of it (f). Slaves and cattle are considered to belong to the description of movable property to which the widow is entitled to an equal share with her children, out of her husband's esate (g). In the movable property, the widow is entiled to no more than a like share as the children (h).

Paraveni property. As there were conflicting decisions, a full Court of the Supreme Court decided that, with respect to family paraveni property the widow has merely a right of maintenance by the heir, who takes possession of the property, and that she does not acquire a life interest in such paraveni property (i). Another full Court adhered to the above decision (j). If there is no acquired property the widow is entitled to maintenance from the paraveni property. If the estate is a large one, the heirs are entitled to specify a portion of it and reserve that to the widow for her maintenance. Bnt if the estate is small and only just sufficient for her maintenance, the widow is entitled to possess it during her lifetime (k). A widow cannot claim both life interest over the acquired property and maintenance from the paraveni property (l). If the acquired property is not sufficient she may claim maintenance only, out of the paraveni land (m). The widow is entitled to remain in her husband's house and to be maintained from the produce of his ancestral lands, so long as she remains unmarried and of good conduct (n).

The widow loses her right to maintenance from her husband's estate by contracting a second marriage in diga (o).

Section 11 of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938 (Chapter 59) lays down that when a man dies intestate after first January 1939 leaving a spouse him surviving then such

(f) P. A. 22. (g) P. A. 17. (h) S. D. 18. (i) Unguhamy vs Kit.iya Unanse F. B. (1861) Ram. 1860–62, 112. (j) Vegodapola vs Andris Appu F. B. (1866) Ram. 1863–68, 190. (k) Ram 1860, 18 112 (l) Per Col. 211. (m) Hapu vs Esanda (1924) 26 N. L. R. 298. (n) Menika vs Horarala (1894) 3 S. C. R. 167. (o) Ukku Banda vs Heen Menika F. B, (1928) 30 N. L. R. 180.

surviving spouse shall be entitled to maintenance out of the paraveni property of such deceased in case there be no acquired property, or if such acquired property be insufficient for her maintenance, and that if such surviving spouse contracts a diga marriage she shall cease to be entitled to maintenance out of the paraveni property.

Acquired Property. A widow, whether married in diga or in binna has a life interest in her deceased husband's acquired property (i). She is entitled to a life interest over all acquired property, whether such property was acquired before or after the marriage (p). Where the entire estate of a deceased consists of acquired property only, and there are chlldren by a former marriage, the widow's life interest extends only to a part of such acquired property (q). In such a case the widow would be entitled to a life interest, only in the share of her own children (r). But where a Kandyan dies leaving an estate consisting only of acquired property or of considerable acquired property and of paraveni property which is negligible, and leaving a widow and issue by a previous marriage, the widow is entitled to a life interest over only half of the acquired property, subject to an equitable allowance in the event such half share is not sufficient for the maintenance of herself and her children (m). The widow is entitled to a life interest in the whole of the acquired property of her husband to the exclusion of her husband's illegitimate children. Illegitimate children do not have the same rights as the legitimate children of another marriage (s). In serveral cases, the Supreme Court held that the widow's life interest in the acquired property of her deceased husband was not affected by a second marriage (t). A Divisional Bench of three judges of the Supreme Court overruled the earlier decisions and held that this life interest is lost by her remarriage in diga. The quitting of the family house by a widow which, in most

(p) Kalu vs Lamee (1905) 11 N. L. R. 222. (q) Tikiri Menika vs Menika (1917) 20 N. L, R. 12. (r) Mutu Menika vs Heen Menika (1917) 4 C. W. R. 268. (s)Dingiri vs Undiya (1918) 20 N. L. R. 186; see also 10 N. L. R. 129. (t) Hadi vs Rangl (1916) 19 N. L. R. 260; see also 3 S. C. R. 107; 6 N. L. R; 214.

cases, results from a second marriage involving a severance of the family tie was apparently regarded as a serious offence meriting a forfeiture of all rights in her husband's property. If with the consent of the deceased husband's relatives, she contracts a binna marriage on his premises, her marriage right will not be vitiated (u). Section 11 of the Kandyan Law Declaration and Amendment Ordinance lays down that when a man dies intestate after 1st January 1939, leaving a spouse him surviving, then such spouse shall be entitled to an estate for life in the acquired property of the deceased intestate; that if the deceased intestate had left a child or descendant by a former marriage the surviving spouse's life estate should extend to only half of the acquired property; and that if such spouse contracted a diga marriage she would not forfeit her aforesaid life estate in the acquired property. A Kandyan widow whose husband died before the Kandyan Law Declaration and Amendment Ordinance came into operation, forfeits her life interest in her husband's acquired property if, without contracting a valid marriage, she forms a diga association with another man. The test which ought to be applied in cases of this kind is whether all the circumstances in which a widow has quitted the family home and formed a diga association with another man are sufficient to justify the inference that she thereby intended finally and completely to sever the family tie (v). If the husband dies after 1st January 1939 (after this Ordinance came into operation) then, under Section 11 the widow does not lose her life interest once acquired even if she contracted a subsequent marriage in diga.

Movables. When a man dies intestate, his widow and children are his immediate heirs, the widow having the custody and administration of the property (movable), so long as she lives in her husband's house conducting herself with prudence and circumspection, and

(u) Ukku Banda vs Heen Menika F. B. (1928) 30 N. L. R. 180. (v) Freda Wikramasinghe vs Kirimutu (1954) 55 N. L. R. 382.

doing nothing to cause shame or disgrace to the family, nor squandering the property. The widow conducting herself thus, her children cannot call for a division of the property, until her death or until she quits her deceased husband's house. But the children of a former marriage of the husband may claim their share. The widow is entitled to no more than a like share as one of the children. She is, besides, entitled to what was considered her own wearing apparel and jewels and ornaments commonly worn by herself and given to her by her husband. Slaves and cattle are considered to belong to that description of movable property, to which she is entitled to an equal share with her children out of her husband's estate. In the event of there being no children, the widow inherits the whole of the household goods, grain in store, also the cattle, which have been acquired together with the increase in the husband's stock of cattle, subsequent to the marriage (w). Heirlooms, such as sannases, weapons, gold chains, Patta Tahadoo or frontlets etc., which were honorary gifts or rewards granted by the King, are not reckoned as part of the chattels, which might devolve to the widow (x). The authorities are agreed that the widow is entitled to the movable property, except heirlooms, where a person dies childless and leaving a widow (y).

The Kandyan Law Declaration and Amendment Ordinance has enacted that when a man dies intestate after lst January 1939 the surviving spouse should be entitled absolutely to all her wearing apparel, jewellery and ornaments used by her or provided for her use by her deceased husband (z); where the deceased has left a child or children or the descendant of any deceased child, the widow whether married in binna or in diga should succeed in like manner and to a like share of all the movable property (except heirlooms and live and dead stock appertaining to immovable property) of the deceased as if she had been a legitimate child of the deceased (a); where the deceased has left no child or descendant of any deceased child, the widow should

(w) S. D. 18. (x) P. A. 21. (y) Kirimenika vs Ranmenika (1916) 19 N. L. R. 221. (z) Section 20. (a) Section 21.

succeed to all such movable property of the deceased (b). The word child in Section 23 means not only a legitimate child but also an illegitimate child. Hence if the deceased had left no legitimate children but only an illegitimate child and the widow, the latter will have to share the movables with the illegitimate child (c).

Enlargement of Widow's Interest. If the deceased proprietor left not a nearer relation than his father's cousin (father's maternal uncle's son), and if the said proprietor had received all assistance from his wife and her family until his death, and had been neglected and disregarded by his kinsman aforesaid, in that case the widow will be entitled to the deceased's entire estate, including his paraveni or ancestral lands, to the exclusion of the cousin aforesaid as well as of more distant relations.

In the event of a married man dying intestate, and without issue, if he left not an adopted child, nor a parent, nor any near relation, then the widow will by Lathimi right succeed to the possession of the deceased's entire estate including his paraveni or ancestral lands.

If the deceased proprietor left no issue, and had survived his parents and his full brothers and their children, then his widow will have an absolute Lathimi right to such lands as belonged to the deceased by right of acquest (that is to say, lands which were not derived to him by inheritance, but which he had acquired by purchase, or which he had obtained from a stranger by rendering assistance) to the exclusion of the deceased's more distant relations, (paternal aunt's children for instance) (d).

Where a Kandyan died leaving no heirs, on his father's side, the Supreme Court held that the widow was entitled to an absolute interest in all his property, paraveni as well as acquired, in preference to his mother's sister's grandchildren as the latter are preci-

(b) Section 23. (c) Setuwa vs Sirimalie (1947) 48 N. L. R. 391.
(d) P. A. 22

sely at the same distance from the deceased, as is the father's cousin referred to above from his propositus i. e., four steps (e).

Where a Kandyan who had survived his parents and his full brothers and sisters and their children, died without leaving issue, the Supreme Court held that the widow was absolutely entited to all the acquired property in preference to the deceased's half brother (f).

If the barren widow is the husband's paternal aunt's daughter or maternal uncle's daughter, she inherits the acquired property next to full brothers. The widow is entitled to such property in preference to the deceased's niece (sister's daughter) (g).

The Kandyan Law Declaration and Amendment Ordinance has enacted that the surviving spouse of a man who dies after 1st January 1939, in case she is the evessa cousin of the deceased, should not thereby become entitled to a larger share than that to which she would otherwise have become entitled; and that the surviving spouse should succeed to all the property both acquired and paraveni of the deceased only in the event of the deceased leaving no other heir (h).

Thus the widow who is an evessa cousin and who enjoyed a more favourable position than any other widow can hereafter succeed to the property of the deceased husband only on the ground of relationship.

Widow's rights to sell or mortgage. When a man dies intestate, his widow and children are his immediate heirs, but the widow, although she has the chief control and management of the landed estate of her deceased husband, has only a life interest in the same (i). The widow has no right to dispose of her husband's lands contrary to what the law directs although she has the usufruct of them (j). The debts of thc deceased must be paid by those who inherit his or her property, according to the value of their respective shares (k). It

(e) Punchirala vs Punchirala F. B. (1879) 2 S. C. C. 44; N. L. R. 145. (f) Sangi vs Mohotha 1908) 6 N. L. R. 201. (g) Kirimenika vs Ranmenika (1916) 19 N. L. R. 221. (h) Section 11. (i) S. D. 1. (J) S. D. 39. (k) S. D. 21.

is the pious duty incumbent on sons, to pay their parent's debts, although they may not have inherited any property from them. A diga wife is liable to pay the debts of her deceased husband, whether she may have inherited property from him or not (l). The Supreme Court has held that a sale, by a Kandyan widow, of the deceased husband's lands to pay off his debts was valid on the following grounds;:– (1) A widow by her husband's death with young children was, left by the Kandyan law the head of the house and family until her sons grew up to manhood; (2) she had the right to give her daughters out in diga; (3) on her devolved the duty of paying her husband's debts; (4) administration of an intestate's estate was unknown to the Kandyan law; (5) the widow held the position and owed to her children and to her husband's creditors, the duty which now is laid on a legal representative (m). Although the widow does not inherit, the property is more or less under her control, specially if there are minors and this is the reason why the liability to pay the debts is put on her. The widow is not liable presonally but as a sort of administratrix to see that the debts of the deceased are paid whether she inherits as a childless widow or does not inherit as in the case where she has children (n). A divisional bench of three Judges held that the widow had no right to lease the deceased's property but the correctness of the decision that the widow had the right to sell to pay off debts was not questioned (o). A widow has the right to sell her deceased husband's paraveni property during the minority of her children for the payment of the debts of her deceased husband without the sanction of Court (p). But a Kandyan widow who had no children by the deceased has no right to sell her deceased husband's immovable property to pay off the debts of the deceased. Though the widow is expected to safeguard the interests of her own children, in the absence of any form of administration

(l) S. D. 22. (m) Appuhamy vs Kirihenaya (1896) 2. N. L.R. 155. (n) Supen Chetty vs Kumarihamy (1905) 3 Bal. 96. (o) Lebbe vs Christie F. B. (1915) 18 N. L. R. 353. (p) Punchirala vs Banda (1948) 50 N. L. R. 488.

under the Kandyan law, she owed no such duty to the collateral heirs of the deceased, and hence had no right to do antyhing to affect their rights (q).

Widow's right to mortgage. A widow having the administration of her deceased husband's estate may, in the minority of her children from necessity, mortgage the landed property; but it must be clearly to satisfy the most necessary and urgent wants of the family, otherwise the children might not be liable to pay the debt. But in all cases where the children are grown up to fourteen or fifteen years of age, their consent is necessary to such a mortgage being valid against them and their lands (r). A Kandyan widow with minor children being at liberty, as a sort of administratrix to alienate the whole of her husband's estate is consequently at liberty to mortgage it for the purpose of paying the deceased's debts (s). A Kandyan widow who has no children has no right to mortgage the deceased's estate.

Rights of a widower. The husband is heir to his wife's landed property, which will, at his demise, go to his heirs. But in the event of the wife having left a son, and the father contracting a second marriage and having issue of the second bed, in this case, on the death of the father, the son of the first bed would inherit the whole of his mother's estate (t). A wife dying, leaving a husband and children, her peculiar property of all description goes to her children and not to her husband. A wife dying barren, or without surviving children, all the property which she received from her parents revert to her own parents, or brothers and sisters and their issue, but the husband inherits all the property acquired during the coverture only (u). If the deceased wife's mother survived, she the mother will be entitled to all the property that had belonged in right of inheritance, and as dowry to the deceased's daughter whose husband, the widower will be entitled to such property only as

(q) Babi vs Dantuwa (1961) 63 N. L. R. 139. (r) S. D. 23.
(s) Bandaramenike vs Imbuldeniya (1949) 50 N. L. R. 478.
(t) S. D. 11. (u) S. D. 19.

himself and his deceased wife had acquired by purchase or other means during the coverture, it being premised, that the deceased wife left no issue (v). A diga married woman having died without issue and intestate, leaving goods partly acquired during the coverture and partly consisting of goods, which she had brought with her at her marriage, the goods first mentioned will remain to the husband, and the rest will go to her parents (w). If a binna wife survived her parents, and died without issue and intestate, the widower may on quitting the house of his deceased wife take away his own goods, and also such goods as his said wife had acquired during the coverture; but all the goods that the deceased had received or inherited from her parents, as well as the goods she had received from her brother, will remain to the brother (x). On the death of a binna married woman, if she leaves, her husband and a child born to her diga married sister even though the husband be her direct cousin (father's sister's son) the right of inheritance will devolve on the sister's child. If however, the husband, on her death, does not leave the premises, he has a right to remain in possession of the wife's lands during his lifetime (y). If the proprietress leave a full brother and her husband, that brother will inherit the paternal lands, and the husband will inherit all the movable property of the deceased, provided he had been married in diga. If she was the binna wife, all the property she had inherited from her parents will come into the possession of the brother, and only the movable property acquired by her after marriage will be inherited by the husband. If the deceased woman's parents and husband be living, all the property given to her by the parents will revert to them, while the property acquired by her after her marriage with him will come into the possession of the husband(z). If the wife dies leaving a husband and children, all property acquired from her husband

(v) P. A. 29. (w) P. A. 30. (x) P. A. 31. (y) N. N. 113. (z) N. N. 115.

reverts to him, by herself (from parents or otherwise) goes to the children, everything acquired during coverture goes to the husband (a).

Binna widower. So far back as 1860, the Supreme Court held that a binna married husband had no right whatever to or interest in his wife's estate after her death. It was admitted at the bar, in that case, a binna husband had no interest at all in his wife's property whether ancestral or acquired (b). Now it is well settled law that a binna widower is completely excluded from any rights to the landed estate of the deceased wife (c). The decisions in the above cases are wide enough to exclude the binna married husband even from property (both movable and immovable) acquired by his wife during coverture, The Kandyan Declaration Ordinance has made an amendment giving the widower a right to a share in the movables. When a wife dies intestate after lst January 1939, the widower whether married in binna or in diga, is entitled to succeed in like manner and to a like share of all the movable property of the deceased whenever obtained, as if he had been a legitimate child of the deceased (d). The widower is entitled to all the movable property if the wife left no child or descendant (e). Here (section 23), the word "child" is used to mean a child, legitimate or illegitimate (f).

Diga widower. A diga married widower too, has no right whatever to the wife's paraveni lands (g). Where a Kandyan woman whose marriage was registered as diga avoids a forfeiture of her rights in the paternal inheritance by preserving or subsequently acquiring binna rights, it does not alter the character of the marriage itself. In such a case the husband will be regarded as a diga married husband (ga). The Kandyan law gives to the diga husband such a life interest in the acquired property of the deceased wife where there are children, just as a

(a) N. N. 115. (b) Naida Appu vs Pulingu Rala (1879) 2 S.C.C. 176. (c) Seneviratne vs Halangoda (1922) 24 N. L. R. 257; see also 18 N. L. R. 105. (d) Section 21. (e) Section 23. (f) Sethuwa vs Sirimalee (1947) 48 N. L. R. 391. (g) 2 C. L. R. 76. (ga) Chelliah vs Kanapatiya Tea and Rubber Co. 34 N. L. R. 89.

diga wife has a life interest in the acquired property of her deceased husband in the event of there being children (h). This right of the widower to a life interest in the acquired property of his deceased wife has not been altered by Section 18 of the Kandyan Law Declaration Ordinance (i). It is clear from Armour that a diga husband inherits his wife's acquired goods if she dies without issue. By the words "goods" Armour intended to include all kinds of property. Where the deceased has left no children the diga wldower is entitled to the acquired property absolutely and not merely to a life interest (j). When a woman married in diga dies leaving issue, her diga husband takes a life interest in her acquired property. If there be no issue her husband will take the acquired property, as he and his deceased wife acquired during coverture, the rest of the property passing to her parents and next of kin. The diga widower does not inherit any portion of the wife's landed property acquired before marriage (k). De Kretser J. doubted the correctness of this rule and held that the widower was entitled to property acquired before as well as during coverture (1). In a later case Keuneman J. held that an illegitimate child was entitled to inherit the mother's property acquired before marriage in perference to the diga widower (m).

Ordinance No. 25 of 1944 (Section 19 of Ordinance No. 39 of 1938) declared that the diga widower is not entitled to inherit any immovable property acquired by the deceased wife before marriage, thus restoring the rule laid down in 24 N. L. R. 257.

A diga widower is entitled to inherit from his deceased wife even though she may have acquired

(h) Tikiri Banda vs Appuhamy F. B. (1914) 18 N. L. R. 105; see also 3 Bal 18. (i) Wimalawathie vs Punchi Banda (1955) 57 N. L. R. 73 (j) Naidappu vs Palingu Rala (1879) 2 S. C. C. 176; Menika vs Banda (1923) 25 N. L. R. 207. (k) 24 N. L. R. 257. (l) Dunuweera vs Muthuwa (1942) 43 N. L. R. 512 (m) Ellen Nona vs Punchi Banda (1943) 45 N. L. R. 11.

subsequent to marriage, the status of a binna married daughter (n). As already stated the widower whether married in binna or diga is entitled to succeed in like manner and to a like share of all the movable property of the deceased as if he had been a legitimate child of the deceased. He is also entitled to all the movable property if the deceased left no child or descendant (o).

Enlargement of the diga widower's interest. A married woman having died intestate leaving neither a child nor a grandchild, neither parents nor full brothers nor full sisters, nor nephews nor nieces, issue of her full brothers and sisters, neither an uncle nor an aunt, nor an adopted child, her husband will be entitled to the reversion of her estate, including her paternal paraveni or ancestral lands. The widower will succeed thereto in preference to the deceased wife's paternal half sister (p). It is only a diga widower that would be entitled to the enlargement of his interests (p). The rule has not been amended by Ordinance No: 39 of 1938.

CHAPTER VIII

DAAHIMI, PROCREATE RIGHT.

The Daahimi right comprises, first Piya Urume or paternal inheritance, the right of succession to the father's estate, or the estate of any other relation in right of one's father. And second, Jatake Urume, inheritance by virtue of paternity, the right whereby in some cases the father succeeds to the estate of his deceased child.

Piya Urume or Paternal Inheritance. The Piya Urume right becomes of avail to the child subsequent to the father's demise, and not previously, therefore in the father's lifetime the child has no right to lay

(n) Seneviratne vs Halangoda (1932) 22 N. L. R. 472; see also 34 N. L. R. 89 (o) Section 23. (p) P. A. 28, N. N. 115

claim to any portion of the father's estate nor to bequeath nor transfer, nor otherwise dispose of any portion thereof, on the presumption that he or she had a right to anticipate the inheritance (a).

When a man dies intestate, his widow and children are his immediate heirs; but the widow, although she has the chief control and management of the landed estate of her deceased husband, has only a life interest in the same, and at her death, it is to be divided among the sons excepting where there is a daughter or daughters married in binna (or at home). These (or rather their children) have the same right to a share of their father's lands as their brorhers (b).

The grandchildren (whether the children of a son or of a daughter) have the same right of inheritance in their grandfather's estate that their deceased parent would have had, had he or she survived, viz., they are entitled to his or her share; and great grandchildren in like manner, inherit through their deceased parents (c).

Widow. The rights of the widow have been fully dealt with in Chapter VII.

A legitimate child's interests in the father's estate are not affected by the divorce of the parents, whether the child was born before or after the divorce, and whether the child remained with the father or was left to the care of the mother, after that divorce (d).

Sons. A son detaching himself from his family and forming a binna marriage in another's house does not lose his right of inheritance in the estate of his parents. The same rule as above applies to a son adopted by an uncle or aunt, or by a stranger, to inherit the property of the adopting parent. The son so adopted does not thereby lose his right of inheritance in the estate of the parents who begot him. But a daughter so adopted would, unless she were an only child, lose her right of inheritance in her parent's estate (e).

(a)P. A. 49. (b) S. D. 1, (c) S. D. 5. (d) P. A. 36. (e) S.D.S.P.A.52.

Unmarried Daughters. Daughters (unmarried) 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 parents estate (f). The basis underlying the Kandyan Law with reference to land held by members of the family is the right of the members of the family to support by the family so as to create customs and rights in the family itself and between the members of the family alone. Accordiug to Sawer if such a marriage of a woman in diga turns out badly, and the woman has to return to the Mulgedera, then there is an obligation on the brothers to make provision for their unfortunate sister and her children out of the family estate. This is a liability which attaches to the brothers as members of the family and it is not an obligation creating a tie on the lands. Even as the re-acquisition of binna rights will give no title to the lands which have passed outside the ownership of the members of the family, so the forfeiture of diga rights will not revest in the brothers land which the sister alienated as of right before marrying in diga. Where a Kandyan woman, after her father's death, alienated property which passed to her by inheritance and then married out in diga, such marriage did not deprive the purchaer for valuable consideration of his rights to the property sold (g). This decision definitely rejected the proposition that an unmarried daughter's right in the estate of her deceased father is a limited right.

(f) S. D. 2. (g) Peiris vs Kiri Banda (1923) 27 N. L. R. 52.

Ordinance N. 39 of 1938 has amended the law by giving the unmarried daughter an absolute interest in her father's estate. The diga marriage of a daughter, after the death of her father, if contracted on or after 1st January 1939 shall not affect or deprive her of any share of his (father's) 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 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 her or them, such daughter shall so convey and shall be compellable by action so to do (h).

Children by different Wives. The father left a son and an infant daughter by one wife, and a son by a second wife. His lands devolve to all the three children in equal shares (i). If a man has been married in binna in two places and a son had been born to him by one wife, and a son and a young daughter by the other, on his death, his lands will be divided into three parts and each child will inherit a share. If the father dies leaving a daughter by one wife and two sons by the other,his lands will be equally divided amongst the three children (j).

According to Armour and the Nitiniganduwa under the ancient law the estate was divided per capita. In the year 1889 a full bench of the Supreme Court decided that the division should be per stirpes and not per capita. In this case Burnside C. J., stated as follows:– "If my decision in this case were primae impressionis, I do not hesitate to say that, following the reason and fairness of the matter, I would be prepared to hold that the children of the first and second marriages would take per capita and not per stirpes but the point has already been

(g) Peiris vs Kiri Banda (1925) 27 N. L. R. 52. (h) Section 12.
(i) P. A. 69. (j) N. N. 78.

decided by the solemn decision of this Court in the reported case in 2 Lorenz, page 27, and also as was stated by counsel in argument in that case, in several collective decisions of this Court. I cannot regard the dicta in Marshall and Armour, and even the Niti Niganduwa, whatever may be its pretensions as a legal authority, as sufficient to disturb a solemn decision of the Court" (k). In a later case Bertram C. J. stated as follows:- "The law has been so accepted since the year 1857, and I agree with the observations of Burnside C.J. that there should be a fixed rule rather than one varied from time to time" (1). In a still later case before a bench of three Judges Wijewardana C.J. stated as follows:- "It has been settled by a long series of decisions of this Court that the succession should be per stirpes where children of different marriages claim property of their father. Even if the decisions of this Court are contrary to the rule to be gathered from Sawer and Armour, I think that the present case is one of those cases in which inveterate error should be left undisturbed because it would be unjust to disturb titles and transactions founded on such an error." Where a Kandyan, whether male or female, dies leaving children by two beds, the children succeed per stirpes and not per capita (m). It is settled law that where a Kandyan father leaves both legitimate and illegitimate children his acquired property is shared between them, each branch taking a moiety. In such a case the succession is per stirpes and not per capita (n). It is also accepted that where a father leaves issue by two marriages and the issue of each marriage inherit a moiety, the only child of one marriage does not forfeit her moiety by marrying in diga. A bench of five Judges has held that when a father died leaving legitimate children and also a sole illegitimate child who was a daughter, such illegitimate daughter did not forfeit her right to a moiety

(k) Siriya vs Kaluwa F. B. (1889) 9 S. C. C. 45. (l) Nanduwa vs Punchirala (1922) 24 N. L. R. 249. (m) Mohottihamy vs Alminona F. B. (1949) 50 N. L. R. 317. (n) Rankiri vs Ukku (1907) 10 N. L. R. 129.

of the acquired property of her father by marrying in diga after his death, even where the parents of both the legitimate and the illegitimate children were the same (o).

Ordinance No· 39 of 1938 has re-established the old law. When a man shall die intestate after the commencement of this ordinance (1st January 1939) leaving him surviving issue by two or more marriages, such issue and the descendants of any predeceased child or children shall inherit inter se in all respects as if there had been but one marriage and the estate of the deceased shall not descend per stirpes to the issue of each marriage according to the number of marriages (p).

As stated above when a Kandyan father left both legitimate and illegitmate children his acquired property was shared between them each branch taking a moiety. Section 15 of Ordinance No. 39 of 1938 has brought about a substantial change of the law in this respect. Paragraph (c) of that section provides that the illegitimate child or children referred to therein shall be entitled to succeed to the acquired property of the deceased equally with his legitimate child or children. In a case to which that Ordinance applies, the position therefore would be that there is no separate moiety which devolves on the illegitimate child or children, to be shared among themselves. Where a Kandyan died after lst January 1939, intestate leaving legitimate children and also an illegitimate daughter who was married in diga, such illegtiimate daughter had no right of inheritance to her father's acquired property. (q)·

Children of Associated Marriages. Where an estate is enjoyed undividedly by two or three brothers having, but one wife in common; on the death of one of the husbands and the wife, or in the event of the wife being divorced after the death of one of the husbands, the children being the issue of the joint

(o) Mallawa vs Somawathie Coonasekera F. B. (1957) 59 N. L. R. 157. (p) Section 13. (q) Ranmenika vs Nandohami (1956) 57 N. L. R. 453

connection, can claim the share of their deceased father, to hold it independently of their surviving father or fathers. After such a joint connection as stated above, with issue, should one of the brothers quit the joint connection and take a wife for himself alone and have issue also by her, he dying intestate, his share of the family property should be divided between the issue of his first wife, which he had in joint connection with his brother or brothers and the issue of his sole wife, each a moiety (r). Where an estate is enjoyed undividedly or otherwise by three brothers, two of whom being married to one wife, while the third brother has a separate wife, in the event of one of the friendly or associated brothers dying without issue, the other brother with whom he had the joint wife, shall be the sole heir. The brother having a separate wife shall have no share of such demised brother's property of any kind(s). Three brothers jointly married one wife and had by her a son, the wife then died, and the three brothers afterwards married a second wife and had by her three sons and a daughter. After the death of the three fathers, their lands devolved in equal shares to the five children. (t).

The general rule as to the distribution, under the Kandyan law, of the property of a person dying intestate and leaving issue by two or more marriages was laid down by the full Court to the effect that the estate is to be divided among the children per stirpes and not per capita. Two brothers Mudalihamy and Dingirala had one child by a joint wife. After the death of the associated wife Mudalihamy married again and had two children by the second wife. Dingirala also married again and left two children. In a contest btween the children, it was held that the child of the associated marrage was entitled to a half share of the estate belonging to each of the associated fathers. The children of the second bed were entitled to the balance half share of their father's estate (u). It is a rule of inheritance of Kandyan law

(r) S. D. 6 (s) S. D. 7. (t) P. A. 75. (u) Appuhamy vs Ranhamy (1913) 5 Bal. N. 61.

that where two brothers have a joint wife, the estate of the brother who dies first passes to children of the association, and that when the survivor who after the dissolution of the association has children by the same wife dies, his estate is divided equally among all the children, whether born during the association or thereafter. Kiribaba and Themisa were associated as husbands of one Elenda. Punchirala and Kironchiya were children of this association. After the death of Kiribaba, a third child Abanchiya was born to Elenda and Themisa. Punchirala and Kironchiya were held entitled to the whole of Kiribaba's estate and a half share of Themisa's estate while Abanchiya was held entitled to the balance half share of Themisa's estate (v).

Hapuwa and Sonda were associated husbands of one Meniki. They had four children. There was no evidence that any of the children of Meniki were Hapuwa's. In the absence of such evidence, it may be assumed that Hapuwa died without issue of his own. According to the rule above mentioned, on Hapuwa's death his lands must be regarded as having devolved on his associated brother Sonda (w).

Ordinance No. 13 of 1859 declared all kinds of polygamy illegal as associated marriages were contrary to public policy and hence, could no longer be tolerated. Since polyandrous marriages were declared illegal since the passing of the said Ordinance, any claimant to property of two brothers who had lived in association, should prove that the associated marriage took place before 7 th December 1859 (x). He is bound to establish the date of marriage strictly and beyond all doubt (y). A certificate of marriage (of 15th August 1871) bore the following endorsement:–

"At the time of this marriage this woman (Horatali) had by this man (Sarana) and by this man's brother Sottana the following children:- Balaya, age

(v) Appuhamy vs Doloswala Tea & Rubber Co. (1921) 23 N. L. R. 129. (w) Lapaya vs Surwamie (1948) 50 N. L. R. 492. (x) Dingiri menika vs Heenhamy (1907) Aser 38. (y) Siyatuhamy vs Mudalihamy (1912) 6 Leader 54.

17, Adari, age 15, and Menika, age 13.' This endorsement was held to be admissible in evidence to prove that the children were the children of Horatali by an associated marriage contracted before 1859, as such endorsement had been made by the certifying authority in the course of his official duty (z).

Illegitimate Children. Our Courts have drawn no distinction between illegitimate children pure and simple, and children who are termed illegitimate in a purely Kandyan sense in as much as they are born of an irregular or improper marriage, and according to the trend of modern Judicial decisions, in dealing with the rights of illegitimate children, the word 'illegitimate' has been used to describe the issue of a union which has not been registered according to the manner provided for by enactment, and such issue only. And accodingly Ordinance No. 39 of 1938 has declared that all children born of a union which has been duly registered under the provisions of any enactment which provides for the registration of marriages, and which in other respects fulfils the requirements stated by law to be the requisites for a valid marriage, shall be deemed to be legitimate, and no others provided that the subsequent registration of a union, which, but for the non-registration will be regarded as a marriage will have the effect of rendering legitimate the children born to the union before the marriage unless such children were procreated in adultery (Section 14).

Paraveni Property. The illegitimate children have no right whatever to the paraveni or ancestral lands of their father (a). Section 15 (a) of Ordinance No. 39 of 1938 lays down that illegitimate children shall have no right of inheritance in respect of the paraveni property of their father thus re-enacting the old law.

Acquired Property. Illegitimate children are entitled to inherit the acquired lands of their father who dies intestate as to those lands, subject to the widow's life interest if any. If there are both legitimate and

(z) Unga vs Menike (1914) 18 N. L. R. 182. (a) 3 N. L. R. 376.

illegitmate children, his acquired property is shared between them, each branch taking a moiety (b). When a father died leaving legitimate children and also a sole illegitimate child who was a daughter, the illegitimate daughter did not forfeit her right to her moiety of her father's acquired property by marrying in diga (c).

Section 15 (b) of Ordinance No. 39 of 1938 lays down that illegitimate children shall, subject to the interest of the surviving spouse, if any, be entitled to succeed to the acquired property of their deceased father in the event of there being no legitimate child or the descendants of a legitimate child of the deceased. Section 15 (c) lays down that illegitimate children shall be entitled to succeed to the acquired property of the deceased equally with a legitimate child or the legitimate children as the case may be:- (1) if the deceased intestate had registered himself as the father of that child when registering the birth of that child; or (2) if the deceased intestate had in his lifetime been adjudged by any competent Court to be the father of that child. Section 15 has brought about a substantial change of the law. Section 15 (c) provides that the illegitimate child or children shall be entitled to the acquired property equally with the legitimate child or children. In a case to which this Ordinance applies the position would be that there is no separate moiety which devolves on the illegitimate child or childern, and there is accordingly no room for the application of the principle that in the absence of any other representative in the illegitimate line to inherit that moiety, it would fall to an illegitimate daughter who has contracted a diga marriage even though she may otherwise have forfeited her right of inheritance to her father's acquired property. Hence where a Kandyan died intestate after 1st January 1939 leaving legitimate children and also an illegitimate

(b) 10 N. L. R. 129. (c) 59 N. L. R. 157.

daughter who was married in diga such illegitimate daughter had no right of inheritance to her father's acquired property (d).

Movables. Illegitimate children were entitled to inherit the movable property of their father. Section 22 of Ordinance No. 39 of 1938 has amended the law by depriving the illegitimate children of any rights to movable property in case there were legitimate children or descendants of a legitimate child. In case there were no legitimate children the illegitimate children and the widow, if any will succeed in equal shares.

Disqualification to Paternal inheritance. The father having died intestate, his landed property will devolve to his children in equal shares, unless the conventional or common law of the country disqualified any of the children from succeeding to a share of the inhertance. The disqualifications are:- (I) A son becoming a priest (II) A child being adopted out of the family. (III) A daughter being marrried out in diga. (IV) A daughter contracting an unlawful marriage.

I. A son becoming a Buddhist Priest (Bhikku). A son becoming a Priest thereby loses all right of inheritance in the property of his parents, because to take the robe is to resign all wordly wealth, nor shall he be restored to his right of inheritance by throwing off the robe after his father's death.

But if he did so at the request of any of his brothers or by the unanimous request of all his brothers, as the case may be, in that event, he will have a right to that share of his parent's property, which would have fallen to him had he never taken the robe.

But should one brother without the consent of his other brothers being laymen, induce the brother being a priest, to throw off the robe, then that brother shall provide for the Seewooralle out of his share of the property solely. The Seewooralle shall have no right to demand any portion out of his other brothers' shares.

(d) 57 N. L. R. 453.

But should the priest be stripped of his robes for some violation of the rules of his order, or from caprice throws them off, he has in either case a right of subsistence from the estate of his parents (e).

If however, the father had by a special gift or bequest bestowed a portion of his land on the sacerdotal son the latter will of course be entitled to the same, yet he will have no right to claim any other parcel of land besides, on the plea of its being an appurtenance of that specific portion which his father had given him. With the exception of that specific portion given to the priest all the rest of the father's landed property will go to his other sons or their issue, being laymen.

If the father himself was in priest's orders in his latter days, and received assistance and support from his sacerdotal son during his last illness and until his death, in that case, the father's landed property will devolve to his son the priest and to his other son the layman in equal shares.

If the son who was made a priest, reverted to the lay state and was received again by his father into the family house, he will be thereby reinstated in the position of an heir, and in the event of his father's demise will share with his brothers or with their children, in the ancestor's estate.

A man by entering the priesthood subsequent to his father's demise will not forfeit to his brothers, nor to his paternal uncle, nor to any other co-heir, that share of land which he had inherited from his father (f).

And the circumstances of being in the priesthood will not be a bar against a man's inheriting a share of his deceased brother's lands including the paternal paraveni. Thus if a man died without issue and intestate, leaving a brother who is a priest, and a nephew the son of a predeceased brother, his paraveni as well as other lands will devolve on the surviving brother and the nephew in equal shares (g).

(e) P. A. 50; S. D. 9. (f) P. A. 51. N. N. 34. (g) P. A. 52

If at the time of the father's death, his son was a robed priest, and the daughter was married in diga, and if the son with the intention of preventing the alienation of the ancestral lands threw off his robes and came and dwelt on the father's land, he will inherit those lands, and the diga married sister will then have no right of inheritance to them (h).

So far back as 1825 the Supreme Court held that a Buddhist Priest cannot make any claim to a share of the paternal estate where there were lay brothers and sisters (i). The Supreme Court has also held that although a priest, if he has lay brothers and sisters can have no claim to his father's lands, yet if he be the only child, he has a right to inherit his father's lands in preference to collateral heirs. The rule that a priest taking the robe renounces all wealth is not universal. He may take by Gift, Bequest, or Purchase and inherit from brothers and sisters (j).

Succession to Bhikkus. Although the proprietor was in priest's orders at the period of his death, his landed property will not remain to the surviving priests of his fraternity, nor to the temple whereof he was the incumbent, but the same will revert to his next of kin (k).

The pupil of a Buddhist priest is not his heir, and he has no right of succession ab intestato to the private property of the deceased over which he had disposing power at the date of his death (l). Money saved by a Buddhist priest, the incumbent of a temple, out of the proceeds of the temple lands, and by him invested in a mortgage passed, on his death, to his temporal representatives (m). The next of kin of a Buddhist Priest succeeds ab intestato to property inherited by him from his parents, etc., or personally acquired by him (n).

Section 23 of the Buddhist Temporalities Ordinance No. 19 of 1931 has amended the law by

(h) N. N. 40. (i) Austin 169. (j) Kande vs Kirinaide F. B. (1854) Ram 1843-55 51 (k) P. A. 48. (l) Somaloka vs Somalankara (1899) 3 N. L. R. 380 (m) Ratanapala Unnanse vs Cader (1882) 5 S.C.C.61. (n) Punchimahatmaya vs Cumarihamy (1885) 7 S.C.C.84

declaring that all pudgalika property acquired by any individual bhikshu for his exclusive personal use, if not alienated by him during his lifetime, will be deemed to be the property of the temple to which he belonged, unless such property had been inherited by him. So that where a Buddhist priest possessed of property dies intestate all property acquired by him for his use will devolve on the temple to which he belonged. Any property to which he is entitled by inheritance, will devolve on his next of kin.

Money due on a policy of insurance taken by a Buddhist priest is property acquired for his exclusive personal use within the meaing of Section 23 aforesaid and hence vests in the temple on the death of the priest unless it has been alienated in his lifetime. An Insurance Policy is a contract between the Company and the assured whereby the assured obtained rights in the policy, which were capable of being assigned. These rights may be described as the property of the assured and the executor or administrator, in the absence of assignment, is a party who can enforce rights which accrued to the assured perviously, when he entered into the contract. This section excepts from the class of pudgalika property acquired by an individual Bhikku for his exclusive personal use, property which has been inherited by that Bhikku. In fact inherited property comes to the Bhikku apart from any intention on his own part to use it or enjoy it. Pudgalika property is defined as property belonging to individual monks, as opposed to Sangika or belonging to the priesthood. If we examine the words of Section 20, we see a distinction drawn between offerings for the use of the temple, and pudgalika offerings for the exclusive personal use of the individual Bhikku. What the draftsman had in mind was a sharp difference between what was for the temple and what was for the individual monk and the phraseology 'for his exclusive personal use' (in Section 23) merely brought out that distinction emphatically. The words 'exclusive personal use' cannot be regarded as tautology. In employing

the words 'personal use' the draftsman meant 'for his own use'. The further employment of the word 'exclusive' brings in the meaning 'and not for the benefit of someone else' (o). The disposition by Last Will of pudgalika property by a Bhikku does not amount to an alienation during the lifetime of the deceased. The provision in the said Section 23 that such property not so alienated shall be deemed to be the property of the temple excludes the right of the executor to resort to it for purposes of administration. The deceased had made a Last Will whereby he appointed the appellant the executor thereof, and disposed of all his pudgalika property. Such disposition did not amount to an 'alienation by the Bhikku during his lifetime'. It was open to the testator at any time before his death to revoke the disposition. Or again, the property was available for execution against the testator, during his lifetime, in which case there might be a total failure. The word 'alienation' is defined as 'to make a thing another man's; or to alter or put the possession of lands, or other things, from one man to another'. Hence a disposition by will does not have the effect set out in that definition (p). Under this section, uninherited pudgalika property acquired by a Bhikku for his exclusive personal use and not alienated by him during his lifetime becomes, on his death the property of the temple to which he belonged, even though he abandoned the robes and became a layman. It is not correct to say that this section applies only to property acquired by a person who was a Bhikku both at the time of the acquisition and at the time of his death. This section provides that property which is not the property of a temple shall be deemed to be such property if it satisfies these conditions:- (1) that it is pudgalika property that had been acquired by a Bhikku of that temple for his exclusive personal use; (2) that it has not been alienated by him during his lifetime; and (3) that it is not property that had been

(o) Dammadara Thero vs Sedarahamy (1939) 41 N. L. R. 236.
(p) Executor of Last Will of Rambukwella Siddahartha vs Sumana Thero (1943) 44 N. L. R. 365.

inherited by him. In 1915 Saranankara Unnanse purchased certain immovable property. In 1934 Saranankara abandoned the robes and became a layman. In 1936, he married Bandara Menike, and he died two months later. It was held that the heirs of Saranankara Unnanse could not inherit such property as under Section 23 it vested in the temple (q).

II. A child being adopted out of the family. A son who was adopted into another family and was consequently removed from his father's care by the adopted parent (his paternal uncle or maternal uncle, or maternal aunt for instance) will not on that account lose his rights and interest in his own father's estate, although he has succeeded to the estate of his adoptive parent. And if after the father's demise, the said son asserted and maintained his title as co-heir, his share of the father's estate will eventually devolve to his issue. But if he having inherited his adoptive parents estate, neglected his interest in his own father's estate, and if after his death, his childrcn did not prefer a claim for his share thereof, in due time the said children will be eventually debarred from sharing in their paternal grandfather's estate (r).

In some cases, a daughter being removed from her father's house and being adopted into another family, eventually loses the right of inheriting a share of her own father's landed property. Thus, if on the death of the mother the daughter was removed from her father's care and was adopted and brought up by her mother's parents, and the father did afterwards on his death bed bequeath all his lands to his son by another wife, if the said daughter was givcn away in marriage by her adoptive parents, or if she was other-wise provided for so as to possess the means of support independent of her father's estate, the daughter will not be entitled to a share of her father's estate. But if the daughter, though removed from the father's care, was not regularly adopted into another family, but was merely brought up as a foster child

(q) William Singho vs Dhammajothi (1955) 57 N. L. R. 16.
(r) P. A. 52; S. D. 8.

by some of her mother's relations, and was maintained by them in charity and was not disposed of in diga, nor permanently provided for, in that case the said daughter's claim on her father's estate will not be affected (s).

Ordinance No. 39 of 1938 had amended the law with regard to the rights of adopted children to inherit from their parents as well as from the adoptive parents. Section 8 (3) is as follows:- 'Notwithstanding the adoption, the person adopted shall continue to have such right of succession to his or her own parent or parents or any other person, as he or she would have had if the adoption had not been effected'.

Hence in a case that comes up after this Ordinance came into operation whether the adoption had taken place before or after the commencement of this Ordinance an adopted child would succeed to the intestate estate of his or her own parents as he or she would have succeeded if the adoption had not been effected. A daughter is placed on the same footing as a son. The mere fact of her being adopted out of the family would not disentitle her to succeed to her parent's property.

III. A Daughter being married out in Diga. A daughter will be incapacitated from inheriting landed property from her father, by being given away in diga marriage by her father, it being premised that she remained settled in diga until her father's death and that her father left other issue a son, or a daughter settled in the father's house in binna. If the daughter were her father's only child then, although she were married in diga by her father, or after his death by her uncles or any other relations, she will yet be sole heiress to her father's landed property (t). The daughter, being the only child of a man's first, or second, or third marriage, will have equal rights with her brothers of the half blood in the father's estate, even if given out in diga (u). If a man died, leaving by the same wife a son, a daughter married out in diga, and an unmarried daughter, the son and the unmarried

(s) P. A. 53. (t) P. A. 54 and S. D. 2 (u) S. D. 4

daughter will succeed to the possession of their father's land, to the exclusion of the diga married daughter. And if the said unmarried daughter should eventually contract a binna marriage in her father's house she will thereby acquire a permanent title to a share of the father's landcd property, and if during her binna coverture she had issue (a son for instance), that son will eventually become entitled to inherit that share. If after the birth of that son the mother was given away in diga marriage by her brother, such subsequent diga marriage will not compromise the right of her said son to succeed to the possession of that share of the estate to which his mother had accquired a title by her former binna settlement (v).

The general rule is that when a woman marries in diga she forfeits her right to inhert any portion of her father's estate. The forfeiture seems to be founded on the following principle enunciated by Lawrie J. in the case of Kirimenika vs Kalumenika:- " In olden times the land in the Kandyan Kingdom did not belong to the individual in separate shares. The unit was the family and not the individual member of the family. All the members who lived in the house had a right to share in the produce which was the result of the labour of all, and all the males living in that house were bound to perfom the services due to the King. It was contrary to Kandyan custom that the produce of the lands should be removed to other houses and eaten by other families. Those who lived in the house had the right to share and eat. Those who left the house could not demand that the shares they formerly enjoyed should be sent after them. On this rests the rule that a priest in robes had no share; if he threw off the robes and rejoined the family his right revived. As a diga marriage did in fact, remove one of the family from the house, she in fact ceased to share in the produce' (w).

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,

(v) P. A. 55. (w) Kawamma vs David Singho (1945) 46 N. L. R. 5.4

conducted from the family house, or Mulgedera, and settled in that of her husband's, 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 paternal roof to enter another family. The essence of a diga marriage is the serverance of the daughter from the father's family and her entry into that of her husband, and her consequent forfeiture of any share in the family property (x).

Whether a marriage is to be in diga or in binna would naturally be determined during the negotiations which precede the marriage. From the point of view of the wife, a binna marriage leaves her rights intact, whereas a diga marriage and the departure from her family, which it involves, result in a forfeiture of her rights of inheritance to her father's estate. On the other hand a binna marriage places the husband in a position of great inferiority as compared with a diga married husband, especially in regard to his rights of inheritance to the property of his wife and the property of his children inherited from her. Since the Ordinance No. 3 of 1870 was enacted, there is a clear contemporaneous record of the type of marriage entered into by the parties which the law declares to be the 'best evidence' and it is now possible to prove that a marriage was in diga notwithstanding the wife remained in her father's household and perhaps never sustained a forfeiture of her rights and that the husband remained a diga married husband with all the rights he intended to secure for himself, when he contracted that the marriage should be in diga (y).

A marriage is a consensual contract. Section 39 of the Kandyan Marriage Ordinance No. 3 of 1870 enacts that the entry in the marriage register shall be the 'best evidence' of the marriage contracted and of the other facts stated therein. As between or as against the parties, or their respective reprsentatives in interest, the register of the marriage is conclusive of

(x) Punchimenika vs Appuhamy (1917) 19 N. L. R. 353. (y) Chelliah vs Katupitiya Tea & Rubber Co. (1939) 34 N. L. R. 89.

the intention with which the marriage was celebrated, unless the case is shown, to be one of mistake or fraud, or can otherwise be brought within the equitable exceptions of Section 92 of the Evidence Ordinance. The mere celebration of a marriage in diga does not work a forfeiture. 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. 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 the custom, and should settle in the home of her husband. 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. The forfeiture of the bride's rights in the paternal estate turns on the question of fact, whether the bride left the paternal home in accordance with the contract. In the absence of evidence, there would be a presumption that the terms of the contract relating to residence had been carried out and hence there is no reason for excluding oral testimony relating to the carrying out of this term of the contract which was not a matter of fact occurring at the time of the contract. Therefore a Kandyan woman whose marriage was registered as a diga marriage, but who continued to live in the Mulgedera does not forfeit her rights to her paternal estate (z).

It is well established law that a Kandyan woman who is the only child of her father by one bed, does not forfeit her rights of inheritance to her half brothers and sisters by other wives (a). It is settled law that on a diga marriage the only legitimate daughter who is also the sole child of the father does not forfeit her right to succeed to her father's property. It is also settled law that where a Kandyan father leaves both legitimate and illegitimate children his acquired property is shared between them, each branch taking a moiety. It is also accepted that where a father leaves issue by two marriages and the issue of each marriage inherit a

(z) Mampitiya vs Wegodapola (1922) 24 N. L. R, 129. (a) Banda vs Lebbe (1916) 2 C. W. R. 108.

moiety, the only child of one marriage does not forfeit her moiety by marrying in diga. A bench of five Judges has held that when a father died leaving legitimate children and also a sole illegitimate child who was a daughter, the illegitimate daughter did not forfeit her right to a moiety of the acquired property of her father by marrying in diga after his death even where the parents of both the legetimate and the illegitimate children were the same. It should be noted that this is a case under Kandyan law prior to Ordinance No. 39 of 1938 (b).

Unmarried daughter married in diga after father's death. If the father died intestate, leaving a son and two minor daughters, if the mother did subsequently give away one of the daughters in diga and had the other daugher married and settled in binna in the father's house, then the father's landed property shall remain in equal shares to the son and the binna daughter, to the exclusion of the diga daughter (c).

The parents being dead, the duty of providing a suitable match for the unmarried sisters, either in diga or in binna devolves on the brother or on the married sister (d).

The parents being dead, and the brother being unable, or neglecting to have his sister suitably disposed of in marriage, the sister may in such case, after having attained the age of full sixteen years, contract marriage of her own accord either in diga or in binna. If it were a binna marriage, then the brother must give up, to her a due portion of their parent's estate (e).

It is the duty of the brothers, after the death of their parents to give their sister in marriage, whether in binna or in diga; but there is nothing to prevent a woman from voluntarily contracting either kind of marriage (f). A woman who after her father's death, that is to say, after she has actually inherited

(b) Mallawe vs Somawathie Gunasekara F. B. (1957) 59. N. L. R. 157. (c) P. A. 54. (d) P. A. 41. (e) P. A. 42. (f) Ranehena vs Nekappu (1911) 14 N. L. R. 289.

her father's property, marries in diga, forfeits her rights already acquired (g). The fact that she was not given in marriage by her brothers or by any other relatives will not prevent the marriage from being a diga one. The marriage in diga, pending an action for declaration of title to her parental property, divests her of that right and hence she cannot maintain the said action (f).

But if after the father's death and before her marriage in diga, a daughter sells for valuable consideration any such property which passed to her by inheritance, such marriage will not deprive the purchaser of his rights to the property sold (h).

Binna daughter quitting Mulgedera. A daughter married in binna, quitting her parent's house with her children to go and live in diga with her husband, before her parents death forfeits thereby for herself and her children a right to inherit any share of her parent's estate (she having at the time a brother or binna married sister) unless one of her children be left in her parent's house. But the binna daughter will not forfeit her interests in her father's estate by quitting her father's house subsequent to his demise (i). It is important to distinguish between the position of a binna married daughter who severs her connection with the Mulgedera after her father's death, from that of a daughter who is given out in diga during her father's lifetime. In the former case the binna married daughter's title to a share in the paternal inheritance had already, before she left the Mulgedera, become crystallised and no forfeiture can thereafter take place if she takes up residence with the same husband (j). In such circumstances, the vested rights of a binna married sister cannot be extinguished except by prescription unless, apparently, they are forfeited by her contracting a second marriage in diga with another man (k).

(g) Dingiri Mahatmaya vs Kiribanda (1947) 48. N. L. R. 210: see also 16 N. L. R. 61 and 13 N. L. R. 176. (h) Peiris vs Kiri Banda (1925) 27 N. L. R. 52. (i) P. A. 59; S. D. 3. Ranhamy vs Kirihamy (1932) 34 N. L. R. 379. (j) Siripali vs Kirihamy (1917) 4 C. W. R. 157. (k) Dissanayake vs Punchimenike (1953) 55 N. L. R. 108.

Granddaughter. A daughter who by reason of a diga marriage was excluded from participating in her father's estate is also excluded from participating in the estate of her grandfather which would have come to her through her father (l).

Proof. Before a person is deprived of rights of inheritance, there ought to be some evidence of the circumstances which constitute forfeiture (m). The current of authorities is to the effect that the burden rests on the person who asserts that a marriage was in diga, to prove it (n).

Section 36 of the Kandyan Marriage Ordinance No. 3 of 1870 declares that the entry in the Register of Marriages shall be the best evidence of the marriage contracted and of the other facts stated therein and 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.

On the production of the certificate of registration of marriage in diga, the Court must in law draw the inference that the bride left the Mulgedera, and forfeited her paternal inheritance in accordance with the contract unless the contrary is proved by the person who denies that the forfeiture took place. This may be proved by facts which the Court would recognize as sufficient to rebut the inference. The production of the diga marriage certificate is of itself sufficient to prove not only that the wife was married in diga but also that she forfeited her paternal inheritance. The burden thereafter shifts to her, or to those claiming through her, to prove that the subsequent conduct of the parties was such that no forfeiture in fact took place (o).

Where no certificate of marriage has been produced, there is no scope for the application of the presumption contained in Section 36 aforesaid which states that if

(l) Menikhamy vs Ransohamy (1930) 11 Cey. Law Rec. 31.
(m) Dingiri Banda vs Dingirihamy (1914) 4 Bal. N. 51.
(n) Manelhamy vs Silinduhamy (1951) 53 N. L. R. 137.
(o) James vs Kumrihamy (1957) 58 N. L. R. 560.

it does not appear in the register whether the marriage was contraeted in binna or in diga, such marriage shall be presumed to have been contracted in diga unless the contrary is shown. In the absence of a statutory presumption in favour of the existence or non-existence of a fact, one would have to fall back on the ordinary rule as to burden of proof, namely, that it rests on the person who asserts it (n). But where no marriage certificate was produced at the trial, but the evidence led was sufficiently strong even to displace a presumption arising under Section 36, it was held that the marriage could not be declared to have been contracted in diga (p).

The registration of a marriage has the effect of making the marriage date back to the actual native ceremonies performed for the purpose of constituting the marriage (q). Where a Kandyan marriage contracted in binna was registered three years later and was described in the marriage register as a diga marriage, it was held that the entry in the register as to the nature of the marriage was rebuttable by other evidence, and that the marriage, upon its registration became valid as from the date of the original association of the parties as man and wife. One Appuhamy came and settled down in binna with Dingirimenika in her father's Mulgedera. Their eldest child was born in August 1903, in the Mulgedera, In December 1904 they registered their marriage. In the register it had been noted that Dingirimenika had at the time of registration been living as a married woman for three years. The marriage was described in the register as a diga marriage. It is not difficult to appreciate that when Appuhamy and Dingiri Menika appeared before the Registrar in December 1904, they could not have regarded themselves as contracting a fresh marriage with effect only from that date; on the contrary, they intended merely to regularise their previous de facto marriage which they, and everyone else, considered to have

(p) Sellappu vs Punchi Banda (1948) 49 N. L. R. 268. (q) Ukku vs Kiribanda (1901) 6 N. L. R. 104; Dingirihamy vs Mudalihamy (1912) 16 N. L. R. 61.

honourably commenced when Appuhamy was first received in the Mulgedera as her husband. In the result, the registration of the marriage gave validity to the uninterrupted association which had originally commenced in the Mulgedera. Dingiri Menika and her husband must therefore be regarded, notwithstanding the entry in the marriage register and notwithstanding their subsequent departure to Kandegedera (Appuhamy's Mulgedera) as having married in binna. The marriage, upon its registration became valid as from the date of their original association as man and wife (r). Similarly where a Kandyan woman was given out in diga but her marriage was subsequently registered as in binna, it was held that the diga association operated to forfeit her rights to her father's estate despite the binna registration (s).

Acquisition of Binna Rights by a Diga married daughter. The books on Kandyan law state that binna rights are acquired by a daughter who has been married in diga in the following circumstances:- (1) By being recalled by the father and remarried in binna; (2) By her father, on her return to his house along with her husband, assigning to them and putting them in possession of a part of his house and a specific share of his lands; (3) On her returning home along with her husband and attending on her father, and rendering him assistance until his death; (4) On her coming back and attending on and assisting her father during his last illness, and the father on his deathbed expressing his will that she should have a share of his lands (t).

The four sets of circumstances set out above are illustrative and not definitive. The ancient standard text books on the Kandyan law consist for the most part of the reports of, or comments upon particular decisions, rather than legal treatises in the

(r) Dissanayake vs Punchimenike (1953) 55 N. L. R. 108.
(s) Tucker vs Appuhamy (1930) 32 N. L. R. 41. (t) P. A. 64.

modern sense of the term. 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 the 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, and the status which the daughter would have enjoyed if she had been married in binna, can be acquired in various ways. A daughter married in diga forfeits her interest in her paternal inheritance, not by virtue of that marriage, but because it involves a severance of her connection with her father's house. If that connection is re-established on its original basis, if the diga married wife is once more received into the family as a daughter, it is only reasonable that she should enjoy a daughter's rights of inheritance, This, of course, is not a one-sided process; the father's family must intend or at least recognize the result (u). The difficulty lies in ascertaining whether or not the original basis has really been resumed, whether or not all parties, for example the father in his lifetime, or his sons after his death, have accepted and approved of the position, and whether the connection maintained is not merely the connection that a daughter naturally still maintains, even after the diga marriage, with her father, mother, brothers and sisters. The law requires that there should be consent in some form or other before a diga married wife can be said to have qualified herself for binna rights by a resumption of a close connection with the Mulgedera (father's house) (v). The fact that a diga married daughter has returned to the Mulgedera or that she has maintained a close and constant connection with the Mulgedera after marriage is not conclusive of the question that she has acquired binna rights. It must appear that the father in his lifetime, or the family after his death, have manifested

(u) Punchimenika vs Appuhamy (1917) 19 N. L. R. 353.
(v) Appuhumy vs Kiri Banda (1926) 7 Cey. Law Rec. 176.

an intention to admit the daughter to binna rights either by express declaration or by conduct from which such an intention can be gathered (w).

Any forfeiture of inheritance 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. There is nothing to show that this is the only test. There is nothing magic about the Mulgedera. When 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. Execution of a series of deeds by the brothers, together with the sister married in diga, will be strong evidence of the waiver of the forfeiture (x). Where a Kandyan permits his sisters, in spite of their marriage in diga (given in diga by mother), to possess their share of immovable property belonging to their father's estate for a long period of time, he has acquiesced in their right and cannot be permitted to deny it. It has been held that it is open to a brother to waive the forfeiture of the rights of a sister married in diga. In that case it was proved by the production of a series of deeds that the diga married sisters had dealt with several paternal lands as if they had rights to them. The rule applied in that case has its origin in the Roman law according to which every one is at liberty to renounce any benefit to whieh he is entitled (y).

The fact that a diga married daughter has returned to the Mulgedera or that she has maintained a close and constant connection with the Mulgedera after marriage is conclusive of the question that she has acquired binna rights although such facts are of great evidentiary value in its determination. It must appear that the father in his lifetime, or the family after his

(w) Mudiyanse vs Punchi Menika (1933) 12 Cey. Law Rec. 257 (x) Banda vs Ungurala (1922) 50 N. L. R. 276. (y) Appu Naide vs Hinmenike (1948) 51 N. L. R. 63.

death have manifested an intenion to admit the daughter to binna rights either by expressed declaration or by conduct from which such an intenion can be gathered. Proof of a course of dealing recognising such rights will go a long way in establishing such an intention. It is not necessary that a diga marriage should be registered for a forfeiture to take place. Similarly for the acquisition of binna rights it is the cessation of the severance that one has to consider. With regard to the second marriage the Judge should consider whether there was a marriage at all, and the nature of the incidents accompanying, and consequent on the living together. If they were similar to those of a binna marriage, then in spite of the absence of registration they tend to indicate the acquisition of binna rights (z). Where the parental property has devolved on the heirs entitled to succeed to that property on the death of her parents, a diga married daughter who returns to the parental home and re-marries and remains there does not by that fact alone become entitled to a share of the parental property, in the same way as if she had contracted a marriage in binna during the lifetime of her deceased parents. For her to become entitled to a share in her parental property and the marriage to be regarded as a binna marraige those who succeeded to that property when she was out in diga must agree to give her a share. Such an agreement may be indicated either expressly by a notarial instrument or by an unequivocal course of conduct. As a course of conduct has to be established by oral evidence or by reference to a series of documents or both, by far the better way of admitting a woman to binna rights would be by an instrument in writing attested by a Notary. Those who have inherited property and acquired rights cannot be deprived of them by the unilateral action of another who had forfeited her rights to the inheritance. There must be consent on their part to such a deprivation or the surrender of their rights must be voluntary (a).

(z) Mudiyanse vs Punchimenika (1933) 35 N. L. R. 179.
(a) Perera vs Aselin Nona (1958) 60 N. L. R. 73.

Where a Kandyan woman after marriage, is conducted to her husband's house and lives there, the marriage is one in diga. Evidence that thereafter, she visited her parents from time to time and stayed for some time with them, that she went to her parents house for her confinement, and attended on her father during his last illness is insufficient to establish a reacquisition of binna rights(b). A woman married out in diga, returning to the Mulgedera, after the father's death and marrying a second time in binna, does not regain binna rights.

Where a Kandyan woman marries in diga, the removal of her parents to live with her at the place in which she lived, will not constitute that place the Mulgedera in substitution for the family Mulgedera which was abandoned (c).

The reacquisition of binna rights by a woman, who was married out in diga, does not give her title to property alienated by the other heirs before she reacquired the binna rights. She would be entitled only to a share of such property as remained with the other heirs at the time of her reacquistion of binna rights (d).

Diga daughter returning destitute. A daughter who was disposed of in diga, having returned to her father's house, either before or after her father's death will be entitled to maintenance from her father's estate. After the father's death, she may have either a supply of necessaries from her full brothers and sisters who inherited their father's landed property, or she may have temporary possession of a portion of the paddy land with lodging in the family house. But so long as she remained in the diga settlement, she will not be entitled to support from her deceased father's estate (e).

Daughters are bound to accept the husbands provided for them by their brothers, and must go out with the chosen ones in diga. But if such a marriage

(b) Eminona vs Sumanapala (1948) 49 N. L. R. 440. (c) Dingiri Amma vs Punchirala (1934) 6 Cey. Law Rec. 164. (d) Appuhamy vs Kumarihamy (1922) 24 N. L. R. 109. (e) P. A. 65.

turns out badly, and the wife has to return to the Mulgedera, then there is an obligation on the brothers to make provision for their unfortunate sister and her children out of the family estate. This is a liability which attaches to the brothers as members of the family, and it is not an obligation creating a tie on the land (f).

The comparatively simple rule excluding the diga married daughter from the inheritance had become complicated owing to modern ideas regarding marriage, and in particular, the requirement of registration. As it is only in matters connected with succession that the difference between diga and binna marriages is of importance, Section 9 (1) of Ordinance No. 39 of 1938 has amended the law by enacting that a marriage contracted after first January 1939 and registered as a 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 that the exclusion of the daughter from the inheritance should only take place where there has been a diga marriage valid in law and contracted during the lifetime of her father.

As alrady stated, a daughter loses her rights to her paternal estate by being married out in diga. 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. If the diga married daughter, with the acquiescence of the family, remained in the Mulgedera without being conducted to the husband's house, then she would not forfeit her rights. A binna married daughter leaving her parents house to go and live in diga with her husband before her father's death, forfeits her rights to the paternal estate. Though a daughter married in diga avoided a forfeiture of her rights by preserving or subsequently acquiring binna rights, yet it did not alter the character of the marriage itself still leaving the husband as a diga married one.

(f) Peiris vs Kiribanda (1925) 27 N. L. R. 52.

These rules will apply only where the marriage was contracted before the first day of January 1939. But where a marriage is contracted on and after that date as in diga, such marriage will for all purposes of the law governing the succession to the estates of deceased persons be deemed to be a marriage in diga. Similarly a marriage contracted on and after the said date in binna will, for all purposes of the law governing the succession to the estates of deceased persons, be deemed to be a marriage in binna. In no circumstances could a marriage contracted in diga (on and after the said date) be altered into a binna marriage; or a marriage contracted in binna be altered into a diga marriage. The exclusion of the daughter from the inheritance will take place only where there has been a diga marriage valid in law and contracted during the lifetime of the father.

(IV) **A daughter contracting an unlawful marriage.** If a daughter degraded herself by becoming the wife of a man of any tribe or caste inferior to her own caste, she will thereby forfeit all right to inherit property of any kind from her parents and other relations (g). The marriage of a man with a woman of a superior caste to himself is prohibited ; and even carnal conversation between the sexes of different castes is penal, especially the conexion of a higher caste woman with a lower caste man. When a woman degraded herself, by having connexion with a man of lower caste than her own, her criminality casts a stain on her family, which formerly could only be oblitreated by the family putting her to death, but this they could not do without permission from the King. However, in late reigns, this extremity was avoided, the King taking the woman to himself as a slave and sending her to one of the royal villages as such, and in one instance the King ordered it to be published that the woman had been sent to Bintenna to be put to death,when it was however known that she, in fact, was only sent there as a slave (h).

So far back as 1845. the Supreme Court held that if parties of different castes are clearly proved to

(g) P. A. 55. (h) S. D. 35.

have agreed to marry, by the usual wedding ceremonies having preceded their union, or other clear and positive proof of their intentions to marry, the Court would not then declare such a marriage to be null and void, as being prohibited by the Kandyan custom now prevailing or in force, when all legal disabilities for caste are virtually abrogated and absolute in the Colony (i). At no time within approximately the last century have marriages between persons of different castes been prohibited, or irregular carnal relationship between them penalised. There is no rule of Kandyan law which penalises a woman who during the subsistence of a valid marriage, is guilty of misconduct with a man of inferior caste, with forfeiture of vested rights. The forfeiture of rights in the case of a diga marriage attached 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. It is impossible to say of a woman who during the subsistence of a valid marriage deserts her husband for another man, that she has gone out in diga (j). A woman who left her father's house with the intention of securing employment and who later lived as the mistress of a Tamil man, did not forfeit her rights to her father's estate as she did not leave her home with the intention of going with that man (k).

Diga without registering marriage. A woman who now lives in diga, but whose marriage has not been registered, is in very much the same position as a diga married woman. The forfeiture of paternal inheritance by a woman who goes out in diga does not depend on there having been a legal marriage between such a woman and the man with whom she goes. Hence a woman who so lives is not entitled to a share of her father's estate as her departure from her paternal home without registration of the marriage is sufficient to cause a forfeiture (l). In such a case she will not only lose her share in her father's estate.

(i) Anstin 235.(j) (Mohamadu va Dingiri Menika F B. (1933) 13 Cey. Law Rec. 144. (k) Menikhamy vs Appuhamy (1913) 5 Bal. N. 38. (l) Kalu vs Howwa (1892) 2 C. L. R. 54. Komale vs Duraya (1907) 3 Bal. N. 122.

but she will also be unable to claim her life interest in her husband's acquired property should he predecease her.

Section 9 (2) of Ordinance No, 39 of 1938 has amended the law by declaring that a daughter going out in diga after 1st January 1939 without registering her marriage shall not by reason of such departure only forfeit or lose any right of succession to which she was entitled.

As already stated a woman who has left her parental home and is living with a man, without registering their marriage, forfeits her rights to the paternal estate.

This rule will apply only where the daughter has left the parental home before 1st January 1939. But where the daughter leaves the parental home, on or after the said date and lives with a man without registering such marriage, she will not forfeit her rights to the paternal estate.

Jataka Urume or Inheritance by virtue of Paternity. The Jataka Urume can be of no avail to the father, so long as the child continues in life (m).

The father is not the heir of the property of his children born in a binna marriage, which they have acquired through their mother; the maternal uncles or next of kin on the mother's side are the heirs to such children; but he will succeed to such children's otherwise acquired property (n).

If the child was the issue of a binna marriage, and if after the death of that child's mother, the father had deserted the child and left it entirely to the care of the mother's family, in that case, the father will have no right to the reversion of any property that belonged to that child; that property will therefore at the child's death, devolve on his or her nearest of kin on the mother's side, in preference to the father and in preference to the said child's paternal half brother and half sister it being premised that the father was not also an Ewessa cousin of the said child's mother. But if the child albeit issue of a binna connection, had

(m) P. A. 76. (n) S. D. 17.

remained under the father's care after the mother's demise, in that case, the father will be entitled to a reversion of the child's estate in preference to any child's distant maternal relations, (mother's grand uncle's son, for instance) and that whether the father was or was not also an Ewessa cousin of the said child's mother (o).

Binna Married Father. In the year 1889 a Full Court of the Supreme Court held that the lands of a binna daughter, which she inherited from her mother, devolved on her maternal relatives in preference to the father (p).

In 1925 Jayawardene J., stated as follows:– "The decision of the collective Court aforesaid has been followed ever since. The rule as laid down by Sawers is too strongly established to be questioned now. In my opinion, the rule as stated in Sawers should be read with the limitation laid down in Armour, that a father's right to inherit the property of a child born of a binna marrige is not lost when there are only distant maternal relations and the child remained under the father's care after the mother's death". In this case the binna married father was held entitled to succeed in preference to the great grandson of a granduncle of the propositus (q). In a later case Schneider A. C. J., stated as follows:– "I agreed with the judgment in Appuhamy vs Gamarala, but on further consideration, I am doubtful whether the statement of law by Armour should be regarded as limiting the law as stated by Sawers. However it was held in that case, that the law as stated by Sawers should be followed. According to Sawer, the maternal uncles, and failing them, the next of kin on the mother's side, are the heirs. The maternal granduncle is entitled to preference to the binna married father, even if the law as stated by Armour be regarded as limiting the law as stated by Sawer. The maternal granduncle would not be excluded by the binna married father. The instance of a distant relation given by Armour is mother's granduncle's son (r).

(o) P. A. 77. (p) Appuhamy vs Dingirimenika F. B. (1889) 9 S. C. C. 34. (q) Appuhamy vs Gamarala (1925) 27 N. L. R. 361 (r) Dingiriya vs Ukkuamma (1926) 28 N. L. R. 203.

If the mother has departed this life previous to the demise of her child, then the father, will be entitled to the reversion of the child's acquired property (s). The father is entitled to an absolute interest in the acquired property to the exclusion of the deceased's brother (t). The binna married father was declared entitled to the acquired property of his child to the exclusion of the deceased's half brother (u).

Ordinance No. 39 of 1938 has amended the law as shown at the end of this Chapter.

Diga Married father. (1) 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 his son's uterine brothers or sisters, if he have any, and failing them, to the son's nearest heirs in his mother's family. (2) 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 son; but failing brothers and their sons, his sister or sister's son succeeds (v). (3) 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 (w).

In a contest between a diga married father and the mother's half brothers and sisters with regard to property which the deceased child had inherited from her mother, it was held that the father was the sole heir following a Supreme Court decision of 1852 (x). The diga married father was declared

(s) P. A. 89. (t) Ranhotia vs Bilinda (1909) 12 N. L. R. 111. (u) Lebbe vs Banda (1929) 31 N. L. R. 28 (v) S. D. 12 and 10 (w) P. A. 76. (x) Dingirimenika vs Appuhamy (1907) 10 N. L. R. 114.

entitled to an absolute estate in the acquired property of his child to the exclusion of the deceased's brother (y). In Chelliah vs Katupitiya Tea and Rubber Co., Garvin J. stated as follows:- "While I am myself inclined to think that it is more in keeping with the principles of intestate succession so far as they are descernible in the Kandyan Law, that the father should only take a life interest in the property which his deceased child inherited from his mother, the balance of judicial decisions is the other way namely, that the father is the heir" (z). In Bisona vs Janga it was held that the father inherited only a life interest (a). In a later case Gratiaen J. said that it was not at all desirable to disturb a long established ruling on any question affecting rights of succession (b). In view of the conflicting decisions this question was referred to a Bench of five Judges. It was held by a majority of the Court that the diga married father succeeded to an absolute interest. Sansoni J. stated as follows:- "Most of the Judges who have had to consider this question 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. 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. 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 (c).

The above cases have been decided according to the law relating to intestate succession as it obtained prior to Ordinance No. 39 of 1938.

By Section 16 of Ordinance No. 39 of 1938 the law has been amended. As regards the paraveni property of a child dying intestate and without issue on or after 1st January 1939, the paternal paraveni reverts absolutely to the father if he is alive, or to his blood relations however remote to the exclusion of his

(y) Ranhotia vs Bilinda (1909) 12 N. L. R. 111. (z) 34 N. L. R. 89
(a) 41 C. L. W. 40. (b) Appuhamy vs Silva (1955) 56 N. L. R. 247.
(c) Karunawathie vs Edmund Perera F. B. (1960) 62 N. L. R. 433.

mother, and the maternal paraveni reverts absolutely to the mother if she is alive or to her blood relations however remote to the exclusion of his father. The mother will be entitled to succeed to the child's paternal paraveni only if there be no heirs on the father's side. Similarly a father will be entitled to the maternal paraveni only if there be no heirs on the father's side. As regards acquired immovable property, the father and mother are entitled to a life interest therein; in the case of a sole surviving parent, he or she would be entitled to a life interest in all the acquired property. In the absence of brothers and sisters of the deceased or their issue, or remoter descendants, the life interest of the parents would be enlarged into full dominium.

This piece of legislation is not a declaration, but an amendment of the law and hence has no retrospective effect (c).

The word 'child' in Section 16 means not only a legitimate child, but also an illegitimate child (d).

The words 'brother' and 'sister' in Section 16 connote a legitimate brother or sister of the full or the half blood. Neither under this Section, nor under the customary law of the Kandyans can an illegitimate child inherit from a collateral source (e).

Father of an illegitimate child. On the death of legitimate children their father may inherit their property by blood right, but he can never as their father do this in the case of illegitimate children(N. N, 15) It is definitely laid down in the authorities that the father of an illegitimate child has no right of succession to his property.

All pudgalika property, that is acquired by any individual **Bhikku** for his exclusive personal use, shall, if not alienated by such Bhikku during his lifetime, be deemed to be the property of the temple to which such Bhikku belonged unless such property had been inherited by such Bhikku (f). For full particulars see under heading 'Succession to Bhikkus' in this Chapter at page 152.

(d) 48 N. L. R. 318 and 391. (e) Ukku vs Horathala (1948) 50 N. L. R. 243. (f) Section 23 of the Buddhist Temporalities Ordinance Chapter 318.

CHAPTER IX.

WADAAHIMI, PARTURIATE OR BIRTH RIGHT.

1. The wadaahimi Right comprises, first Mau Urume or maternal inheritance, the right of succession to the mother's estate, or to the estate of any other relation in right of one's mother.

2. And second, Daroo Urume, inheritance by virtue of maternity, the right whereby the mother inherits the estate of the deceased child.

Mau Urume or Maternal Inheritance. The Mau Urume right takes effect subsequent to the mother's demise and not previously. Therefore in the mother's lifetime none of her children can have a right to any portion of her estate; her children can neither insist on a division or partition of that estate, nor can they prohibit the mother from disposing thereof according to her own will (a).

If a woman dies leaving several children, her lands and all other property will be divided amongst them all; the son, the binna married daughter, the diga married daughter and the child adopted into another family, will without distinction, receive equal shares in the property (b).

Subject to the rights of a widower, if any, the children inherit the property of their mother in equal shares.

Widower. The rights of the widower have been fully dealt with in an earlier Chapter.

Children of different unions. According to Armour and the Niti Niganduwa, under the ancient law the estate of a person was divided per capita. It has been settled by a long series of decisions of the Supreme Court that the succession should be per stirpes where children of different marriages claim property of their father. The early text writers do not draw any distinction between the rule governing the succession of children of different marriages of a father and that governing the succession of children of different marriages of a mother. Moreover there are definite deci-

(a) P. A; 78. (b) N. N. 108.

sions of the Supreme Court adopting the rule of succession per stirpes, in the case of the property of a mother. A divisional bench of three Judges has held that where a Kandyan, whether male or female, dies leaving children by two beds, the children succeed per stirpes and not per capita.

This is the law in respect of the estate of a person who died before the commencement of Ordinance No. 39 of 1938 (c). Section 18 of Ordinance No. 39 of 1938 has re-established the old rule, that the estate should be divided equally among all the children of the different unions.

Illegitimate Children. If a woman died intestate, leaving issue a son and a daughter, born out of wedlock, and if neither of the children have an acknowledged father, the whole of the mother's estate will devolve in equal shares to the son and the daughter, and that even if the daughter were married in diga (d).

Property given to a concubine, or acquired by her if she dies intestate and without issue, follows the same rule of inheritance as the property of an unmarried woman; but if a concubine or a prostitute leave issue, they inherit their mother's property (e).

The children of a woman married to a man of her own caste according to usual rites and customs, or of a woman who after cohabitation with a man of higher or of lower caste than herself, and when still in an unmarried state has intercourse with a man who is not known, all inherit the estate equally. There are however exceptions viz.–if the parents of a woman marry her to a man in binna, and she bears a child to him, but afterwards cohabits with and bears a child to a man of lower caste than her own, the children born in proper wedlock as aforesaid inherits, by maternal right of inheritance, all the ancestral property of the mother, of which nothing goes to the child born to the low caste man. However

(c) Mohottihamy vs Alni Nona F. B. (1949) 50 N. L. R. 317; see also 9 S. C. C. 43. 7 N. L. R. 242. and 24 N. L. R. 249. (d) P. A. 83. (e) S. D. 21.

putting aside the ancestral property all the acquired property of this vile outcaste woman is divided equally amongst all her children (f).

The first paragraph (P. A. 83) is a clear authority for the proposition that illegitimate children succeed to all the property of their mother whether paraveni or acquired. It is not essential that their father should be acknowledged to give them that right. It is settled law that illegitimate children of a woman inherit her acquired property equally with legitimate children (g). The Supreme Court has held that the illegitimate offspring of parents of the same social status succeed to the inherited or paraveni property of the mother (h). The Supreme Court has also held that an illegitimate child of a deceased daughter was entitled to succeed to the acquired property of the grandmother (g).

The law with regard to the rigths of illegitimate children to the estate of their mother has been amended by Section 18 of Ordinance No. 39 of 1938 as follows:- (1) In succession to an unmarried woman or to a diga married woman who dies on or after 1st January 1939 the illegitimate children are entitled to an equal share in all property, with the legitimate children. (2) In succession to a binna married woman residing on her mother's property, or on her father's property the illegitimate children are entitled to succeed only to a share of the acquired property and movables, equally with the legitimate children; they have no right to any share of the paraveni property.

Disqualification to Maternal Inheritance. The mother having died intestate, her landed property will devolve on all her children in equal shares, unless the conventional or common law disqualified any of the children from succeeding to a share of the inheritance. The disqualifications are (1) A son becoming a priest. (2) A daughter being married out in diga. (3) A child being adopted out of the family. (4) A daughter contracting an unlawful marriage.

(f) N. N. 15. (g) Raju vs Elisa (1931) Modder 508. (h) Menika vs Menika (1923) 25 N. L. R. 6.

1. The son becoming a Priest. A son whether he be a layman or priest, or a daughter whether married in diga or living in binna on her mother's premises, (these) the male and female children, will all have an equal right to the (maternal) inheritance (i).

If the mother died intestate, leaving two sons, one of them a layman, and the other a priest, the former will succeed to the possession of the mother's landed property, and the right of the sacerdotal son to a share thereof will remain in abeyance.

If the mother died intestate, leaving an only child a son, her entire estate, including her paraveni or ancestral lands, will devolve on that son, although he were in Priest's orders, to the exclusion of the brothers and sisters and their issue (j).

A son becoming a Priest, thereby loses all right of inheritance in the property of his parents, because to take the robe is to resign all worldly wealth; nor shall he be restored to his right of inheritance by throwing off the robe after his **father's death**, unless he shall have done so at the request of his brother, or by the unanimous request of his brothers, as the case may be; in that event he will have a right to that share of his parents, property which would have fallen to him, had he never taken the robe (k).

The Niti Niganduwa, dealing with inheritance by maternal right, says that a son whether he be a layman or priest will have an equal right to the maternal inheritance. This is a perfectly definite statement that there is no forfeiture in the case of property which formed part of the mother's estate. Sawer says that he cannot recover any rights after his father's death, but he makes no mention of non-recovery of rights on the mother's death. In view of these authorities it would seem that there is no definite statement that a priest does not inherit his mother's estate. In as much as that there is a presumption against a forfeiture, and as there is no clear authority in the Kandyan law that a man forfeits his rights to his mother's estate by becoming

(i) N. N. 106. (j) P. A. 84. (k) S. D. 9.

a priest, the Supreme Court has held that a man does not forfeit his right to succeed to his mother's estate by becoming a priest (l).

Section 18 (2) of Ordinance No. 39 of 1938 has enacted that when a woman married in binna on her father's property dies intestate after 1st January 1939, leaving children.....such children shall be entitled to succeed.....in like manner.....as they would have become entitled out of the estate of their father. Thus a son who had become a bhikku would forfeit his rights to the maternal estate where the mother was married in binna on her father's property and where she has died after the commencement of this Ordinance.

2. A Daughter being married out in diga. A woman who was married and settled in diga, having died intestate, leaving sons and daughters, her landed property will devolve on all her children in equal shares, although the daughters were married out in diga, and whether the sons did or did not inherit landed property from the father, it being premised that all the said children were issue of the deceased's diga marriage (m). If the mother left a daughter married out in diga, and a son, the latter will inherit the lands derived from his mother's paternal ancestors, to the exclusion of his diga married sister (n).

If the father's house and landed estate are distant, or distinct from the mother's house and estate, then the marriage of a daughter in binna in the mother's house is considered a diga marriage, in respect of the father's house and estate, and vice versa, but although in some cases, by being married out in diga, away from the houses of both the parents, a daughter may lose her right to inherit a share of her mother's landed estate, yet, if she were married and settled in binna in her father's house, she will not lose that right, and accordingly, in the event of the parents dying intestate, their lands will devolve in equal shares to their son or sons and to the said daughter (o).

(l) Menika vs Neina (1923) 26 N. L. R. 111. (m) P. A. 82. (n) P. A. 80. (o) P. A. 81.

If a woman dies leaving several children, her lands and all other property will be divided among them all; the son, the binna married daughter, the diga married daughter, and the child adopted into another family, will, without distinction receive equal shares in the property (p).

Daughters, having brothers, have no superior interests of inheritance in their mother's landed estate to what they have in their father's estate, with this exception, however that, where both the parents have each an independent estate, the daughters, whether married in diga or otherwise, have paraveni rights to equal shares with their brothers in their mother's estate (q).

The same customs regulate the succession to the mother's estate as to the father's (r).

In the year 1856, the Supreme Court held that a diga married daughter was not entitled to the mother's property:- (1) Where such property was derived from her (the mother's) paternal ancestors and (2) Where the parents had not each an independent estate. In a later case it was held that in the uncertainty of the law on the subject and the conflicting state of authorities a diga married daughter should not be deprived of a share in her mother's inheritance (s). Modder lays down without qualification, that a daughter's diga marriage does not work a forfeiture of the maternal estate when the parents had each an independent estate. This statement of the law is in accordance with the views expressed by Sawer. The law is definitely stated by Sawer without qualification, and in the absence of a clear rule to the contrary in the case of maternal inheritance it is immaterial whether the mother married in binna or in diga (t).

Section 18 of Ordinance No. 33 of 1938 has amended the law by providing that in succession to a diga married woman or a woman married in binna and residing on her mother's property and who dies intestate after 1st January 1939 all her children whether

(p) N. N. 108. (q) S. D. 16. (r) S. D. 6. (s) Kiriwantes vs Gunatirala (1896) 2 N. L. R. 92; see also 7 N. L. R. 100; 5 C. W. R. 175. (t) Carolis Silva vs Kiri Banda (1925) 28 N. L. R. 190.

married in binna or in diga should succeed to her property. In succession to a woman married in binna on her father's property, the diga married daughters are not entitled to a share thereof.

3.A daughter being adopted out of the family. A daughter so adopted would unless she were an only child, lose her right of inheritance in her parents' estate, the same as if she had been given out in diga (u).

A daughter whom the father had given away in diga and a daughter who had been adopted into another family are on a par (v).

The above passages speak of the parent's estate. There is no clear rule which speaks of a forfeiture by the adopted daughter of her maternal estate. The same rules that apply to a diga married daughter ought to apply in the case of an adopted daughter too.

Section 8 (3) of Ordinance No. 39 of 1938 has amended the law by providing that, notwithstanding the adoption, the person adopted shall continue to have such right of succession to her own parents or any other persons as he would have had if the adoption had not been effected.

4. A daughter contracting an unlawful marriage. At no time within approximately the last century have marriages between persons of different castes been prohibited, or irregular carnal relationship between them penalised. If parties of different castes are clearly proved to have agreed to marry by the usual wedding ceremonies having preceded their union, or other clear and positive proof of their intention to marry, the Court would not then declare such a marriage to be null and void, as being prohibited by any Kandyan custom now prevailing or in force when all legal disabilities for caste are virtually abrogated and obsolete in the Colony (w).

Daroo Urume or Inheritance by virtue of Maternity. The mother is heir to her children, even to the paraveni property of her deceased husdand, through them (x).

(u) S. D. 9 (v) P. A. 54. (w) Mohamadu Tamby vs Dingiri Menika (1933) 13 Cey. Law. Rec. 144. (x) S. D. 11.

Failing imediate 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, is his father or if the father, be demised, the mother, but this for a life interest only (y).

A person dying childless, having parents and brothers and sisters, the property which the deceased may have had from his parents, reverts to them reciprocally (if from the father, to the father; if from the mother to the mother) as does his acquired property whether land, cattle or goods, to his parents, but his parents have only the usufruct of this acquired property (z).

The mother is the sole heiress to her child, who had survived his or her father, and died without issue, and left neither full brother nor full sister. Accordingly, property of every description, not excepting even the paraveni lands which had derived to the deceased child from his or her father and paternal grandfather, will in the event of the child dying intestate devolve on the mother even to the exclusion of the said child's paternal grandmother, paternal uncle, and paternal aunt, and their issue. And that, even if the said child's mother had been divorced from her husband, the father of that child, and even if she had contracted another marriage in diga after that divorce, either before or after the death of the said child's father (a).

The mother inherits the property of her children at their death by filial right of inheritance (b).

If the proprietress has no children or grandchildren brother or sister of the same parents as herself, and dies leaving her mother and paternal aunt, all the propery of the deceased, including her paternal lands, will devolve on the mother (c).

If the proprietor dies, leaving only his mother, and his father's brothers, his property including his paternal lands will devolve on her mother (d).

(y) S. D. 10. (z) S. D. 16. (a) P. A. 85. (b) N. N. 15. (c) N. N. 113. (d) N. N. 94.

Paraveni property. In the year 1824 the Judicial Commissioner's Court held that the mother is the heir of her only fatherless child dying without issue, however, the property the child dies actually possessed of may have been acquired, whether it shall have been the paraveni property of the child's father, or accrued to the child in any other way, and that to the exclusion of the child's father's family (e). In the year 1888 this decision was followed by Lawrie J, who held that the mother was the sole heiress to the paraveni lands of her child who had died unmarried and without issue, as against the father's sister, there having been no brothers or sisters of the intestate. If the deceased child left a full brother or sister, that brother or sister would be entitled to the deceased's share of his or her paternal paraveni land in preference to the mother. In the passage in Sawer's Digest to the effect that a mother had only a qualified life interest in her deceased child's property, Sawers must be taken to have been dealing with a mother's rights when her deceased child had left full brothers and sisters (f). In a later case Hearne J, after reviewing the above cases stated that the law on the subject must be regarded as settled (g).

Acquired property. As to the extent of the mother's interest in the acquired property, we have in the first place the Niti Niganduwa's statement that the mother will "inherit" and that the property will "devolve" on her. Strictly interpreted these terms import acquisition of the dominium. In the next place, we have Sawers dictum that the mother "is the heiress to the acquired property of all kinds and same is entirely at her disposal", followed by Armour's implied statement that "the mother is sole heiress", and his express declaration that acquired lands "will devolve absolutely to the mother". These passages are unequivocal. Lastly, we have in apparent conflict with these, Sawer's general statement that the mother's is a "life interest only or on the

(e) Austin 133. (f) Punchirala vs Dingirimenika 8 S. C. C. 135.
(g) Ukkurala vs Ewonsia (1941) 43 N. L. R. 166.

same condition as she holds her deceased husband's estate, which is merely in trust for her children", which, refers to paraveni property, when there are brothers and sisters; and Sawer's statement that the property which a man dying childless but leaving parents, and brothers and sisters had had from his parents reverts to them recriprocally and " his acquired property, whether land, cattle or goods to his parents, but his parents have only the usufruct of the acquired property, they cannot dispose of it by sale, gift or bequest,it must devolve on the brothers and sisters.....ultimately it is divided among the brothers of the whole blood equally". This statement of the law is not adopted by the later writer Armour but Sir Charles Marshall takes it over almost verbatim and without comment, although he notes the contradiction between the two passages. If there is a conflict between the authorities as to the claims of the mother and of the brothers and sisters, preference ought to be given to the mother as the nearer relation in blood. The instance in which she is postponed to the brothers and sisters is where the principle operates of the inherited lands reverting to the source whence they came. That principle, of course does not affect acquired lands. Where a person dies unmarried intestate, and without issue his acquired immovable property devolves on his mother (the father being dead) in preference to his (decased's) brothers and sisters (h). The mother is entitled to the acquired property in preference to the father (i).

The mother is entitled to the acquired property only in case the deceased left no issue. If the deceased left him surviving an illegitimate child, such child, will inherit the acquired property to the exclusion of the mother. In as much as illegitimate are entitled equally with legitimate children to the acquired lands, the word "issue" in the passage from Sawer must include both legitimate and illegitimate issue (j).

(h) UKKuhamy vs Balaetana (1908) 11 N. L. R. 226. (i) Kalu vs Kira (1915) 18 N. L. R. 465. (j) Ranhamy vs Meniketana (1907) 10 N. L. R. 153.

In case the deceased left him surviving his mother and a widow, the mother will be entitled to the acquired property subject to the life interest of the widow (k). In case the deceased left her surviving her mother, and her husband married in diga, the mother would be entitled only to the property acquired before marriage, the widower (husband) succeeding to the property acquired during coverture (l).

Section 16 of Ordinance No. 39 of 1938 has amended the law by declaring that the **paraveni paternal** property of a child dying intestate on or after 1st January 1939 and without issue should revert absolutely to the father if he is alive, or to his blood relations however remote, to the exclusion of the deceased's mother, and in the case of **maternal paraveni** that it should revert absolutely to the mother if she is alive or to her blood relations, however remote, to the exclusion of the father. The mother would succeed to the paternal paraveni only if there be no heirs on the father's side. Similarly the father would succeed to the maternal paraveni only if there be no heirs on the mother's side.

In the case of acquired property the father and mother are declared entitled in equal shares to a life interest in all the acquired immovable property of such a child. In case the deceased had not left any brothers and sisters or their issue or remote descendants the life interest of the parents would be enlarged into full dominium.

All **pudgalika property** that is acquired by any individual **bhikku** for his exclusive personal use shall, if not alienated by such bhikku during his lifetime, be deemed to be the property of the temple to which such bhikku belonged, unless such property had been inherited by such bhikku (m).

For full particulars see chapter VIII under heading "Succession to Bhikkus" at page 150.

(k) 11 N. L. R. 222. (l) 24 N. L. R. 257. (m) Section 23 of the Buddhist Temporalities Ordinance Chapter 318.

CHAPTER X.

RIGHTS OF ASCENDANTS AND COLLATERALS.

As we have already pointed out in Chapter VI, there are two kinds of property, namely, Paraveni and Acquired property. Paraveni property is again Paternal Paraveni or Maternal Paraveni.

Our Courts had always regarded Paraveni property as meaning Ancestral property which had descended by inheritance, property derived by any other source of title or by any other means being regarded as acquired property (a).

Section 10 of Ordinance No. 39 of 1938 defines Porperty. Subsection 1 demonstrates that the character of Paraveni that is superimposed on property is dependent entirely upon the mode or manner in which a person becomes entitled to it, and it indicates three different modes by which a person becoming the owner of property would throw the mantle of Paraveni on the property, the subject of such ownership. It is an essential requisite of Paraveni that the property should pass to the person from one to whose intestate estate he would be an heir; provided this requisite is satisfied, then if the property passes by (1) suceession or (2) gift inter vivos or (3) devise under a Last Will, the property becomes Paraveni. Where the Ordinance provides that property vesting by succession ab intestato on an heir is Paraveni it enacted nothing new. It is declaratory of the existing law. But when it says that a gift by a deed inter vivos or a devise under a Last Will of property belonging to a person dying after the commencement of the Ordinance it enacts new law which cannot be given retrospective effect.

All other property of a deceased person shall be deemed to be **"acquired property"**. The proviso to section 10 (1) next proceeds in certain circumstances to convert what the main provisions–Section 10 (1) (a), (b), and (c)–declare to be paraveni into acquired property, and this it does by imposing the fulfilment

(a) Lebbe vs Banda (1929) 31 N. L. R. 28.

of certain conditions specified therein. There are two conditions which are antecedently predicated, (1) that the propositus should not have left him surviving a child or descendant, and (2) that the property should have been acquired property of the person from whom it passed to the propositus (b).

Paternal Paraveni. 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 (c).

A person dying childless, having parents and brothers and sisters, the property, which the deceased may have had from his or her parents, reverts to them reciprocally, (if from the father to the father; if from the mother to the mother) as does his acquired property (d).

If a man dies, leaving relations on his mother's side, but none on his father's side, his father's lands, would pass to his mother's family from him, his widow, if he left one, having a life interest in the property (e).

If a person survived his or her parents and died without issue and intestate, and left not an adopted child, nor a brother nor a sister of the full blood, nor a nephew nor a niece, of a full brother or a full sister in that case the deceased's paternal paraveni lands will pass to his or her next of kin on the father's side, and the lands which had derived to the deceased from his or her maternal ancestors, will devolve on the next of kin on the mother's side (f).

Although the proprietor was in the priest's orders at the period of his death, his landed property will not remain to the surviving priests of his fraternity, nor to the temple whereof he was the incumbent, bnt the same will revert to his next of kin,

(b) Ausadahamy vs Tikiri Banda (1950) 52 N. L. R. 314.
(c) S. D. 10. (d) S. D. 16. (e) S. D. 17. (f) P. A. 48.

the lands that belonged to the deceased in right of his maternal ancestor will devolve to his nearest of kin on the mother's side, and his paternal paraveni lands will revert to his nearest of kin on the father's side (f).

The governing principle seems to be that the ancestral property when the line of descent is broken, goes over to the next nearest line which issues from under the common ancestral roof tree (g).

Modder in his valuable work on Kandyan law gives the following order of succession in respect of property inherited from his or her father or paternal ancestors by a person dying intestate and childless:- 1. Mother. 2. Brothers and sisters of the full blood equally, and their issue per stirpes. 3 Brothers and sisters of the half blood consanguinean, equally and their issue per stirpes. 4. Paternal grandfather 5. Paternal grandmother. 6. Paternal uncles equally, and their issue per stirpes. 7. Paternal aunts equally, and their issue per stirpes (h). 8. Failing heirs on the father's side, the property will pass to the next of kin on the mother's side (i).

Widow. The widow's rights have been explained in Chapter VII. **Widower.** The widower's rights too have been fully explained in Chapter VII.

Father. Section 16 of Ordinance No. 39 of 1938 has enacted that the father, if he be alive shall inherit the paternal paraveni. Under this Ordinance any property gifted by a father to a child would be deemed paraveni property.

(1) Mother. As stated in Chapter IX the Supreme Court held in a series of cases that the mother was sole heiress to the paternal property of her child who had survived his or her father and died without issue and left neither full brother nor full sister.

This right of the mother has been amended by Section 16 of Ordinance No. 39 of 1938 by declaring the mother entitled to inherit the paternal paraveni property only in case there were surviving no heirs on the father's side.

(g) Ranhamy vs Kinhamy (1878) F. B. I. S. C. C. 3.
(h) Modder 585. (i) Modder 599.

(2) Brothers and sisters of the full blood equally, and their issue per stirpes. In respect of the father's property, the right of inheritance of the half blood is postponed to that of the brothers and sisters of the whole blood (l). Nephews and nieces of the whole blood (the children of a brother or sister of the whole blood) succeed before nephews and nieces of the half blood (the children of brothers or sisters of the half blood) (m).

It is a well established rule of the Kandyan law that property inherited from his father by a person dying childless and intestate will devolve on his brothers and sisters of the full blood equally. The principle of the rule clearly is this:- Property inherited by a person from his father must, on his death, childless and intestate pass to the other children of his father by the same wife (n).

If a man died without issue and intestate leaving a sister married out in diga, and a brother, the latter will succeed to the deceased's share of the paternal paraveni lands to the exclusion of the diga married sister, whether the said sister had been so married away previous to the demise of their father or subsequently (o).

Under the Kandyan law the disqualification of a diga marriage operates after the father's death, and after the children who succeeded him might be thought to have acquired vested interests. The Kandyan law appears to regard the paternal estate as still subsisting after the heirs have entered on the inheritance. Hence a diga married sister is precluded by her diga marriage from inheriting the paraveni property of her deceased sister (p). Similary, a woman married in diga is not entitled to inherit jointly with a binna married sister or her children, the property of a deceased brother which he had inherited from their common father (q).

The sisters of the whole blood, though given out in diga, or their children succeed in preference to brothers of the half blood or their children (r).

(k) P. A. 28. (l) S. D. 12. (m) S. D. 13. (n) Appuhamy vs Doloswala Tea & Rubber Co. (1911. 23 N. L. R. 129. (o) P. A. 53. (p) Perera vs Sethuwa (1914) 17 N. L. R. 307. (q) Nammal Etana vs Heen Appu (1917) 4 C. W. R. 3. (r) S. D. 15

A full sister, although she was married in diga will succeed to her brothers's share of the paternal paraveni (as well as other lands), in preference to their paternal uncle and paternal half brother and half sister and their issue (s).

It is a well established rule of the Kandyan law that property inherited from his father by a person dying childless and intestate will devolve on his brothers and sisters of the full blood equally. The principle of the rule clearly is this:- Property inherited by a person from his father must, on his death, childless and intestate, pass to the other children of his father by the same wife. A and B were the associated husbands of C. D and E were the children of this association. F, another child, was born to C after the death of A. On the death of A his property devolved on D and E. On the death of E, intestate and issueless, the property inherited by him from A devolved on D exclusively as he was a full brother. F who was a half brother was not entitled to share with D (t).

(3) **Brothers and sisters** of the half blood consanguinean (on the father's side) equally, and their issue per stirpes.

Failing a brother or a sister of the full blood, the deceased's paternal paraveni lands will devolve on his or her paternal half brother or paternal half sister, in preference to his or her paternal aunt and her issue (u).

As already stated, property inherited by a person from his father must, on his death, childless and intestate pass to the other children of his father by the same wife. Failing such children only, that the half brother or sister (that is children by the same mother but another father) would succeed (t).

Where a person dies intestate leaving brothers and sisters of the half blood, they would succeed to the paternal paraveni per stirpes and not per capita.

(s) P. A. 45. (t) Appuhamy vs Doloswala Tea & Rubber Co. (1921) 23 N. L. R. 129. (u) P. A. 43.

A person died leaving two sets of half brothers. Each set was declared entitled to a half share of the estate (v).

Section 17 of Ordinance No. 39 of 1938 has amended this rule by declaring that when there are two or more sets of half brothers or half sisters the division should be per capita and not per stirpes.

(4) Paternal grandfather. The natural and genaral rule is that, in default of issue or collateral relatives entitled to succeed, the property of a deceased person should go to his nearest ascendant (w).

(5) Paternal grandmother. As already stated, the governing principle seems to be that the ancestral property when the line of descent is broken, goes over to the next nearest line which issues from under the common ancestral roof tree (x).

(6) Paternal uncles equally, and their issue per stirpes. The right of inheritance of uterine children of the half blood is postponed to that of paternal uncles and aunts or their issue (y).

In a contest between the paternal uncle's sons and a uterine half brother (mother's son by her second husband) the Full Court held that the paternal uncle's sons were entitled as the governing principle seems to be that the ancestral property, when the line of descent is broken, goes over to the next nearest line which issues from under the common ancestral tree. The uterine half brother did not trace his line of descent from the same ancestral roof as the deceased (x).

It is doubtful whether the forfeiture created by a diga marriage extended further than to the father's estate and even with regard to his estate the tendency was to relax the law and to admit the diga married daughter (z). Unless the law be clear, and unless the forfeiture be certain, it should not be decreed (a). Where a person died leaving as his next of kin, the children of Kapuruhamy, his father's brother, namely,

(v) Silinduhamy vs Mohottihamy (1911) 14 N. L. R. 85. (w) 17 N. L. R. 201. (x) 1 S. C. C. 3. (y) S. D. 12. (z) Dingiri Menika vs Appuhamy (1900) 6 N. L. R. 133. (a) Kiriwante vs Ganatirala (1896) 2 N. L. R. 92.

two sons and three daughters married out in diga, all the children were declared entitled to the paraveni property of the deceased. In this case one goes back to the deceased's grandfather before one begins to come down. That does not mean that the grandfather is artificially revived and that the property passes to him and then he dies and it passes to his son Kapuruhamy (the deceased's father's brother) who is also artificially revived, and it being Kapuruhamy's inherited property his daughters married in diga take nothing. Such a way of looking at the matter is most unusual (b).

(7) **Paternal aunts** equally and their issue per stirpes. The paternal aunt is entitled to paternal paraveni in preference to the maternal aunt (c).

(8) **Failing heirs** on the father's side, the property will pass to the next of kin on the mother's side.

Any paraveni property inherited by a **Bhikku** will devolve on his heirs in the order enumerated above.

Section 16 of Ordinance No. 39 of 1938 has enacted that the father, or if the father be dead, the next heir or heirs shall inherit the paternal paraveni. Section 17 has enacted that in the case of succesion to males, brothers and sisters inter se should inherit from all males in exactly the same way as they do from their father.

Maternal Paraveni. Modder in his treatise on Kandyan law gives the following order of succesion in respect of property inherited from his or her mother or maternal ancestors by a person dying intestate and childless:-

(1) Diga married father. (2) Brothers and sisters of the full blood equally, and their issue per stirpes. (3) Brothers and sisters of the half blood uterine equally, and their issue per stirpes. (4) Maternal grandfather. (5) Maternal grandmother. (6) Maternal uncles equally and their issue per stirpes. (7) Maternal aunts equally, and their issue per stirpes. (8) Failing heirs on the mother's side, the property will pass to the next of kin on the father's side (d).

(b) Kiri Banda vs Dingiri Banda (1939) 41 N. L. R. 25.
(c) Mudalihamy vs Bandirala (1898) 3 N. L. R. 209. (d) Modder 585.

The above mentioned order of succession is however subject to the rights of the widow or widower as the case may be.

Widow. The rights of a widow have been dealt with fully in Chapter VII.

Widower. The rights of a widower too have been dealt with fully in Chapter VII.

Binna Married father. The Supreme Court has held that a binna married father is entitled to succeed to the lands of his daughter which the latter had inherited from her mother in preference to the deceased's grand uncle's son.

(1) **Diga married father.** A Bench of five Judges of the Supreme Court has held that prior to Ordinance No. 39 of 1938 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 (e).

Section 16 of Ordinance No. 39 of 1938 has amended the law by enacting that where a person dies after the commencement of this Ordinance his father whether married in binna or in diga should not inherit the maternal paraveni property of such person unless there be surviving no heirs on the mother's side.

(2) **Brothers and sisters** of the full blood equally, and their issue per stirpes.

(3) **Brothers and sisters** of the half blood uterine equally, and their issue per stirpes.

Where a person dies intestate, leaving brothers and sisters of the half blood, they would succeed to the maternal paraveni, per stirpes and not per capita (h).

Section 17 of Ordinance No. 39 of 1938 has amended the law by enacting that where there are two or more sets of half brothers or half sisters the division should be per capita and not per stirpes.

(e) Karunawathie vs Edmund (1960) F. B. 62. N. L. R. 433.
(h) 14 N. L. R. 87; 24 N. L. R. 249.

(4) **Maternal grandfather.**

(5) **Maternal grandmother.** The full Court has held that the grandmother and a uterine sister were entitled to inherit the property of the deceased which he had inherited from his mother in preference to the binna married father (i).

(6) **Maternal uncles** equally and their issue per stirpes.

(7) **Maternal aunts** equally and their issue per stirpes.

(8) Failing heirs on the mother's side, the property will pass to the next of kin on the father's side.

Acquired Property. Prior to Ordinance No. 39 of 1938 all property derived by inheritance was regarded as paraveni property whilst property derived by any other source of title or by another means was regarded as Acquired Property. As mentioned earlier Section 10 of Ordinance No. 39 of 1938 has defined property.

(I) A person dying childless, having parents and brothers and sisters, the property which the deceased may have had from his or her parents, reverts to them reciprocally, (if from the father, to the father; if from the mother, to the mother), as does his acquired property, whether land, cattle or goods, to his parents; but his parents have only the usufruct of this acquired property; they cannot dispose of it by sale, gift, or bequest; it must devolve on the brothers and sisters, the latter having only the same degree of interest in their deceased brother's acquired property that they have in their deceased parents estate; ultimately, it is divided among the brothers of the whole blood of the dceceased, equally, or their sons, according to what would have been their father's share; but, failing brother's sons it goes to the sisters of the whole blood, or their sons, and failing them, to the brothers of the half blood uterine, and their children; failing them, to sisters of the half blood uterine, and their children, and failing brothers and

(i) 9 S. C. C. 34.

sisters of the half blood uterine and their children, the property goes to the brothers of the half blood by the father's side, and their children; next, to the half sisters by the father's side and their children; and, failing them, to his mother's sisters; and next, to cousins, called brothers and sisters, on the mother's side, that is to say, the mother's sister's children; and failing them 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. See Table 1 (j),

(II) An unmarried daughter acquiring property and dying intestate, her property goes to the mother, failing the mother, to the father and failing the father, to her brothers and sisters of the whole blood; if there be but one such brother the whole goes to him; if there be several brothers, they shall share equally; failing brothers aud sisters of the whole blood, to the brothers and sisters uterine of the half blood; and failing them, to brothers and sisters of the half blood by the father's side, and failing them, to the maternal uncle; failing him, to the maternal aunt; and failing the maternal aunt, to the maternal grandmother; failing her to the maternal grandfather; failing him, to the paternal uncle; and failing him, to the paternal aunt, failing the paternal aunt, to the paternal grandfather; and failing him, to the paternal grandmother; failing the paternal grandmother, to the maternal uncle's sons and daughters; and failing them, to the maternal aunt's sons and daughters, or grandsons and grand daughters; and failing them to the paternal uncle's sons and daughters, or grandsons and granddaughters; and failing them, to the paternal aunt's sons and daughters, or grandsons and granddaughters.

(j) S. D. 16.

NOTE,- The above is the opinion of Molligoda, First Adigar; Doolleywe Dissawa; Dehigama Senior Diva Nilame and Dodantela, Chief of Lower Bulathgama; but Mullegama Dissawa and..... are of opinion that brothers and sisters of the whole blood should share equally their deceased sister's property, and the same should be the case with half brothers and sisters uterine and half brothers and sisters on the father's side; in short that the sexes related in an equal degree should share equally. The Chiefs now all concur in this opinion, that the sexes share equally up to paternal uncles and aunts. See Table 2(k).

(III) Ergo, child dying intestate, acquired property goes, (1) To the mother. (2) To the father. (3) Brother and sister of the whole blood. (4) Brother and sister uterine of the half blood. (5) Maternal grandmother. (6) Maternal grandfather. (7)Maternal uncles and aunts. (8) Paternal grandmother. (9) Paternal grandfather. (10) Half brother and sister by the father's side. (11) Paternal uncles and aunts. (12) Maternal aunt's children. (13) Maternal uncle's children. (14) Paternal uncle's children. (15) Paternal aunt's children. See Table 3 (l).

(IV) The following table of inheritance is one given by D' Oyly which is incomplete:- (1) Maternal grandmother. (2) Maternal grandfather. (3) Paternal grandmother. (4) Paternal grandfather. (5) Mother's sisters and mother's. brothers. (6) Father's brothers. (7) Father's sisters. (8) Mother's sister's children. (9) Mother's brother's children. (10) Father's brother's children. (11) Father's sister's children. (12) Mother's sister's grandchildren. (13) Mother's brother's grandchildren. (14) Father's brother's grandchildren. (15) Father's sister's grandchildren. See Table 4 (m).

(k) S.D. 20. (l) S. D. 21. (m) Hayley 432.

In table 1 Sawer discusses the devolution of the property of a person dying childless, having parents and brothers and sisters, and he proceeds also to give the respective rights of the deceased's mother's sister and brother and their children and the deceased's father's brothers and sisters and their children. In tables 2 aud 3 he gives two conflicting sets of rules for the devolution of the acquired property of an unmarried daughter, and a child respectively. These rules in tables 2 and 3 while conflicting with each other are also in conflict with the rules given in table 1.

Hayley says:- "The differences which occur between tables 1 and 2 do not appear to be due to the fact that table 2 was primarily compiled for application to an unmarried daughter. If a man's maternal aunt succeeds before his maternal uncle, there seems no intelligible reason why the position should be reversed in the case of a woman. Table 3, which is ostensibly an amendment to table 2, is the succession to 'a child' ..... we are not told whether male or female. It is obviously impossible to reconcile the conflicting orders of precedence stated in the four tables, but from a close scrutiny, in the light of certain examples to be found in the Niti Nighanduwa, it is possible to trace principles by the aid of which we may venture to construct a table with some degree of probability. The differences themselves bear out the theory already advanced, that the rules governing the succession in the remote degree have an earlier origin than those affecting the immediate family – descendants and collaterals – and are intimately conected with kinship traced through females; for, in spite of the preference in some cases of the mother's male relations to her female relations which is probably due to the gradual predominance of more recent ideas, the tables all agree in preferring the mother's brothers and sisters to those of the father, and the maternal grandparents to the paternal. **There can be no doubt, therefore, that the acquired property goes, in the first place, to the mother's side** (n). The Niti Niganduwa says:- If on the

(n) 3 N. L. R. 202.

SAWERS DIGEST 16. TABLE NO. 1.

1. } Parents.
2. }
3. Brothers of the whole blood or their sons.
4. Sisters of the whole blood or their sons.
5. Brothers of the half blood uterine and their children.
6. Sisters of the half blood uterine and their children.
7. Brothers of the half blood by the father's side and their children.
8. Sisters of the half blood by the father's side and their children.
9. Mother's sister (maternal aunt)
10. Mother's sister's children.
11. Mother's brothers and their children.
12. Father's brothers and their children.
13. Father's sisters and their children.

SAWERS DIGEST 20 TABLE NO. 2.

1. Mother.
2. Father.
3. Brothers and sisters of the whole blood.
4. Brothers and sisters uterine of the half blood.
5. Brothers and sisters of the half blood on father's side.
6. Maternal uncle.
7. Maternal aunt.
8. Maternal grandmother.
9. Maternal grandfather.
10. Paternal uncle.
11. Paternal aunt.
12. Paternal grandfather.
13. Paternal grandmother.
14. Maternal uncle's sons and daughters.
15. Maternal aunt's sons and daughters or grandsons and grand daughters.
16. Paternal uncle's sons and daughters or grand sons and grand daughters.
17. Paternal aunt's sons and daughters or grand sons and grand daughters.

SAWERS DIGEST 21. TABLE NO. 3.	D'OYLY 312. TABLE NO. 4.
1. Mother.	1. Maternal grandmother.
2. Father.	2. Maternal grandfather.
3. Brothers and sisters of the whole blood.	3. Paternal grandmother.
4. Brothers and sisters uterine of the half blood.	4. Paternal grandfather.
5. Maternal grandmother.	5. Mother's sisters and mother's brothers.
6. Maternal grandfather.	6. Father's brother's.
7. Maternal uncles and aunts.	7. Father's sisters.
8. Paternal grandmother.	8. Mother's sisters children.
9. Paternal grandfather.	9. Mother's brother's children.
10. Half brothers and sisters by the father's side.	10. Father's brother's children.
11. Paternal uncles and aunts.	11. Father's sister's children.
12. Maternal aunt's children.	12. Mother's sister's grandchildren.
13. Maternal uncle's children.	13. Mother's brother's grandchildren.
14. Paternal uncle's children.	14. Father's brother's grandchildren.
15. Paternal aunt's children.	15. Father's sister's grandchildren.

HAYLEY
TABLE NO. 5.

1. Mother.
2. Father.
3. Brother's of the whole blood or their sons.
4. Sisters of the whole blood or their sons.
5. Brothers of the half blood uterine and their children.
6. Sisters of the half blood uterine and their children.
7. Brothers of the half blood by the father's side and their children.
8. Sisters of the half blood by the father's side and their children.
9. Maternal grandmother.
10. Maternal grandfather.
11. Mother's sisters (maternal aunts).
12. Mother's sisters children.
13. Mother's brothers (maternal uncles).
14. Mother's brother's children.
15. Paternal grandfather.
16. Paternal grandmother.
17. Father's brothers (paternal uncles).
18. Father's brother's children.
19. Father's sisters (paternal aunts).
20. Father's sister's children.

MODDER.
TABLE NO. 6.

1. Mother.
2. Father.
3. Brothers of the whole blood and their issue.
4. Sisters of the whole blood and their issue.
5. Brothers of the half blood uterine and their issue.
6. Sisters of the half blood uterine and their issue.
7. Brothers of the half blood on the father's side and their issue.
8. Sisters of the half blood on the father's side and their issue
9. Maternal grandmother.
10. Maternal grandfather.
11. Paternal grandfather.
12. Paternal grandmother.
13. Maternal uncles and their issue.
14. Maternal aunts and their issue.
15. Paternal uncles and their issue.
16. Paternal aunts and their issue.

death of a man, his father's brother and his mother's brother be living, the lands newly acquired by the deceased's father, the lands of the deceased by the mother's side, the lands acquired by the deceased, and his movable property, will all be inherited by the mother's brother, while the paternal lands of the deceased will be inherited by the aforesaid father's brother (o).

The position of the half-brothers and half-sisters on the father's side in table 3 is so anomalous and inexplicable, that, although it was followed in Dingiri Banda vs Kiri Banda (p), we can but disregard it. We find then the following main points on which the tables are at variance:-

1. Whether the mother's sister or the mother's brother is to be preferred.
2. Whether or not cousins represent their deceased parents, or are postponed until the death of all uncles and aunts.
3, Whether remoter ascendants are preferred to those less remote.
4. Whether the grandfather is postponed to the grandmother, or vice versa.

The mother's sister and brother. It seems clear that the mother's sisters who were 'Little mothers' and their children, who were "brothers" and "sisters," were preferred to the mother's brothers, who were "uncles" and their issue, who were "cousins" to the deceased; the corresponding rule being observed on the father's side of the house. Sawer himself implies that this was the order of precedence when he states at page 17:- 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 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.

(o) N. N. 103, (p) 14 N. L. R. 510.

This seems to modify the preference of the mother's kin but makes it clear that cousins called "brothers and sisters," on each side of the house are nearer in kinship than cousins strictly so called, although the stronger claim of the maternal kin places the mother's brother and his children before the father's brother and his issue.

Representation of uncles and aunts by their children. In any event, the principles of representation are now so generally followed that it seems certain that Sawer's first table is correct and that the other three, in giving the order amongst cousins, must be taken to refer to cases where there are no uncles or aunts, and not to prevent the children of a deceased uncle or aunt from claiming their parent's share. The Niti Nighanduwa at page 102 states that a father's sister, and the son of a father's deceased sister, share equally. We may take it as certain, therefore that, in respect of each grade of uncles or aunts the children represent their parents. If as has been suggested, the priority of the mother's sister is due to her being a 'mother' by relationship, coupled with the remnants of a system of female kinship, it seems to follow that her children, who are the deceased's brothers and sisters should represent her to the exclusion of the mother's brother, an uncle and comparatively distant relation.

Sawer's first table, therefore should be followed, with perhaps the above quoted modification given by him, that when there are only cousins called brothers and sisters on both sides, they share equally. By analogy, from the rule which applies in the case of brothers, and nephews and nieces, we may assume that in each grade, when one of the earlier generation survives, the distribution is per stirpes, but when there are only cousins, they succeed, inter se, per capita.

Grandparents and remote ascendants. Table 1 makes no reference to the grandparents. Table 2 makes them succeed in each case after the aunts and uncles on their respective sides; while tables 3 and 4

give them preference. In the case of the paternal grandfather, we may assume that the family system would give him, as the eldest male, the control of the property in preference to his own children. Whether the grandmother on the mother's side was similarly entitled, it is impossible to say with certainty, but the probabilities are in favour of such precedence so that, with reference to the uncles and aunts, the position would be that stated in table 3, which it is noticeable followed the order in which guardians are appointed. Between themselves on the whole, it is most likely that the grandmother on the maternal side was preferred to the grandfather, while the paternal grandfather took priority of the paternal grandmother as stated in table 2.

When there are no grandparents, however, their descendants of the whole blood with deceased, and his uncles and aunts, must be exhausted before the grandparent's collaterals are admitted.

We are not told whether the distinction between a woman's sister's son and her brother's son is recognised in the remoter degrees; but apparently on each side of the house, an equality is observed between the father's cousins, called brothers and sisters, similar to that in the case stated by Sawer of persons so related to the deceased himself.

If we now insert the grandparents and other ascendants in Sawer's first list, according to the rules which we have chosen, we find that the order of precedence is as follows:- (1) Maternal grandmother, (2) Maternal grandfather, (3) Mother's sisters, the children of deceased sisters representing them per stirpes, (4) Mother's sister's children, per capita, (5) Mother's brothers, the children of deceased brothers representing them per stirpes, (6) Mother's brother's children per capita, (7) Paternal grandfather, (8) Paternal grandmother, (9) Father's brothers, the children of deceased brothers representing them per stirpes, (10) Father's brother's children per capita, (11) Father's sisters, the

children of deceased sisters representing them per stirpes, (12) Father's sister's children, per capita. See Table 5.

The mother's remoter relations take after class (6) but it is doubtful whether they are preferred to classes (7) to (12).

The father's remoter relations take after class (12). According to Sawers, when only classes (4) and (10) survive, they share equally (q).

Modder says:– 310. The property acquired through his or her binna married mother of a person dying intestate and without issue, follows the order which governs the devolution of maternal inherited property.

311. The acquired property of a childless intestate, the issue either of a binna connection, (such property being derived otherwise than through his or her mother), or of a diga connection, devolves on the nearest line on the mother's side, failing which it passes to the corresponding line on the father's side in default whereof, it reverts to the next nearest line on the maternal side, failing which, it goes to the corresponding line on the paternal side, and so on ad infinitum, males being preferred to females in the same degree.

Accordingly, the order of devolution may be set down as follows:–

1. Mother. 2. Father. 3. Brothers of the whole blood equally, and their issue per stirpes. 4. Sisters of the whole blood equally, and their issue per stirpes. 5. Brothers of the half blood uterine equally, and their issue per stirpes. 6. Sisters of the half blood uterine equally, and their issue per stirpes. 7. Brothers of the half blood on the father's side equally, and their issue, per stirpes. 8. Sisters of the half blood on the father's side equally, and their issue per stirpes. 9. Maternal grandmother. 10. Maternal grandfather. 11. Paternal grandfather. 12. Paternal grandmother.

(q) Hayley 432-439.

13. Maternal uncles equally and their issue per stirpes. 14- Maternal aunts equally, and their issue per stirpes. 15. Paternal uncles equally, and their issue per stirpes. 16. Paternal aunts equally, and their issue per stirpes. See table 6 (r).

The question whether Hayley's amended table should be adopted or whether any other table should be adopted was discussed by the Members of the Kandyan Law Commission, but finally they decided that the adoption of any table of preference found no place in the general scheme on which their recommendations were made and left the interpretation of the present law to our Courts.

Order of devolution.

Widow. The rights of the widow have been fully dealt with in Chapter VII.

Widower. The rights of a widower have been fully dealt with in Chapter VII.

(1) **Mother.** The mother comes first in the order of succession. When a person dies intestate and without issue, his or her acquired property devolves on his or her mother in preference to his or her brothers and sisters (s). The mother is entitled to the acquired property in preference to the father (t). If the deceased had left him surviving a widow the mother will be entitled to the acquired property subject to a life interest in favour of the widow (u). If the deceased has left her surviving her husband (married in diga) then the mother will be entitled to the property acquired before marriage, the husband succeeding to the property acquired during coverture (v).

(2) **Father.** The father comes second in order of succession. If the mother has departed this life previous to the demise of her child, then the father

(r) Modder 607-608. (s) Ukkuhamy vs Ranetana (1908) 11 N. L. R. 226. (t) Kalu vs Kira (1915) 18 N. L. R. 465. (u) Kalu vs Lami (1905) 11 N. L. R. 222. (v) Seneviratne vs Halangoda (1922) 24 N. L. R. 257.

is entitled to an abslute interest in the acquired property of his child to the exclusion of the deceased's brother (w). But if the deceased had left him surviving a widow, the father will be entitled to such property subject to a life interest in favour of the widow (u). If the deceased had left her surviving her husband (married in diga), then the father will be entitled to the property acquired before marriage, the husband succeeding to the property acquired during coverture (v).

Section 16 of Ordinance No 39 of 1938 has amended the law by enacting that the father and mother would be entitled in equal shares only to a life interest in all the acquired immovable property of a deceased unmarried child, or in the case of a deceased married child, upon his or her leaving no children or their issue, and no widow or widower as the case may be; and that in the case of a sole surviving parent, he or she would be entitled to a life interest in all the acquired immovable property irrespective of whether the death of the deceased parent took place before that of the deceased child or not; and in case there were surviving no brothers or sisters of the deceased or their issue, or remoter descendants the life interest of the parents would be enlarged into full dominium.

(3) **Brothers of the full blood equally,** and their issue per stirpes. Under table 3 both full brothers and full sisters come in the third step. In table 1. Sawer expressly prefers males to females in the same degree, brothers to sisters, half brothers to half sisters etc. The rule as to exclusion of sisters, if there be brothers, or the exclusion of nieces, if there be nephews is supported by Armour who says "A man having died without issue and intestate the landed property which he has acquired or obtained by gift, will devolve to his brother's son, to the exclusion of his sister's son (x). In regard to acquired property, there is no definite system laid down by the jurists, but **the tendency is to**

(w) Ranhoti vs Bilinda (1909) 12 N. L. R. 111. (x) P. A. 46.

to give preference to the maternal over the paternal line and to elect males before females in the same degree (y). The above cases dealt with succession to a male.

But in the case of a married or unmarried woman who died intestate and issueless leaving a brother and two sisters it was held that the brother and the two sisters succeeded equally to the acquired property. In this case the question was one of succession to a female and was governed by Sawer who says that when an unmarried daughter who had acquired property and died intestate, her property goes to her mother, failing the mother, to the father; and failing the father to her brothers and sisters of the whole blood (z).

(4) **Sisters of the full blood equally** and their issue per stirpes. As stated above males were preferred to females in the case of succession to a male though in the case of succession to a female, both brothers and sisters of the full blood succeeded equally.

Section 17 of Ordinance No. 39 of 1938 has amended the law by enacting that whenever an estate devolves upon heirs other than a child or the descendant of a child, and such heirs are in relation to one another brothers or sisters, or brothers and sisters, or the descendants of any deceased brother or sister, such heirs shall inherit inter se the like shares and in like manner as they would have done had they been the children or descendants of the deceased intestate. In short the preference given to males was removed giving full brothers and full sisters equal rights to succession in such a case.

The widow who was **ewessa cousin** came next to full brothers. Sawer says that if the barren widow be the husband's paternal aunt's daughter, or his maternal uncle's daugher, she inherits the acquired lands next to full brothers (a). A widow who was the ewessa cousin of deceased was declared entitled to the full dominium of the acquired property in preference to the deceased's sister's daughter (b).

(y) Menika vs Suddana (1926) 28 N. L. R. 226. (z) Ukkubanda vs Ukkubanda (1946) 47 N. L. R. 481. (a) S. D. 39. (b) Kirimenika vs Ranmenika (1916) 19 N. L. R. 221.

The **widow** came next to full brothers and sisters. If the deceased proprietor left no issue, and had survived his parents and his full brothers and sisters and their children, then his widow will have an absolute Lathimi right to such lands as belonged to the deceased by right of acquest (c). The widow was declared entitled to the acquired property in preference to the half brother of the deceased (d).

As already stated, Section 11 of Ordinance No. 39 of 1938 has removed this preference given to a widow by declaring that a widow's interest should enlarge into full ownership only in the event of the deceased leaving him surviving no other heir; and that a widow who is an ewessa cousin of the deceased should not become entitled to any share larger than that to which she would otherwise have become entitled.

(5) The **brothers of the half blood uterine equally** and their issue per stirpes.

(6) The **sisters of the half blood uterine equally** and their issue per stirpes. The uterine half brother was held entitled to the acquired property to the exclusion of his uterine half sisters (e).

This preference of males to females has been removed by Ordinance No. 39 of 1938 and now these brothers and sisters are entitled in equal shares.

(7) **Brothers of the half blood on the father's side equally** and their issue per stirpes.

(8) **Sisters of the half blood on the father's side equally,** and their issue per stirpes. Though the Supreme Court in 14 N. L. R. 550 held that a maternal uncle was entitled to acquired property in preference to the paternal half brother, we can disregard it as Hayley says. This preference of males to females has been removed and these brothers and sisters too are entitled in equal shares.

(9) **Maternal grandmother.** It was held that acquired property which the deceased got from her mother devolved on the grandmother in preference to the binna married father (f).

(c) P. A. 23. (d) Tittawella Sangi vs Tittawella Mohotha (1903) 6 N. L. R. 201. (e) Dingirimenika vs Appuhamy (1900) 6 N. L. R. 133. (f) Ranmenika vs Mudalihamy (1913) 16 N. L. R. 131

(10) **Maternal grandfather.**

(11) **Mother's sisters,** maternal aunts. In the case of acquired property, the maternal aunt is preferred to the paternal uncles, though in case of paraveni property the paternal uncle is preferred (g).

(12) **Mother's sisters children.**

(13) **Mother's brothers,** maternal uncles. Though the Supreme Court held that a maternal uncle was entitled to acquired property in preference to the paternal half brother we may disregard it. Maternal uncles come far below sisters and brothers of the half blood on the father's side. In the case of acquired property, the maternal aunt and maternal uncle would come before the paternal uncle and paternal aunt.

(14) **Mother's brother's children.**

(15) **Paternal grandfather.**

(16) **Paternal grandmother.**

(17) **Father's brothers, paternal uncles.**

(18) **Father's brother's children.**

(19) **Father's sisters, paternal aunts.**

(20) **Father's sisters children.**

Hayley's reasons for adopting the above table have been given earlier.

BHIKKU (Buddhist Priest). The rights of a Bhikku and the rights of Succession to the intestate estate of a Bhikku have been fully explained in Chapter VIII at page 150.

CHAPTER XI.

ADOPTION.

The practice of adopting children seems to have prevailed in the Kandyan provinces to a great extent, especially amongst those who possessed considerable landed property and had no relations of their own (a)

(g) Mudalihamy vs Bandirala (1898) 3 N. L. R. 209.
(a) Salomon's Manuel 6.

A regularly adopted child, if the adopting parent had no issue of his or her own body, inherits the whole estate of the parent adopting him or her; but should the adopting parent have issue, male or female, of his or her own body, in that case, the adopted child will have but an inferior portion of the estate with the issue of the parents.

N. B. The chiefs are not prepared to say what proporiton such share should bear to the share of one of the issue, but they think it should be a fourth of the share, which falls to such issue.

A regular adoption must be publicy declared and acknowledged and it must have been declared and generally understood that such child was to be an heir of the adopting parent's estate. The adopted child must be of the same caste as the adopting parent, otherwise the adopted child cannot inherit the hereditary property of the parent. A child being reared in a family, even of a near relative, is not to be construed into a regular adoption, without its having been openly avowed and closely understood that the child was adopted on purpose to inherit the property (b).

There are no prescribed forms and ceremonies of affiliation and therefore it is not practicable to ascertain in every instance whether an orphan child, or a child who was removed from the parent's care in its infancy and who was educated by another person was merely a foster child and protege of that person, or whether the said child was adopted and affiliated by that person.

However, this much is certain, that unless the child and the person who had brought up and educated that child were of the same caste, and unless that person had publicly declared that he or she adopted that child and resolved that the said child should be an heir to his or her estate, that child will not be recognized as adopted and affiliated, and will not therefore be admitted as an heir to the estate of the patron or foster-parent, on the ground of adoption.

(b) S. D. 39.

If the patron or foster-father permitted the protege to remain in his house after having attained the years of discretion and even to contract a marriage and to continue to dwell, with his wife, in the house of the patron, if the protege was also employed by the patron to manage the cultivation of his lands and to perform the Rajakariya services on account thereof; yet after all, if the patron did not publicly declare that he had adopted the said protege as a child, to be an heir to his estate he the said protege will have no right to any portion of that estate on the ground of adoption.

If a daughter who was married and settled in binna in her father's house, died before her father, leaving issue, a daughter for instance, if the father then permitted the son-in-law to remain in his house, and there to contract a second marriage; if the son-in-law with his second family continued to dwell in that house until the death of the father-in-law, yet for all that, the said son-in-law and the issue of his second marriage will not be recognized as heirs by adoption to any portion of the deceased's estate, which will devolve entirely to the aforesaid grandchild.

If the son died before his mother, leaving a widow and children, if the son's widow continued to dwell in her mother-in-law's house and was even allowed to contract a second marriage and to live with her second husband in that house; for all that the said son's widow will not be recognized as an adopted heiress of her mother in-law and she will therefore have no right to a share of the mother-in-law's estate; the whole estate will devolve to the son's children to the exclusion of their mother and their mother's other children, born to the second husband.

If a son, who had a wife in diga in his father's house, died before his father, without issue; if the father then detained his son's widow and had her married again and settled in his own house, and if the daughter-in-law continued to dwell there and rendered assistance to her father-in-law until his demise, these facts will warrant the conclusion that the deceased had

decidedly adopted his daughter-in-law, and she will therefore be entitled to inherit her father-in-law's estate if he died intestate and left no issue.

But if the father–in–law did leave legitimate issue, a son or a grandson, in that case the daughter–in–law will be entitled only to that portion of the estate which her father–in–law may have specially allotted or bequeathed to her (c).

In some instances the paternal and maternal right of inheritance will devolve on persons who have not been begotten by the proprietor or born of the proprietress.

If any person takes charge of and adopts a child of equal caste, and in order that the child may at his death inherit his name and lands, proclaims to the world that the child is his, his heir, and that he has adopted him, that child will inherit the property of his adopting parents at their death. But, unless the fact of such adoption is proclaimed to the world, even though a child has been taken charge of by any person and a marriage has been contracted for it when of age by that person; even though issue has been born on the premises of the guardian; the child will not, like an adopted child, be entitled to the paternal inheritance of the above mentioned guardian (d).

The adoption which one has to prove is an adoption for the purpose of inheritance (e). It is not sufficient that a man should publicly acknowledge another as his son; he must go further and acknowledge, state and declare that he is to be his son for the purpose of inheritance (f). The fact must be proclaimed by the adopting parent with a degree of publicity, which may vary according to circumstances (g). The description of a person as "my nephew" (by relationship) "adopted by me" (mavisin tanagat mage bena vana) in a deed of gift was not sufficient to prove adoption. To constitute a valid adoption the

(c) P. A. 38-39. (d) N. N.41. (e) Pasumbahamy vs Keerala (1891) 2 C. L. R. 23. (f) Tikiri Kumarihamy vs Punchi Banda (1901) 2 Br. 299. (g) Tikiri Banda vs Loku Banda (1904) 2 Bal 144.

following requisites are necessary:- (1) that the parties should be of the same caste, (2) that the adoption should be public and formally and openly declared and acknowledged, (3) that it must clearly appear that the adoption was for the purpose of inheriting the property of the adoptive parents (h). The mere fact that a person lived with the intestate, and was brought up by him, and was called by him his son was not sufficient to prove adoption unless there was evidence of any formal or public recognition for the purpose of inheritance (i).

The adoptive parents' refusal of a proposed diga marriage for the adopted child, on the ground that he had adopted her to inherit his lands, was a sufficiently public and formal declaration to satisfy the law (j). A declaration made on many occasions to the public officials of the village and the adjoining villages, that the adoption was for the purpose of inheritance was held to be a sufficient public declaration (k). Though deeds of gift inter vivos are not sufficient to prove adoption, yet a will being a definite declaration of the intention of the testator for the devolution of his property on his death, the appointment (by will) of an adopted son as residuary legatee to the exclusion of all others shows that the adoption was for the purpose of inheriting the adoptive parent's property (l).

The law does not require that the declaration as to the child being adopted for the purpose of inheritance should be made at the time of the original adoption. It may be made at any time, provided it ts sufficient to show the character of the adoption (m).

If no particular formalities are necessary the declaration need not be according to a particular formula as long as it is clearly understood that the adoption was for purposes of inheritance. If no ceremonies are prescribed the declaration need not

(h) Loku Banda vs Dehigama Kumarihamy F. B. (1904) 10 N. L. R. 100.(i) Punchimenika vs Dingiri Banda (1916) 3 C. W. R. 173. (j) Grenier (1873) 117. (k) Ukku vs Sinna (1913) 1 Bal. N. 57. (l) Dunuville vs Kumarihamy (1917) 4 C. W. R. 99. (m) Peiris vs Fernando (1915) 1 C. W. R. 1.

be made on a ceremonious occasion. It is agreed that the declaration need not be made when members of the public are assembled together for the purpose of hearing the declaration or that the declaration need be made in a public place. The rule that has been laid down by the Supreme Court is as follows:- the adoption must be public in the sense that it must be generally known and that publicity must have been given to the adoption for the purpose of inheritance as the result of an open declaration and acknowledgment on the part of the adoptive parent which need not be on a ceremonious occasion, which may be made in the course of conversation, and which must be proved to have been made to members of the public as distinct from members of the adoptive parent's household or relatives or even persons interested in the question of the adoption (n).

For a valid adoption the person adopting must do so with the intention that the child adopted should inherit all his property and not merely get a part (o).

In the latest case Basnayake C. J. has held that the true view of the Kandyan law of adoption is that set out in the Niti Niganduwa; that no oral declaration whether public or not or on a formal occasion or otherwise is necessary; all that is needed is reliable, clear and unmistakable evidence in whatever form of the deceased's intention to adopt the adopted child as his heir.

Basnayake C. J. states as follows:- "Sawers states that a "regularly adopted child" is entitled to inherit the estate of the parent adopting him. He then goes on to state the requirements of a regular adoption. The child must be of the same caste. The fact that the child is being adopted in order to succeed to the property of the adoptive parent must – (1) be publicly declared and acknowledged, and (2) have been declared and generally understood, and (3) have been openly avowed and clearly understood. The import

(n) Tikiri Kumarihamy vs Niyarapola (1937) 44 N. L. R. 476; see also Ambahera vs Somawalhie F. B. (1943) 44 N. L. R. 457.
(o) Amunugama vs Herat Pr. C. (1958) 59 N. L. R. 505.

of the expression "publicly declared and acknowledged" is not the same as "declared and generally understood" nor is it the same as "openly avowed and clearly understood". A fact can be declared and generally understood without a public declaration. Again "generally understood" and "clearly understood" are not the same. A clear understanding of a fact can exist among a few while a fact cannot be said to be "generally understood" unless a relatively large number understand the fact. Besides what is generally understood need not necessarily be clearly understood. The requirement of a public declaration and a public acknowledgment without an indication of the forum before which the declaration and acknowledgment are to be made renders the requirement unworkable and of little practical value. When Sawer's entire statement is read, with emphasis on the spirit and not on the mere words, it reduces itself to this – that the fact a child has been adopted in order that he may inherit the property of his adoptive parent should be known and the adoptive parent should have indicated his intention clearly. It is not necessary that the adoptive parent should go before any public authority and make a solemn declaration or acknowledgment nor is it necessry that he should make a formal oral or written declaration. It is sufficient if his intention has been made known whether it be in the course of conversation or otherwise. This view of the matter finds support in Armour's statement. As no forum and ceremonies are required there is always a difficulty in ascertaining from any one single act of his, the intetnion of the adoptive parent. A person who has brought up a foster child and at one moment intended that the child should be his heir is not tied down to that intention. He is free to change his mind,

We have the advantage of having in the Niti Niganduwa the law stated in the very language of those who were custodians of it. In this work, the Sinhalese for what Sawers and Armour translate as "publicly declared" is"ලොවට දන්වා". The literal render-

ing of these words in English is "made known to the world" or "made known to all" or "indicated to the public" or "letting others know".

In my opinion the law as stated in the Sinhalese version of the Niti Niganduwa is a correct statement of the law and the statements of Sawers, and Armour (which are not expressed in the very language in which the Chiefs and others versed in Kandyan customary law conveyed it to them) that the adoption must be publicly declared and acknowledged must be understood tn the sense of "ලොවට දන්වා" (p).

Adopted child's share in intestate estate of adoptive parents. As regards the share which an adopted child takes in the intestate estate of his adoptive parents, all the authorities are agreed that where the adoptive parents leave no children of their own the adopted child inherits the whole estate of either of the adoptive parents, in preference to the surviving spouse or collaterals of the deceased (q).

Difference of opinion exists where the adoptive parents leave children of their own. Sawers states that in such a case "the adopted child will have but an inferior portion of the estate with the issue of the parent", and adds a note to the effect that the chiefs are not prepared to say what proportion such share should bear to the share of one of the issue but they think it ahould be a fourth of the share which falls to such issue (q).

Modder states that where an adoptive parent has left children an adopted child will be entitled to a one third share of the deceased's property, but he bases this statement on a reported decision of the Supreme Court (r).

As Hayley points out in his book on Kandyan law the difference of opinion that exists on this point, is merely a reflection of the true state of the law which considered the matter as one for equitable adjustment on the circumstances of each case rather than one which called for hard and fast rules (s).

(p) Dayangame vs Somawathie (1956) 58 N. L. R. 337.
(q) S. D. 36. (r) Modder 580. (s) Hayley 479.

Termination of adoption. As regards the termination of adoption, the text writers do not in so many words state that the rights acquired by adoption can be terminated, but nevertheless it appears to be sufficiently clear that an adoption can in effect be terminated.

The Niti Nighanduwa dealing with the case of a proprietor who has two adopted sons, one of whom has left him and rejoined his own family, states that the child who went away will have no right of inheritance in the proprietor's estate. The proceedings of the Board of Commissioners contain reference to the case of Amunugama Kapuralagedera Punchyralla vs Hoonkirigedera Tikkiralle, decided on September 6, 1825, where it was held that an adopted son who had been expelled from the adoptive parent's house had no right of inheritance in the estate of the adoptive parent (t).

Right of adopted child to inherit from his or her own parents. A male does not lose his rights to succeed to the estate of his own parents. In some cases a daughter being removed from her father's house and being adopted into another's family, eventually loses the right of inheriting a share of her own father's landed property. But a female who is the only child of her father by one bed does not forfeit her right of inheritance to her half brothers and sisters by other wives.

The law has been amended by Sections 7 and 8 of Ordinance No. 39 of 1938 which are as follows:-

"7(1). No adoption effected after the commencement of this Ordinance (first January 1939) shall avail in law to create any right or liability unless it be evidenced by an instrument in writing, with the consent of the person adopted, expressed in the instrument and signed by both the adoptor, and the person adopted, in the presence of (1) a District judge a Commisssioner of Requests, or the President of a Rural Court; or (2) a licensed Notary and two witnesses.

Provided that if the person adopted be a minor, such consent may be given and such instrument signed

(t) N. N. 90.

on his behalf by his parents or, if only one parent is alive by that parent, but if there is no surviving parent or if either of his parents cannot be found or is incapable of acting in this behalf by reason of unsoundness of mind, illhealth or other incapacity, the District Court or Court of Requests having local jurisdiction over the place where the minor ordinarily resides may, upon petition made to such Court by any person interested and after such inquiry as the Court may deem necssary, appoint any person or persons to give such consent and to sign such instrument.

For the purposes of the Civil Procedure Code, 1889 and of the Stamp Ordinance, 1909, an application to the District Court under this section shall be deemed to be an action of the value of one hundred rupees.

(2) No Stamp duty shall be payable or chargeable in respect of any instrument of adoption executed in accordance with the provisions of sub-section (1) or of any application to a Court made under that sub-section.

8 (1), On the death of the adoptor intestate, a person duly adopted, whether before or after the commencement of this Ordinance, shall have such right of succession to his estate as if he were a legitimate child of the adoptor, that is to say, if the adoptor leave him surviving no **child or descendant** of a deceased child, then as an only chid, or if the adoptor leave a child or children or a descendant of a deceased child, then to the same extent and in like manner as a child, and if married in binna or in diga as the case may be, then as a child so married, but the person adopted shall, by virtue of the adoption have no right of succession to any person other than the adoptor.

(2). The adoptor shall not, by virture of adoption acquire any right to succeed to the estate or any part thereof of the person adopted on his death intestate.

(3) Notwithstanding the adoption, the person adopted shall continue to have such right of succession to his or her own parent or parents, or any other person, as he or she would have had if the adoption had not been effected.

(4). A duly effected adoption shall not be cancelled or revoked, and no cancellation or revocation shall affect any right or liability arising out of the adoption" The word child or descendant in 8 (1) means not only a legitimate child but also an illegitimate child.

After 1st January 1939, an act of adoption to have any legal force should be by a deed executed in the presence of a District Judge, a Commissioner of Requests or the President of a Rural Court or in the presence of a licensed Notary and two witnesses. Such instrument should be signed by the adoptor and the person adopted or by his representative. This is the only way in which the door could be closed against perjured testimony.

The adopted child, for the purpose of inheritance in the estate of his adoptive parent, is regared as of the same status as any legitimate child of the adoptive parents, having all the rights and subject to all the disabilities governing the succession of a legitimate child to the intestate estate of a deceased person.

As regards inheritance, an adopted daughter is placed on the same footing as an adopted son. Prior to the amendment an adopted daughter was in the position of a daughter given out in diga.

An adopted child can succeed to the intestate estate of the adoptive parent only. He would have no right to succeed to the property of the spouse of the person adopting or of the relations of the adoptive parent. An adoptive parent is not entitled, qua adoptive parent, to any right of succession to the estate of the adopted child. This is without prejudice to any rights he may have as a blood relative to the adopted child. Notwithstanding the adoption, the person adopted will be entitled to succeed to the estate of his or her own parents. Once a child is adopted he will always remain an adopted child. He will always have the right to inherit on the death intestate of the adoptor.

The Adoption of Children Ordinance No. 24 of 1941 (Chapter 61) provides for the adoption of children, for the registration as custodians, of persons having

the care, custody or control of children of whom they are not the natural parents, and for matters connected with the matters aforesaid.

Section 16 lays down that the provisions of Part I shall be in addition to and not in substitution of the provisions of any written or other law relating to the adoption of children by persons subject to the Thesawalamai or the Kandyan Law and notwithstanding anything to the contrary in such other law, an adoption order may be made authorising any such person to adopt a child and where made shall have effect in accordance with the provisions of Part I.

Unwanted children are always available at the Lying in Homes and Women's and Children's Hospitals in the big towns. There is always some foster parent ready and waiting to adopt such newly born infants and small children.

In the past this kind of adoption fell under two classes viz:- (1) The adoption of orphans or unwanted children where the parent drops out from the moment someone else assumes responsibility for them, and (2) The adoption as "dependants" of children who have parents of their own who have not divested themselves or been deprived of the responsibility for maintaining them.

The above Ordinance requires the Commissioner of Requests to make necessary inquiries and pass an order authorising the applicant to adopt a child if he is satisfied:-

(1) That the applicant is a citizen of Ceylon resident and domiciled in Ceylon. (2) That the child is under the age of fourteen years. (3) That the child, where he is over ten years of age, consents to such adoption. (4) That the parent or guardian has consented to such adoption provided however that such consent may be dispensed with if the person whose consent is necessary has abandoned or deserted the child or cannot be found.

Upon an adoption order being made, all rights duties and liabilities of the parent or guardian would be

extinguished and all such rights duties obligations and liabilities would vest in and be exercisable by and enforceable against the adoptor as though the adopted child was a child born to the adoptor in lawful wedlock.

Persons taking charge of unwanted children or orphans under fourteen years of age from the custody of their parents or natural guardians, but who are not prepared to go through the legal process of real adoption, should register themselves as custodians of such children assuming full parental control and responsibility. An authorized officer should register any person as custodian if he is satisfied:– (1) That the parents of the child consent to deliver the child into the care custody and control of the applicant, (2) That the child if over the age of ten years has consented and (3) That in the interests of the child, it should be placed in the care of the applicant.

Authorized officers are the Government Agent, Assistant Government Agent, Magistrate, Officer in charge of a Police Station and any Registrar appointed under the Births and Deaths Registration Ordinance or the Marriage Ordinance.

The custodian of a protected person has to provide adequate food, clothing and medical attention for the protected person, permit Probation Officers to visit such child, after the child attained the age of twelve years open an account in the Post Office Savings Bank, and deposit each month to the credit of such account, an amount as prescribed in the regulations, until the protected person attains the age of eighteen years.

CHAPTER XII.

THE KANDYAN LAW DECLARATION AND AMENDMENT ORDINANCE NO. 39 of 1938 (CHAPTER 59).

This Ordinance was enacted on the recommendations of the Kandyan Law Commission. This Commission had decided that its work should consist chiefly of an endeavour:- (1) to remove uncertainties in the

law as at present understood; (2) to re-establish those portions of the old law which, as a result of judicial interpretation, have developed along lines at variance with the spirit of the ancient custom; (3) to recommend alterations in or additions to the old law where it may appear to be no longer in accord with modern conditions. Hence they recommended amendments on the following subjects viz. (1) the revocation of grants, (2) the disinherison of heirs, (3) adoption, (4) the definition of Acquired and Paraveni property and (5) the law of intestate succession and this Ordinance has implemented such recommendations.

"**Section 1.** (1) This Ordinance may be cited as the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938 and shall come into operation on such date (hereinafter referred to as the commencement of this Ordinance) as the Governor may appoint by proclamation published in the Gazette.

(2) This Ordinance shall apply to persons subject to the Kandyan Law".

This Ordinance has been proclaimed as from First January 1939.

"**Section 2.** In this Ordinance unless the context otherwise requires (a) "gift" means a voluntary transfer, assignment, grant, conveyance, settlement or other disposition inter vivos of immovable property, made otherwise than for consideration in money or money's worth; (b) "donor" means a person who has made a gift; (c) "donee" means a person in whose favour a gift has been made".

As to whether a voluntary transfer could be proved to be a gift see Chapters V and VI at pages 111 and 125.

"**Section 3.** Any deed or instrument executed after the commencement of this Ordinance, whereby any property, movable or immovable, is transferred, assigned, granted, conveyed, settled, or otherwise disposed of, shall be of full force and effect according to the tenor of such deed or writing notwithstanding the absence therein of any clause providing, expressly or otherwise, for the disinherison of the heirs of the person executing such deed or instrument."

"**Section 4.** (1) Subject to the provisions and exceptions hereinafter contained a donor may, during his lifetime and without the consent of the donee or of any other person, cancel or revoke in whole or in part any gift, whether made before or after the commencement of this Ordinance, and such gift and any instrument effecting the same shall thereupon become void and of no effect to the extent set forth in the instrument of cancellation or revocation. Provided that the right, title, or interest of any person in any immovable property shall not if such right, title, or interest has accrued before the commencement of this Ordinance, be affected or prejudiced by reason of the cancellation or revocation of the gift to any greater extent than it might have been if this Ordinance had not been enacted.

(2) No such cancellation or revocation of a gift effected after the commencement of this Ordinance shall be of force or avail in law unless it shall be effected by an instrument in writing declaring that such gift is cancelled or revoked and signed and executed by the donor or by some person lawfully authorised by him in accordance with the provisions of Ordinance No. 7 of 1840 or of Ordinance No. 17 of 1852."

"**Section 5.** (1) Notwithstanding the provisions of section 4 (1), it shall not be lawful for a donor to cancel or revoke any of the following gifts where any such gift is made after the commencement of this Ordinance:- (a) Any gift by virtue of which the property which is the subject of that gift shall vest in the trustee or the controlling viharadhipati for the time being of a temple under the provisions of Section 20 of the Buddhist Temporalities Ordinance, 1931, or in any bhikshu with succession to his sacerdotal pupil or pupils or otherwise than as pudgalika for the benefit of himself and his heirs, executors, administrators or assigns; (b) any gift in consideration of and expressed to be in consideration of a future marriage, which marriage has subsequently taken place;(c) any gift creating or effecting a charitable trust as defined by Section 99 of the Trusts Ordinance, No. 9 of 1917; (d) any gift, the right to cancel or revoke which shall have been expressly

renounced by the donor, either in the instrument effecting that gift or in any subsequent instrument, by a declaration containing the words " I renounce the right to revoke" or words of substantially the same meaning or, if the language of the instrument be not English, the equivalent of those words in the language of the instrument. Provided that a declaration so made in any such subsequent instrument shall be of no force or effect unless such instrument bears stamps to the value of Five Rupees and is executed in accordance with the provisions of Ordinance No. 7 of 1840 or of Ordinance No. 17 of 1852.

(2) Nothing in this Section shall affect or be deemed to affect the revocability of any gift made before the commencement of this Ordinance."

"**Section 6.** (1) Upon the cancellation or revocation of any gift, the donor shall be liable to pay to the donee compensation in such sum as shall represent the cost of any improvements to the property effected by the donee, after deducting the rents and profits received by him, and the expenses incurred in the fulfilment of the conditions, if any, attached to the gift provided that if the donee has made default in the fulfilment of any such conditions, no compensation shall be payable to him in respect of the improvements or otherwise.

(2) Such compensation shall be payable to any donee otherwise entitled thereto whether or not he would be an heir at law of the donor in the event of such donor dying intestate.

(3) In this Section "donee" includes any person who has succeeded to the title of the donee under the gift"..

These sections have been dealt with fully in Chapter V. Section 3 is an amendment. Section 4 (1) is declaratory whereas 4 (2) is an amendment. Section 5 (1) (a) (b) and (d) are declaratory whereas 5 (1) (c) is an amendment. Section 6 (1) is both declaratory and an amendment whereas 6 (2) is an amendment.

"**Section 7.** (1) No adoption effected after the commencement of this Ordinance shall avail in law to create any right or liability unless it is evidenced

by an instrument in writing with the consent of the person adopted expressed in the instrument and signed by both the adoptor and the person adopted, in the presence of– (a) a District Judge, a Commissioner of Requests, or the President of a Village Tribunal; or (b) a licensed Notary and two witnesses.

Provided that if the person adopted be a minor, such consent may be given and such instrument signed on his behalf by his parents or, if only one parent is alive, by that parent; but if there is no surviving parent or if either of his parents cannot be found or is incapable of acting in this behalf by reason of unsoundness of mind, ill–health, or other incapacity, the District Court or Court of Requests having local jurisdiction over the place where the minor ordinarily resides may, upon petition made to such Court by any person interested and after such inquiry as the Court may deem necessary, appoint any person or persons to give such consent and to sign such instrument.

For the purpose of the Civil Procedure Code 1889, and of the Stamp Ordinance, 1909, an application to the District Court under this section shall be deemed to be an action of the value of One hundred Rupees.

(2) No stamp duty shall be payable in respect of any instrument of adoption executed in accordance with the provisions of sub–section (1) or of any application to a Court made under that sub–section".

"**Section 8.** (1) On the death of the adoptor intestate, a person duly adopted whether before or after the commencement of this Ordinance shall have such right of succession to his estate as if he were a legitimate child of the adoptor, that is to say, if the adoptor leave him surviving no **child, or descendant** of a deceased child, then to the same extent and in like manner as a child, and if married in binna or in diga as the case may be, then as a child so married, but the person adopted shall, by virtue of the adoption, have no right of succession to any person other than the adoptor.

(2) The adoptor shall not, by virtue of the adoption, acquire any right to succeed to the estate or any part thereof of the person adopted on his death intestate.

(3) Notwithstanding the adoption, the person adopted shall continue to have such right of succession to his or her own parent or parents or any other person, as he or she would have had if the adoption had not been effected.

(4) A duly effected adoption shall not be cancelled or revoked, and no cancellation or revocation shall affect any right or liability arising out of the adoption".

These sections have been dealt with fully in Chapter XI. The word "child or descendant" in 8 (1) means not only a legitimate child but also an illegitimate child.

"**Section 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 estate 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.

(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 on the death of any person intestate".

This is an amendment to the existing law. The comparatively simple rule excluding the diga married daughter from the inheritance had become complicated at the outset owing to 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, which, with the dowry, was the origin of her exclusion, but then in 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 persons of low rank who could not afford costly ceremonies. The departure of the daughter without registration of the marriage has been held to be sufficient to cause a forfeiture and although they appear to follow Kandyan principles they in fact have led to curious results. Conversely the departure with the husband has been held to be so essential, that notwithstanding the registration of the marriage as a diga one, the Courts have allowed the fact that the daughter continued to live with her parents virtually to convert it into a binna marriage, entitling her to a share in her father's estate. The result of these decisions was 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 the entry in the marriage register shall be the best evidence of the marriage contracted. As it is only in matters connected with succesion that the difference between diga and binna marriages is of importance this section has enacted that a marriage contracted on or after lst January 1939 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; and that 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 shall convert a binna marriage into a diga marriage; or a diga marriage into a binna marriage; and 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 lifetime of her father.

In short the marriage certificate would be the best and conclusive evidence of the kind of marriage. Par-

ties will not be allowed to lead evidence to disprove the kind of marriage mentioned in the marriage certificate. A daughter will not lose her rights if she goes out in diga with a man without registering the marriage.

"**Section 10.** (1) The expressions "paraveni property" or "ancestral property" or "inherited property" and equivalent expressions shall mean immovable property to which a deceased person was entitled:–

(a) by succession to any other person who has died intestate, or

(b) under a deed of gift executed by a donor to whose estate or a share thereof the deceased would have been entitled to succeed if the donor had died intestate immediately prior to the execution of the deed, or

(c) under the last will of a testator to whose estate or a share thereof the deceased would have been entitled to succeed had the testator died intestate:

Provided, however, that if the deceased shall not have left him surviving any **child or descendant,** property which had been the acquired property of the person from whom it passcd to the deceased shall be deemed acquired property of the deceased.

(2) Where the paraveni property of any person includes a share in any immovable property of which that person is a co–owner, any divided part of or interest in that property which may be assigned or allotted to that person by any deed of partition executed, or by any decree for partition entered by a Court, after the commencement of this Ordinance, shall for all purposes be and be regarded as paraveni property of that person.

(3) Except as in this section provided all property of a deceased person shall de deemed to be acquired property.

(4) The expressions "paternal paraveni" and "maternal paraveni" and similar or equivalent expressions shall be deemed to mean paraveni property as hereinbefore described derived from or through the father or from or through the mother, as the case may be".

This section has been dealt with fully in Chapter VI. Section 10 (1) (a) and the proviso are declaratory, the rest are amendments. The word "child" in the proviso to section 19 (1) means not only a legitimate child but also an illegitimate child.

"**Section 11.** (1) Where a man shall die intestate after the commencement of this Ordinance leaving a spouse him surviving, then (a) the surviving spouse shall be entitled to an estate for life in the acquired property of the deceased intestate, and, if there be no acquired property, or if such property be insufficient for her maintenance, then to maintenance out of the paraveni property: Provided, further, that the surviving spouse shall out of her estate for life in the acquired property be bound to maintain the legitimate children of the deceased. Provided, that if the deceased intestate shall have left a child or descendant by a former marriage, the surviving spouse's life estate shall extend to only one half of the acquired ptoperty: Provided, further, that the surviving spouse shall out of her estate for life in the acquired property be bound to maintain the legitimate children of the deceased:- (i) if such children are minors and in need of maintenance; and (ii) if the deceased left no paraveni property or if such paraveni property is insufficient for the maintenance of such children; (b) if the surviving spouse shall contract a diga marriage she shall cease to be entitled to maintenance out of the paraveni property of the deceased but shall not by reason of such remarriage forfeit her aforesaid life estate in the acquired property; (c) should the surviving spouse be an ewessa cousin of the deceased intestate, she shall not thereby become entitled to any share in the estate larger than that to which she would otherwise have become entitled;(d) in the event of the deceased leaving him surviving no other heir the surviving spouse shall succeed to all his property both paraveni and acquired.

(2) In this section "maintenance" when used with reference to any property, whether paraveni or acquired, means maintenance out of the income of such property."

This section has been fully dealt with in Chapter V11.

"Section 12. (I) 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 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 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 her or them, such daughter shall so convey and shall be compellable by action so to do.

(2) In this section "marriage" means a marriage contracted after the commencement of this Ordinance."

As stated earlier an unmarried daughter inherits a share of the paternal estate. If later she was given in marriage in diga by her mother or brothers she forfeited her rights in the paternal estate. This section enacts that where a daughter contracts a marriage in diga on or after first Jannary 1939, after her father's death she will not be deprived of her share in the paternal estate. But the brothers and the binna married sisters have the right of emption at the market value of her share of the estate thus securing the integrity of the paternal estate if the other heirs are prepared to indemnify the sister by making a settlement, either in cash or landed property, equivalent in value to the share of the paternal estate to which she is entitled.

"Section 13. When a man shall die intestate after the commencement of this Ordinance leaving him surviving issue by two or more marriages, such issue and the descendants of any predeceased child or children, shall inherit inter se in all respects as if there had been but one marriage and the estate of the deceased shall not descend per stirpes to the issue of each marriage according to the number of marriages".

According to both Amrour and the Niti Nigan-duwa under the ancient law, the estate was divided per capita. It has been settled by a long series of decisions of the Supreme Court that the succession should be per stirpes where children of different marri-ages claim property of their father. This section has re-enacted the old law by declaring that the division should be per capita.

"**Section 14.** For the purposes of succession to the estate of any person who shall die intestate after the commencement of this Ordinance the term "legiti-mate" shall mean born of parents married according to law and the term "illegitimate" shall mean born of parents not married according to law:

Provided that a legal marriage between any parties shall have, the effect of rendering legitimate any children who may have been procreated between the same parties before the marriage. unless such children shall have been procreated in adultery."

"**Section 15.** When a man shall die intestate after the commencement of this Ordinance an illegitimate child or illegitimate children–(a) such children shall have no right of inheritance in respect of the paraveni property of the deceased; (b) such child or children shall, subject to the interests of the surviving spouse, if any, be entitled to succeed to the acquired property of the deceased in the event of there being no legitimate child of the de-ceased; (c) any such child shall, subject to the interests of the surviving spouse, if any, be entitled to succeed to the acquired property of the deceased equally with a legitimate child or the legitimate children, as the case may be- (1) if the deceased intestate had registered himself as the father of that child when registering the birth of that child; or (2) if the decsased intestate had in his lifetime been adjudged by any competent Court to be the father of that child".

The illegitimate children were entitled to the acquircd property per stirpes. The change made by this section is that they take per capita. In case a sole ille-gitimate daughter is married in diga after first January 1939, she will forfeit her rights to any share of the acquired property.

"**Section 16.** 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 estate 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; (b) on the death of the surviving parent, the acquired property shall, subject to the provisions of Section 17, devolve upon the brother or sister or brothers and sisters, or the descendant or descendants of any deceased brother or sister by representation. (c) if there be no brother or sister or descendant of a deceased brother or sister, the parents in equal shares or the surviving parent as the case may be, shall become entitled to the property; (d) the father or if the father be dead, the next heir or heirs on the father's side, shall inherit the paternal paraveni, and the mother, or if the mother be dead, the next heir or heirs on the mother's side shall inherit the maternal paraveni. The mother shall not inherit paternal paraveni unless there be surviving no heir on the father's side and in like manner the father shall not inherit maternal paraveni unless there be surviving no heir on the mother's side".

In a series of cases the Supreme Court had held that the mother was the sole heiress to the paraveni lands of her child who had died unmarried and without issue and left neither full brother nor full sister. Where a person died unmarried, intestate and without issue his acquired property devolved on his mother in preference to his brothers and sisters. A diga married father of an intestate dying without issue, was entitled to inherit the property of the deceased derived from his mother. The father was also entitled to an absolute interest in the acquired property.

By this section it has been enacted that the paternal paraveni shall revert to the father or his heirs and that the mother shall not inherit the paternal paraveni unless there be surviving no heirs on the father's side. Similarly the maternal paraveni shall revert to the mother or her heirs and the father shall not inherit the maternal paraveni unless there be surviving no heirs on the mother's side. The parents would be entitled only to a life interest in the acquired property if the deceased left any brother or sister or descendant of any deceased brother or sister. Only in case there were no brothers or sisters or descendants of a deceased brother or sister, would the parents be entitled to an absolute interest in the acquired property. The word "child" in "Child or descendant" at the beginning of the section means both legitimate and illegitimate children. The words "brother" or "sister" or "brothers" and "sisters" connote a legitimate brother or sister of the full or the half blood (50 N. L. R. 243).

"**Section 17.** In the devolution of the estate of any person who shall die intestate after the commencement of this Ordinance–(a) whenever the estate or any part thereof shall devolve upon heirs other than a child or the descendant of a child, and such heirs are in relation to one another **brothers or sisters, or brothers and sisters** or the descendants of any deceased brother or sister such heirs shall inherit inter se the like shares, and in like manner as they would have done had they been the children or descendants of the deceased intestate; (b) whenever the estate or any share thereof shall devolve upon heirs who in relation to one another are of the half-blood, such heirs inter se shall inherit per capita and the estate shall not descend to them per stirpes".

In regard to acquired property though there is no definite system laid down by the jurists the tendency was to elect males before females in the same degree in succession to a male dying intestate and issueless and leaving brothers and sisters (a).

This section enacts that in the case of succession to males, brothers and sisters inter se should inherit from all males in exactly the same way as they do from

(a) 28 N. L. R. 266.

their father. In short, brothers and sisters share equally, the preference given to males being removed. In the case of children of the half blood where there are two or more sets of half brothers or half sisters the division is to be per capita and not per stirpes. The words "brothers or sisters or brothers and sisters" in para. (a) connote elegitimate brothers and sisters (50 N.L.R.243).

"**Section 18.** (I) When a woman unmarried, or married in diga, or married in binna on her mother's property, shall die intestate after the commencement of this Ordinance leaving children or the descendants of a child or children, the estate of the deceased shall devolve in equal shares upon all such children, (the descendant or descendants of any deceased child being entitled to his or their parent' s share by representation) whether male or female, legitimate or illegitimate, married or unmarried, and, if married, whether the marriage be in binna or in diga:

Provided that if the deceased was married in binna as aforesaid an illegitimate child or children shall not be entitled to succeed to the paraveni property of the deceased.

Provided, further, that the descendant of a deceassed child shall be entitled to that child's share by representation whether or not he or she has been kept apart from the deceased intestate.

(2) When a woman married in binna on her father's property shall die intestate after the commencement of this Ordinance leaving children or the descendants of a child or children, such child or children, and his or their descendant by representation, shall be entitled to succeed inter se in like manner and to the like shares as they would have become entitled out of the estate of their father.

Provided that if the deceased was married in binna as aforesaid an illegitimate child or children shall not be entitled to succeed to the paraveni property of the deceased".

As we have already pointed out all children whether legitimate or illegitimate were entltled to

succeed to the mother's estate. This section enacts (1) in succession to a woman unmarried or married in diga, all her children whether male or female married in binna or in diga, legitimate or illegitimate would succeed equally; (2) in succession to a binna married woman residing on her father's property the principles of succession to males should apply, that is a daughter married out in diga and a son who had become a bhikku would forfeit their shares in the estate; (3) in succession to a binna married woman residing on her mother's property, all her children would share equally, save that illegitimate children are excluded from her paraveni property; (4) children of a diga married daughter who remain in their father's village and grow up apart from their maternal grandmother would not be excluded from inheriting a share of their grandmother's estate.

"**Section 19.** On the death intestate of a woman married in diga, leaving a surviving spouse but no child or descendant of a child, such surviving spouse shall not be entitled, and shall not be deemed to have been at any time entitled to any part of the immovable property of the deceased other than the part consisting of the acquired property to which the deceased became entitled subsequent to and during the subsistence of such marriage in diga".

In Seneviratne vs Halangoda it was held that a diga widower was entitled only to the property acquired by his wife during coverture in case she died issueless, and that he was not entitled to the wife's property acquired before marriage (b). In Dunuweera vs Mutuwa, Kretser J. doubted the correctness of this rule and held that the widower was entitled to property acquired before as well as after coverture (c). This section has declared that the widower is not entitled to inherit any property acquired by his deceased wife before marriage thus restoring the rule laid down in Seneviratne vs Halangoda.

(b) 24 N. L. R. 257. (c) 43 N. L. R. 512.

MOVABLES.

"**Section 20.** Heirlooms and live and dead stock appertaining to immovable property to which a person has become entitled as paraveni property as defined by Section 10 shall, on his dying intestate after the commencement of this Ordinance, devolve in like manner as immovable property and the following provisions of this Ordinance shall not apply thereto."

"**Section 21.** When a man shall die intestate after the commencement of this Ordinance leaving a surviving spouse she shall be entitled to all wearing apparel, jewellery and ornaments used by her or provided for her use by her deceased husband."

"**Section 22.** When any person shall die intestate after the commencement of this Ordinance leaving a surviving spouse and a child or children, or the descendant of any deceased child entitled to represent his or her parent the surviving spouse, whether the marriage was in binna or in diga, shall succeed in like manner and to a like share of all the movable property of the deceased whenever obtained, as if he or she had been a legitimate child of the deceased".

The words "child or children" mean both legitimate and illegitimate children.

"**Section 23.** Subject to the aforesaid right of the surviving spouse, if any, the movable property of any person who shall die intestate after the commencement of this Ordinance shall devolve in equal shares upon all his or her surviving children (the descendant or descendants of any deceased child being entitled to his or her or their parent's share by representation) whether male or female legitimate or illegitimate, married or unmarried, and if married, whether the marriage be in binna or in diga:

Provided further that if the deceased was a male person an illegitimate child shall not succeed if there be surviving any legitimate child or the descendant of a legitimate child:

Provided further that the issue of a legitimate child inter se shall succeed in like manner."

"**Section 24.** When any person shall die intestate after the commencement of this Ordinance leaving no **child** or **descendant** of any deceased child, the surviving spouse, if any, shall succeed to all the movable property of the deceased."

The widow, in addition to her separate property and paraphernalia, is entitled in her own right to a share similar to that of each child. If there are no children or remoter descendants the widow succeeds to all movables other than heirlooms and movables inherited with ancestral lands. The widower too whether married in binna or in diga, is entitled to a share similar to that of each child. If there are no children or remoter descendants the widower too succeeds to all movables other than heirlooms and movables inherited with ancestral lands. In the case of succession to a male all legitimate children whether male or female married or unmarried, and if married whether the marriage be in binna or in diga will share equally. The illegitimate children will succeed to a share of the movables of the father only in case there were surviving no legitimate child or the descendant of a legitimate child. In the case of a female the movable property devolves in equal shares upon all her children whether male or female legitimate or illegitimate, married or unmarried and if married, whether the marriage be in binna or in diga. The word "child or descendant" means not only a legitimate child but also an illegitimate child.

"**Section 25.** A person who has rendered assistance and support or any other benefit to a person who has subsequently died intestate, shall not by reason of such assistance, support, or benefit, become entitled to succeed to any interest in the estate of such deceased intestate to which he would not have become entitled had such assistance, support or benefit not been rendered."

"**Section 26.** Nothing in this Ordinance shall be deemed to affect or render invalid any existing judgment, decree, or order of a Court of competent

jurisdiction in respect of any property the subject matter of the action in which such judgment, decree, or order was given, passed, or made."

"Section 27. The provisions of this Ordinance shall not have, and shall not be deemed or construed to have, any retrospective effect except in such cases where express provision is made to the contrary".

This Ordinance is, however, not entirely declaratory, for it is also an amending piece of legislation. This Section expressly enacts that its provisions shall not have any retrospective effect except in cases where express provision is made to the contrary. Though retrospective effect should be given to the declaratory provisions yet this rule is subject to qualification. It may be true that the enactments are declaratory in form, but it does not necessarily follow that they are therefore retrospective and were meant to apply to acts which had been completed or to interests which had vested before they became law (d).

On an examination of all the Sections of the Ordinance it is clear that where the draftsman of the Ordinance used the word "child" or "descendant" he meant a wider class than the legitimate issue, and that these words cover both the legitimate and the illegitimate issue. When the draftsman referred to legitimate issue, he did so in no uncertain terms (e). Vide Sections 8, 16, 18, 21 and 23. Section 23 says that "when any person shall die intestate leaving no child, the surviving spouse shall succeed to all the movable property." If the "child" in this Section is construed to mean only a legitimate child then this Section will nullify Section 22 which recognizes the right of an illegitimate child to succeed to the movable property of his father, if there is no legitimate child and to succeed to the movable property of the mother in all cases. Again Section 16 provides that, where a person dies leaving no spouse or "child" the acquired property should devolve in a certain manner on his parents brothers and sisters. If "child" here means

(d) 52 N. L. R. 314. (e) 48 N. L. R. 318.

only a legitimate child then Sectin 16 cannot be reconciled with Section 15 (b) which states that an illegitimate child shall subject to the interests of the surviving spouse be entitled to succeed to the acquired property in the event of there being no legitimate child. Where the Ordinance has to refer to a legitimate child only, it does not use the word "child" but "legitimate child" or some such expression as "child by a former marriage" (vide Section 11 (1) (a) proviso (f).

The words "brother and sister" in Sections 16 and 17 connote a legitimate brother or sister of the full or the half blood. Neither under these Sections nor under the customary law can an illegitimate child inherit from a collateral source (g).

CHAPTER XIII.

BUDDHIST ECCLESIASTICAL LAW.

Budddism was founded by Gautama Buddha of the Sakya clan about the year 588 B. C.

The same year after preaching the first sermon to the five companions who had been his attendants during his ascetic practices, he founded the Sangha or the Buddhist Priesthood with the said persons as the first members. In the course of his long ministry of forty–five years, and as occasion arose he made a great number of regulations for its guidance.

To enter the order as a Samanera or beginner one must be at least capable of scaring away crows that is five to seven years old. He must be a male who is not blind, deaf or dumb. He must be one not suffering from any deformity or from any illnesses like leprosy, eczema, abscesses, tuberculosis or epilepsy. He must be a free man, free from debt and exempt from military service. He must obtain the permission of his parents. He will be robed under an Achariya (master).

(f) 48 N. L. R. 391. (g) 50 N. L. R. 243.

Ordination. When such samanera is well versed in the doctrine he may be ordained a full fledged bhikku. Before he is so ordained the Sanga Sabha composed of at least five bhikkus, of at least ten years standing should find out whether he is free from the disqualifications above mentioned. Such Samanera should be at least twenty years of age. He must be presented for ordination by his Acariya (master) or tutor. The ordination usually takes place in the presence of twenty members of the Sangha all of whom should be Maha Theras (that is upasampada Bhikkus of more than ten years standing). Even five members of the Sangha would be sufficient for ordination, as Mahinda Thero introduced the Sangha with five Bhikkus.

The rules made by the Buddha for the maintenance of discipline among members of the Sangha are contained in the Vinaya Pitaka. The book called the Patimokkha gives a list of 227 offences under seven headings viz (1) Parajika, (2) Sanghadisesa, (3) Aniyata Dhamma, (4) Nissaggiya Pacittiya, (5) Pacittiya Dhamma, (6) Patidesaniya Dhamma, (7) Sekhiya Dhamma and (8) Adhikarana Samatha Dhamma.

(1) **Parajika offences.** There are four offences under this heading viz:– (a) Sexual intercourse with a woman, (b) Committing any theft, (c) Committing murder, and (d) Pretending to possess miraculous powers. These offences are punishable with expulsion from the order.

(2) **Sanghadisesa.** There are thirteen such offences, six of which are sexual offences. These offences are punishable with suspension and penances.

(3) **Aniyata Dhamma.** There are two such offences which too are sexual offenccs. These too are punishable with suspension or censure.

(4) **Nissaggiya Pacittiya Dhamma.** There are thirty such offences concerning robes, carpets, bowls etc. which are punishable by forfeiture of such articles.

(5) **Pacittiya Dhamma.** There are ninety two such offences such as uttering a lie, slandering other priests, cutting trees etc. requiring a confession and absolution.

(6) **Patidesaniya Dhamma.** There are four such offences like giving a portion of the alms collected to a Bhikkuni, punishable with censure.

(7) **Sekhiya Dhamma.** There are seventy five of these rules. These are not offences. They are merely rules to guide the bhikkus with regard to discipline. These rules concern the right way of wearing of the robes, how to behave when walking or seated, how to eat the food that is offered etc.

(8) **Adhikarana Samatha Dhamma.** These are seven rules regarding the settlement of disputes.

On the Uposatha days, that is, on the Full Moon day and the New Moon day, the Upasampada (ordained) bhikkus have to meet in the Simage and recite the Patimokka (containing the above-mentioned 227 rules). These precepts are recited by the senior bhikku or one nominated by him. After reciting the rules necessary inquiries are made as to whether anyone has committed any of the offences.

We are here concerned only with the **Parajika** offences for which there is no lesser punishment than expulsion from the order; in the case of the other offences the punishment varies from suspension to censure.

At the Uposatha ceremony, any bhikku may make a charge against another, of any of the offences aforementioned. In such a case a Trial is held by the Sangha in the presence of the accused bhikku and the necessary punishment is meted out.

Introduction of Buddhism to Ceylon. About the year 307 B. C. Emperor Asoka of India sent a mission to Ceylon headed by his own son Mahinda Thero.

Mahinda Thero was accompanied by the Theras Ittiya, Uttiya, Sambala and Bhaddasala, the novice Sumana and the lay disciple Bhanduka. Not only was King Devenampiyatissa, together with a large number of people converted to Buddhism by Mahinda Thero but on the seventh day after his arrival, a minister, Aritthа by name, entered the order with fifty-five others. Thus the **Sangha was established in Ceylon.**

From the time of the conversion of Devanampiya-tissa, Buddhism, as the state religion, was intimately connected with the Kings. The Sinhalese histories abound with records of the building of Vihares, Dagabas, and Pansalas, the dedication of lands for their upkeep, and numerous other acts of liberality towards the Sangha on the part of successive monarchs. The Crown was apparently recognised as the head of the Church, and entitled to interfere not only in questions affecting the temporalities, but also in matters of doctrine and discipline. The appointment of Church officers, both ecclesiastical and lay, was in the hands of the King. At the beginning of the nineteenth century, the King appointed the chief priests of the larger foundations and temples such as the Malwatte and Asgiriya Vihares and the temples, of Adam's Peak and Alutnuwara, the Diwa Nilame or Diyawadana Nilame, whose duty it was to guard the ToothRelic in the Dalada Maligawa, and the Basnayaka Nilames of the principle dewalas. All these officers could be removed from office by the King (a).

Various Sects. During the time of King Kirtisri Rajasingha, the members of the Sangha were in a degenerate state. Many were of bad morals; they had wives and children and devoted themselves to unseemly professions. There was not even a sufficient number of Upasampada bhikkus to ordain the Samaneras. The King sent a mission to Ayojjhaya in Siam, to invite a sufficient number of ordained bhikkus. The King of Siam called together a Chapter consisting of a group of eleven ordained Bhikkus with Thera Upali as head, and sent them to Ceylon. This was in the year 1752 A. D. They took residence at Malwatu Vihare in Kandy. On the Full Moon day in the month of Esala, the King got the said bhikkus to confer Upasampada on the distinguished Samaneras then living in Ceylon. Later the King invested Reverend Saranankara, who had by then been ordained, with the dignity of a Sangaraja. Thus was the Siam **Nikaya** established in Ceylon. The Siam Nikaya ordained only members of the Goigama

(a) Hayley 533.

community. Those displeased with the said arrangement sent six Samanera bhikkus to Burma wherc they were ordained. These six bhikkus on their return to the Island established the Sect that is known as **Amarapura Nikaya** which ordained candidates of any caste. The third Sect known as **Ramanya Nikaya** was established about the year 1815. Among these three Sects there is no difference of opinion with regard to the doctrine.

Buddhism under the English. When the Kandyan Provinces were ceded to England by the Convention of 1815 it was provided that the religion of Buddha should be declared inviolable, and that its rites, ministers and places of worship would be maintained and protected. By the Proclamation of 21st November 1818 all lands which were the property of temples were exempted from all taxation. Ordinance No. 10 of I856 provided for the settlement of claims to exemption from taxation of temple lands in the Kandyan Provinces and for the due registration of all lands belonging to such temples.

In the earlier years of the British administration, the Government stepped into the place of the Buddhist Monarchs, and exercised its authority as head of the Buddhist Church without hesitation. The customary allowances made to the bhikkus by the Kings were continued. Bhikkus who misconducted themselves were removed from office. Vacancies were filled. The Dalada Maligawa was provided with a military guard, after the British recovered the Tooth Relic from the rebels who had removed it in 1818. The relic itself was under the custody of the Resident, and was shown to the people by order of the Governor, who himself attended, in 1828 with much of the pomp and ceremony which accompanied the event in the time of the Sinhalese Kings. Towards the middle of the Nineteenth Century, the propriety of a Christian Government acting as head of the Buddhist Church, began to be questioned (b).

With the idea of making provision for the management of the Buddhist Vihares and Devales, Ordi-

(b) Hayley 534.

nance No. 2 of 1846 was enacted. It was framed on the principle that Government was not only bound to secure the Buddhists against molestation and injury in their persons or in their property on account of their religious observances but were bound to advance further, and to enact and execute laws, having for their express object the more easy, convenient, and orderly celebration of the Buddhist rites and ceremonies. It enacted that the Dalada or Saced Tooth should be delivered over to the custody of a committee constituted under section one of the said ordinance. Then followed an enactment vesting in that Committee all the rights powers and privileges which by virtue of the Convention of 1815 were vested in the Governor of these settlements for the time being so far as the same relates to the appointment and removal of priests and Chiefs of temples, and to the internal discipline of the Ministers of the Buddhist religion. Power was given to the said committee to remove any bhikkus on non-performance of their duties. Any bhikku aggrieved by such action had the right to appeal to the District Court which had the right to inquire and make order accordingly. Lord Gray refused to advise the Queen to confirm the said enactment No. 2 of 1846 as he declined to admit that the convention of 1815 was capable of being interpreted in the manner put forward by the framers of the Ordinance.

In the year 1856, the decision arrived at by the Secretary of States for the Colonies was communicated by the Governor to a meeting of bhikkus and chiefs convened at the Queen's Pavilion in Kandy. The communication was to the following effect, namely, that the Government would withdraw from interference with the appointment of bhikkus and temple servants, and an Ordinance would be framed to substitute some other method of appoinment; that the Dalada would be made over to the bhikkus; and that the annual garnts of money made for the maintenance of Buddhism would be discontinued.

Though Ordinance No.2 of 1846 was disapproved by Lord Gray, he laid down the principles on which

the future constitution to be given to Buddhism should be based, namely, that the Sangha may regulate their matters for themselves and execute their own regulations as they shall see best; that mere proprietary rights might be vested in the bhikkus or in any committees or trustees of their appointment; and that they might be enforced or defended like the proprietary rights of any other corporate body.

In 1847 all allowances previously granted by the Ceylon Government to bhikkus and contributions to religious festivals were withdrawn, and the bhikkus were left to shift for themselves as best as they could.

In the year 1849, the Government again reverted to its old policy; the Dalada was taken into the custody of the Government Agent and the bhikkus continued to be appointed as formerly under the Seal of the Govenor.

In 1853 the Governor addressed a letter to the Government Agent giving directions to restore the Dalada to the Chiefs and bhikkus, prescribing forms of certificates instead of letters of Appointment to be given to elected bhikkus, and intimating that compensation in the shape of gifts of Crown lands should be given to the Sangha in lieu of the Government subsidy which had been stopped (c).

Since the withdrawal, many years ago, of all control by the Government over temporal affairs of the Buddhist religious foundations in this Colony, great and scandalous abuses had prevailed in their management. The well-disposed were unable to check these abuses, owing to the want of any efficient machinery for exercising control in such matters. It appears to have been ruled by the Courts that the incumbents of the different Viharas and Dewalas were not, in the ordinary sense of the word, trustees, and that the (Buddhist) inhabitants of any locality had not that pecuniary interest in the Temple property which alone would entitle them to call in question before a Court of law the abuse of the property by the incumbent for the time being. Each incumbent was, therefore,

(c) Sessional Paper 4 of 1907.

virtually the irresponsible owner of property in which he was only intended to hold a life interest for certain purposes, and on certain conditions. The monastic Colleges, indeed, could have administered discipline, and degraded and disrobed bhikkus, but they could have done so only in the case of bhikkus personally attending before them; and as they had no means of compelling attendance, and no power of inflicting penalties for non-attendance, it may be presumed that delinquent incumbents did not pay much attention to any citation issued by those bodies. But, unless he did so, no offender against the rule could have been disrobed and expelled from the mendicant order, or deprived of the incumbency of the particular vihare to which he had been appointed.

When the connection of the Government with the Buddhist Temporalities was severed, it was fully admitted by Her Majesty's Government that it became an obligation, at the same time, to give to the Buddhist religious community a sound working constitution; or that, although this obligation was fully recognised more than forty years ago the difficulties in the way of accomplishing the object in view had hitherto proved too considerable to be surmounted (d).

From 1819 the local Government took steps to register the temple lands which were exempted from all taxes. In 1856 the Government appointed commissioners to define and allot temple lands. The demarcation and delineation of temple lands was followed by a Legislative Enactment, the Service Tenures Ordinance of 1870 to define services due by the tenants and to provide for the commutation of these services.

In the year 1889 the first Buddhist temporalities Ordinance was enacted. The main objects of the Ordinance were the transference of temple property to trustees, instead of the incumbent for the time being and the control of such trustees, by committees. The most important feature in the machinery for securing the efficient application of these provisions was the establishment of a strict audit, under the direction of

(d) Governor's addresses.

District Committees. By adopting this plan the danger of creating a new and possibly formidable power, such as was created by the Ordinance No. 2 of 1846, was avoided, the trustees being local and not central; and on the other hand, the sort of confiscation and interference contemplated by the Ordinance of 1877, and justly deprecated by the Secretary of State and Sir J. Longden, were also avoided (d).

Prior to this Ordinance, the management of Buddhist Temporalities was in the hands of the incumbents of the temples. As during the period of their management, temple properties had been mismanaged and dissipated, this Ordinance removed the management from the hands of bhikkus and gave it over to lay trustees who were elected by the District committees constituted under this Ordinance. The next Buddhist Temporalities Ordinance No.8 of 1905 retained the management in the hands of the lay trustees but povided that they should be elected by a majority of voters resident in the villages to which the temples were attached. A Commission appointed in 1918 found that the management by the trustees was as unsatisfactory as the management by the bhikkus had been. Hence in the present Buddhist Temporalities Ordinance No. 19 of 1931 provision is made for the Viharadhipati to nominate himself or any other Bhikku or layman as the trustee. In case of failure to nominate a trustee, the Vihardhipati himself is taken to be the trustee. The Ordnance No.3 of 1889 and the subsequent Ordinances provided that the supervision and conrol of trustees should be by District Committees constituted under those Ordinances. The present Ordinance has constituted the Public Trustee as the sole supervising authority of the Trustees.

The Buddhist Ecclesiastical law, with regard to spiritual succession and the rights and duties of Bhikkus is applicable not only in the Kandyan Provinces but throughout the whole Island (e).

The right to succeed to an incumbency depends on the law observed and practised among the Sangha

(e) 6 N. L. R. 313.

in Ceylon. The original source of the law is undoubtedly the Buddhist Scriptures or the Three Pitakas. These Pitakas contain a large body of rules and regulations with reference to the conduct of the Sangha, succession to ecclesisatical property, and so forth, but the Buddhists of Ceylon have not adopted all these rules and our Courts have only given effect to such rules as have been adopted in this Country. For instance, notwithstanding the rule of absolute poverty, Bhikkus generally hold considerable private property which is at their disposal, and on their death descends to their lay heirs. Again, a bhikku may acquire property by special gift or bequest, and he may inherit his brother's or sister's or mother's estate, or if he be the only child, he has a right to his father's property in preference to collaterals. The jurisdiction exercised by the Asgiriya and Malwatta Chapters in appointing incumbents to vacant temples where the line of succession has been broken, appears to have no support in the Pitakas, which confer that power upon the entire Sangha. Nor is there any warrant in the books for the distinction between the Siamese and Amarapura Sects. and for the incapacity of a bhikku of one Sect to succeed to an incumbency held by a bhikku of another sect. These changes should be regarded not as lapses, but as necessary developments in the course of centuries. Doctrine and belief are, of course, immutable, but discipline and administration are naturally subject to modifications. Accordingly, it becomes necessary in matters of the latter kind, to look to actual practice and custom rather than to the ancient Canons (f).

CHAPTER XIV.

TEMPLES AND THEIR ADMINISTRATION.

Not only Viharas Dagobas and other buildings but even large extents of land were dedicated to the Sangha by the Kings and other philanthropic persons.

(f) 20 N. L. R. 385.

In the Buddhist Temporalities Ordinance of 1931 a temple is thus defined:- "Temple" means Vihare, Dagoba, Dewala, Kovila, Avasa or any other place of Buddhist worship".

Every Vihara belongs to the whole Sangha to the full extent of the accomodation which it affords, and cannot be portioned out in shares, whether divided or undivided. Subject therefore, to the effect of the principle of pupillary succession, the beneficial interest of every Vihara and its endowments is in the Sangha as a whole. The general principle of the dedication of every Vihara to the Sangha, as a whole is affected by the religious customs under which temples have been from time to time dedicated for the use of a particular priest and his pupils and the pupils of those pupils in perpetual succession (a).

A **Vihara,** the dedication of which was sanctioned by the Buddha is conceived of as being dedicated to the whole order of the Sangha, present and future, throughout the world, in all directions, North, South, East and West. The five things namely an Aramaya or the site for an aramaya, a vihare or site of a Vihare, furniture like beds chairs etc., tools like axes mamoties etc., and creepers bamboos, grasses etc., are untransferable and unapportionable.

Till 1931 the trustees were laymen but in that year, this Ordinance aforesaid introduced a departure from the practice of excluding Bhikkus from the office of trustee on account of the abuse of their trust by the lay trustees. This Ordinance permitted a Viharadipati to nominate himself as trustee instead of appoinating a lay trustee. This Ordinance does not declare a temple to be a juristic person, nor did any of the previous Buddhist Temporalities Ordinances do so. The property of a temple was vested in a trustee on behalf of the Sangha and it was the trustee that was always empowered to sue and to be sued (b). A Buddhist Temple is not a juristic person. It is not like the deity of a Hindu Temple. It is not a Corporotion.

(a) 20 N. L. R. 383. (b) Wijewardena vs Buddharakkita Thero (1957) 59 N. L. R. 121

It has no legal personality. Section 20 of the Buddhist Temporalities Ordinance says that all property belonging to a Vihare or any place of Buddhist worship shall vest in the Trustee. But a Vihare is not a juristic person. A place of Buddhist worship is not a juristic person. It cannot have property belonging to it. To what then does Section 20 apply? The answer given by the Supreme Court is that it deals with Sanghika property namely property which has been dedicated to the Sangha, with the ceremonies and forms necessary to effect a dedication but with special attention to the bhikkus of a particular temple. The Buddhist Temporalites Ordinance does not apply at all to property which is vested either by will or deed, in private trustees for the benefit of a temple as a charitable trust. A testatrix devised a land to Raja Maha Vihara Kelaniya and entrusted to certain named trustees the management of the same for the benefit of the said Vihare. The Privy Council held that the said land did not vest in the Viharadipati (c).

Premises dedicated by a person or an incorporated body of persons for the establishment of a pirivena to impart a knowledge of Buddhism to Bhikkus as well aS laymen do not constitute a "temple" within the meaning of Section 2 of the Buddhist Temporalities Ordinance even if subsequent to the establishment of the Pirivena, and in the course of years, a Dagoba, an image house and a Bo tree appear on the premises and the monks residing in the Pirivena permit lay devotees to come there on certain days for worship. Such an instrument is not governed by the Buddhist Temporalities Ordinance but creates a valid trust under the Trusts Ordinance and the office of Trustee devolves on the person appointed from time to time in terms of the instrument (d). No particular type of building or buildings are necessary to constitute a temple. A block of land was purchased and living quarters for a bhikku were erected by the Dayakas. The land was formally donated to the Sangha in the customary manner

(c) Mapitigama Buddharakkita Thero vs Wijayawardana Pr. C. (1960) 62 N. L. R. 49. (d) Morentudwa Dhammananda vs Baddegama Piyaratana (1958) 59 N. L. R. 412.

on the date of occupation of the new avasa by the plaintiff. Thereafter the Dayakas collected subscriptions and these were handed to the defendant who was the Treasurer of the Society. Under Section 20 of the Buddhist Temporalities Ordinance the plaintiff was the controlling Viharadipati and hence was declared entitled to recover the monies collected from the defendant (e). Where a Buddhist Temple, when its premises were under military occupation, suffered damage owing to substantial demolition of the buildings, the interval during which it became temporarily unfit for use as a place of worship cannot be said to have destroyed either its identity as a temple or the status of its incumbent (f).

Where a deed was on the face of it, nothing more than a gift of pudgalika property by a Viharadipati to his pupil and the latter's successors in the pupillary succession, it could not be contended that the donee held the land as temple property for the benefit of the Vihare. Section 6 of the Trusts Ordinance requires the author of a trust to indicate with reasonable certainty (1) the intention on his part to create a trust, (2) the purpose of the trust, and (3) the beneficiary. None of these elements were present in the said deed. Nor was the Vihare mentioned in the deed as a beneficiary (g).

Dedication. It is by a gift that a temple or any other property can become Sanghika, and the very conception of a gift requires that there should be an offering or dedication. Until a dedication takes place the temple remains gihi santaka (lay property). This dedication may take the form of a writing or may be verbal, but in either case it is a formal act, accompanied by a solemn ceremony in the presence of four or more bhikkus who apparently represent the Sarva Sangha or the entire Sangha. For a dedication there must be a donor, a donee, and a gift. There must be an assembly of four or more Bhikkus. The property must be shown; the

(e) Romanis Fernando vs Wimalasiri Thero (1951) 53 N. L. R. 245. (f) Gunaratana Thero vs Nayaka Thero (1952) 54 N. L. R. 391. (g) Surasena vs Rewata Thero (1958) 60 N. L. R. 182.

donor and the donee must appear before the assembly, and recite three times the formula generally used in giving property to the Sangha with the necessary variation according as it is a gift to one or more. Water must be poured into the hands of the donee or his representative. In the case of a notarial gift it must be accepted by the Bhikku. The Sangha is entitled to possess the property from that time onwards. No property can become Sanghika without such a ceremony. Sometimes there is a stone inscription recording the grant or a deed is given. A dedication may be presumed in the case of a temple whose origin is lost in the dim past (h). A temple does not, by the mere fact that it is a place of worship, become the property of the Sangha. A private individual can have on his property a temple and it would be his private property. A temple or any other property given to the Sangha must be dedicated in the manner prescribed above which is the procedure prescribed in the Vinaya. Then and then only can it become Sanghika property. In order to perfect the paper title and complete the entries in the Register of Documents kept under any law for the time being regulating the registration of documents, it has been the practice after the formal dedication is over for the donor to execute a deed conveying the property for the use of the Sangha to a trustee named in the deed. He is at times entrusted with the administration of the gift subject to the terms specified in the grant (i). When a pansala or other property is dedicated in Sanghika, the dedicators or grantors cease to have any right or control over it, and the right to the property so granted is regulated by a well known tenure called Sishiyanu Sishiya paramparawa, unless express provision is made to the contrary in the dedication (j). Where a society which was formed to establish a Buddhist Temple executed a deed entrusting the charge of the temple and its premises to a bhikku provisionally, intending to effect a permanent transfer and dedication at some time later, such deed

(h) Wikramasinghe vs Unanse (1921) 22 N. L. R. 236. (i) Wijewardena vs Buddarakkita (1957) 59 N. L. R. 121. (j) Dammaoti vs Sarananda Unanse (1881) 5 S. C. C. 8.

did not divest the society of all its rights and prevent it from subsequently entrusting the control and management of the temple to persons other than those named in the deed as the premises remained gihi santhaka (k).

A donor who dedicated immovable property to the Buddhist Sangha cannot subsequently derogate from his own grant by attempting to contradict the representation in the dedication that the property belonged to him. Immovable property, when it is duly dedicated to the Sangha, becomes Sanghika, although no notarial document is executed in accordance with the Prevention of Frauds Ordinance (1).

The general principle of the dedication of every Vihare to the Sangha as a whole is affected by the religious custom under which temples have been from time to time dedicated for the use of a particular bhikku and his pupils, and the pupils of those pupils in perpetual succession (m).

The ceremonies which took place when a Buddhist Seminary was established did not constitute a formal dedication. In such a case, the premises were not Sanghika property and the trustees are entitled to remove a bhikku from the premises on bona fide grounds in accordance with the power vested in them under the trust instrument (n).

Incumbent or Viharadhipati. This is an office unknown to the Vinaya. The Vinaya makes provision for the appointment of a great number of special officers of vihares. Among the special officers provided for are those of "regulator of lodging places" "apportioner of rations","Suprintendent of building operations "Overseer of stores," "receiver of robes" and many others. There is nothing in the Vinaya which provides for the appointment of a general presiding or superintending officer. Bhikkus who frequent a cemetery for purposes of meditation must notify the dwelling in the

(k) Wajirawansa Thero vs Abraham Silva (1958) 60 N. L. R. 276. (l) Dharmawansa The.o vs Ukku Banda (1959) 60 N. L. R. 350 see also 57 N. L. R. 470. (m) Sarananda Unanse vs Indajoti Unanse (1918) 20 N. L. R. 385. (n) Werahera Wimalasara vs Porolis Fernando (1955) 56 N. L. R. 369.

cemetery to the cemetery keeper, the chief elder of the Vihare (Mahathera) and the officer in charge of the village. This may possibly be the origin of the officer referred to in Ceylon as the "incumbent".

All the special officers above referred to are officers of the Sangha itself, appointed by a formal resolution in accordance with the procedure prescribed for formal acts of the Order, at a meeting of the Sangha called for the purpose, at which the attendance of four priests constitute a quorum. The officer who in Ceylon decisions and ordinances is referred to as the "incumbent" is an officer of a different nature. The terms by which he is described are "Adikhari" or "Adipati". Where there are several persons in the line of pupillary succession, the adikhari is appointed from among these persons either by nomination of his predecessors or by selection of these persons. The selection is not made by a formal act of the Sangha, but it is the formal choice of the other persons entitled to the succession. By custom the right to succeed is determined by seniority (o).. A senior pupil may renounce his claim and allow a junior to be so selected (p). In the earlier Ordinances "Incumbent" was defined as the Chief resident priest of a temple. In the present Ordinance "Viharadhipati" is defined as the principal Bhikshu of a temple, other than a devale or Kovil, whether resident or not. Prior to the enactment of the Buddhist Temporalities Ordinance, the endowments of a temple were vested in the incumbent (q). Property dedicated to the Vihare was the property of the incumbent for the time being for the purposes of his office, including his own support and the maintenance of the temple and its services (r). After 1889, they were vested in trustees appointed under the Ordinance though the presiding priest or incumbent had the control and administration of the Vihare itself. In effect, therefore, a "Viharadhipati" after 1931 is the presiding priest who

(o) Saranankara Unanse vs Indajoti Unanse (1918) 20 N. L. R. 385. (p) 59 N. L. R. 289. (q) Dhammananda vs Ranasinghe (1939) 39 N. L. R. 567. (r) Ratanapala Unanse vs Kevitiagala Unanse (1890) 2 S. C. C. 26.

was known as an "incumbent" before 1931, with the difference that he need not be resident in the temple of which he claims to be the Viharadhipati. It seems clear that in enacting the Ordinance of 1931 there was no intention on the part of the legislature to draw a distinction between a "Viharadhipati" and an incumbent (s). A Viharadhipati is one who can lawfully claim to be the head of the Vihare; one generally, who can show that he is the pupil of the last incumbent or that he is in the line of pupillary succession (t). In the case of a temple which is exempted from the operation of Secion 4 (1), but governed by Section 4 (2) the management and the title to the property of the temple are vested in the Viharadhipati of such temple hereinafter referred to as the controlling Viharadhipati. The first qualification required of a controlling Viharadhipati is that he should be the Viharadhipati of the temple (s). If at the dedication of a Vihare an express nomination is not made by the donors and the most senior of the bhikkus accepted the dedication, there is nothing to counter the inference that the intention was to constitute such senior bhikku as the first incumbent. Even if such senior pupil could not be regarded as the incumbent, the legal position was that the incumbency was vacant and the right to appoint to such vacancy was vested in the Chapter on whose behalf the Vihare was accepted (u). When a Buddhist temple is built for the first time by laymen and offered to the Sangha, there is no requirement of law or custom that the Viharadipati should be appointed by a written document (v). An incumbency is an office to which rights in property attach (w).

The office of "incumbent" is a single office and cannot be held jointly, and consequently a claim to a share of an incumbency cannot be sustained (x).

(s) Pemananda Thero vs Thomas Perera (1955) 56 N. L. R. 413; see also 59 N. L. R. 245. (t) Punchibanda vs Dharmanda Thero (1948) 48 N. L. R. 11. (u) Mawella Dhammavisuddi Thero vs Kalawana Dhammadassi Thero (1954) 56 N. L. R. 284. (v) Dhammavisuddi Thero vs Dhammadasa Thero (1955) 57 N. L. R. 469. (w) 62 N.L. R. 193. see also 58 N. L. R. 29. (x) 20 N.L. R. 385.

The incumbent is entitled to the unhampered use of the Vihare for the purpose of maintaining the customary religious rites and ceremonies. He can claim full possession of it even though the title in respect of it and of the other endowments of the Vihare is vested in a trustee. He is also entitled to the control and management of the temple premises and might regulate its occupation and use to the extent that no other bhikku can select for himself a particular place in the Vihare independently of him against his wishes. A bhikku who is guilty of contumacy is liable to be ejected bv him (y). A Viharadipati does not forfeit his right to the office when he leaves the temple of which he is Viharadhipati and takes up residence in another of which also he is the Viharadhipati (z).

The Viharadhipati who had appointed a thewawa bhikku has the right to discontinue the latter and appoint a new thewawa bhikku (a).

Limitation of actions and prescription. By the Buddhist Temporalities Ordinance of 1905, the property of a Vihare, both movable and immovable, was vested in the trustee. An incumbent clearly had no title to the immovable property of the temple nor a right to the possession thereof. Apart from his ecclesiastical duty the incumbent of a vihare had certain rights of administration and control of the vihare itself, but these were not such rights as were contemplated by section 3 of the Prescription Ordinance. Hence an action for an incumbency of a temple, being an action for a declaration of a status, was barred by the lapse of three years from the date when the cause of action arose (b).

In a later case (c) Gratiaen J. stated as follows:- "The earlier authorities certainly seem to indicate that,

(y) Podiya vs Sumangala Thero (1956) 58 N. L. R. 29; see also 28 N. L. R. 145 and 23 N. L. R. 24. (z) Jinaratana Thero vs Dhammaratana Thero (1955) 57 N. L. R. 372. (a) Dhammadassi Thero vs Dhammasiddi Thero (1946) 47 N. L. R. 553 (b) Terunanse vs Terunanse (1927) 28 N.L.R. 477; see also Rewata Unanse vs Ratnajoti Unanse (1916) 3 C. W. R. 198; Premaratne vs Indasara (1938) 40 N .L R . 235. (c) Saranankara Thero vs Dhammananda Thero (1954) 55 N. L. R. 313.

if a trespasser who disputes the status of a true incumbent of a temple continues thereafter to remain in adverse possession without interruption for a period of three years, the dilatory incumbent's right to relief in the form of a declaratory decree becomes barred by limitation under the prescription Ordinance. We must, of course, regard ourselves as bound by these decisions, but with great respect I think that, on this particular point, the question calls for a reconsideration by a fuller bench on an appropriate occasion. It is clear law that an impostor cannot acquire a right to an incumbency by prescription; nor can the rights of the true incumbent be extinguished by prescription". In a still later case (d) Basnayake C. J. stated as follows:- "Before the Buddhist Temporalities Ordinance of 1931 all property movable or immovable belonging to a temple and all rents and profits thereof vested in the lay trustee. The function of the maintenance and upkeep of the temple and its priests was also vested in the lay trustee. The present Ordinance of 1931 made a radical change in this respect and vested the management of the property belonging to every temple exempted from the operation of Section 4 (1) but not exempted from the operation of the entire Ordinance in the Viharadhipati of the temple. The plaintiff's action is in effect an action, for not only a declaration of status, but also for the recovery of the temple and its property, for his prayer is that the defendant be ejected from the premises described in the plaint. It would therefore not be correct to treat the instant case as an action for declaration of a status alone. The decisions of this Court which hold that an action for an incumbency is barred by the lapse of three years may have to be re-examined in a suitable case in the light of the altered rights of a Viharadhipati who is now empowered to sue and be sued as the person in whom the management of the property belonging to a temple is vested".

(d) Amaraseela Thero vs Sasanatilleke Thero F. B. (1957) 59. N. L. R. 289.

Upon the extinction of the line of pupillary succession, the temple vests in the Sangha and the right of appointing a new Viharadhipati vests in the Mahanayake of that fraternity. The fact that a stranger has functioned as Viharadhipati for a period of over ten years does not entitle him to defeat the Maha nayake's right of appointment which is a right that cannot be lost by prescription (e).

The English Law of Trusts was long ago received into the law of this country. One of the principles of that system of law is that for certain purposes it does not allow a trustee to set up the statute of Limitation against a Cestui Que Trust, or anyone claiming on his behalf. The same principle has been applied in Ceylon with reference to our own Prescription Ordinance. The English principle that time was no bar to an action on a trust applied only to express trusts. But the doctrine was extended to certain cases of constructive trusts which for the purpose were by the law of England put upon the same footing as express trusts. Section 5 (3) was inserted in the Trusts Ordinance in order to give effect to these principles. (28. N. L. R. 424.)

Section 111 (l) (c) of the trusts Ordinance which provides that any claim in the interests of any charitable trust for the recovery of any property comprised in the Trust or for the assertion of title to such property shall not be held to be barred or prejudiced by any provision of the Prescription Ordinance applies to Buddhist Temporalities (f).

Section 34 of the Buddhist Temporalities Ordinance provides that in the case of any claim for the recovery of any property, movable or immovable, belonging or alleged to belong to any temple, or for the assertion of title to any such property, the claim shall not be held to be barred or prejudiced by any provision of the Prescription Ordinance. The expression "immovable property" is used in the sense of corporeal immovable property only. Hence the

(e) Dhammaloka Thero vs Saranapala Thero (1956) 57 N. L. R. 518. (f) Sobitha Thero vs Wimalabuddi Thero (1941) 42 N.L.R.453.

section is not a bar to a claim to a right of cartway, over immovable property belonging to a temple, by possession for over ten years (g).

The prohibiton against the acquisition of property by a Buddhist temple without the license of the Governor under the old Ordinance of 1905 does not prevent a Buddhist temple from acquiring title by prescrpition to a land (h).

Where the incumbent of a Vihare, to which trustees have not been appointed, possesses land not expressly gifted or dedicated to the Vihare, he is in the position of a de facto trustee for the Vihare and as such, he can acquire title by prescription for the benefit of the Vihare (i).

Trustees. As stated earlier, after the withdrawal of all control by the Government over the temporal affairs of the Buddhist religious foundations great and scandalous abuses prevailed in their management. At that time the endowments of a temple were vested in the incumbent, and the property dedicated to the Vihare was the property of the incumbent for the time being for the purposes of this office, including his own support and the maintenance of the temple and its services and on his death it passed to the succeeding incumbent (j).

At no time in the history of Buddhist temples in this island, has a bhikku who had no right to the incumbency of a temple, been invested with the title to or, the power to manage, temporalities of the temple. The Ordinance of 1931 did not confer any such legal status on one who may not even claim to be, and, who is not in law, the chief priest of a temple (k). As the temple properties had been mismanaged and dissipated during the time of the management by incumbents, the Buddhist temporalities Ordinance

(g) Pannaloka Thero vs Jinorasa Thero (1957) 60 N. L. R. 256. (h) Wimalasuriya vs Wickramaratna (1917) 20 N. L. R. 140; see also 15 N. L. R. 239. (i) Ranasinghe vs Dhammananda (1935) 37 N. L. R. 19. (j) Dhammananda vs Ranasingha (1937) Pr. C. 39 N. L. R. 567. (k) Pemananda Thero vs Thomas Perera (1953) 56 N. L. R. 413.

No. 3 of 1889 was enacted which removed the management of these properties from the hands of the priests and gave it over to lay trustees who were elected by the District Committees constituted under that Ordinance. Under section 20 of this Ordinance all movable and immovable property vested in such trustees. The said Ordinance of 1889 was repealed and replaced by the Buddhist Temporalities Ordinance No: 8 of 1905. This Ordinance retained the manage ment in the hands of the lay trustees but provided that they should be elected by a majority of voters resident in the villages to which the temples were attached. A Commission appointed in 1918 found that the management by the trustees was as unsatisfactory as the management by the bhikkus had been.

The Ordinance of 1905 has been repealed and replaced by the Buddhist Temporalities Ordinance No. 19 of 1931. The provisions of this Ordinance are applicabie to every temple in Ceylon. But by an order made by the Minister and published in the Gazette, any temple other than the Dalada Maligawa, the Sripadasthana and the Atamastana may be exempted by a general reference or otherwise from the operation of all or any of its provisions. As it was found that the number of temples to be exempted was far in excess of the number of the temples to be regulated by this Ordinance, the various proclamations published under Section 3 stated that all temples other than those mentioned in the respective schedules annexed to the Proclamations were exempted from the operation of Section 4 (1) of the Ordinance. A **list of temples** brought under the operation of Section 4 (1) is given **in the Schedule** at the end of this Chapter. The said list is based on a certified copy issued by the Public Trustee on the 28th November 1962. Section 4 (1) vests the management of the property belonging to a temple not exempted from the operation of this subseciton in the trustee appointed under the provisions of this Ordinance. Section 10 provides that the trustee for every temple not exempted from the operation of section 4 (1) may be nominated by the Viharadhipati of such temple who should thereupon report such

nomination to the Public Trustee. He could nominate himself or any other Bhikku or layman. When such nomination is made and duly reported to the Public Trustee, the latter should forthwith issue a letter of appointment. Section 4 (2) vests the management of the property belonging to a temple exempted from the operation of section 4 (1) in the Viharadhipti of the temple referred to. Section 20 vests all property movable and immovable belonging to a temple in the trustee or the controlling Viharadhipati for the time being of such temple. The Ordinance No. 3 of 1889 and the Ordinance No 8 af 1905 provided that the supervision and the control of the trustees should be by the District Committees constituted under those Ordinances. The present ordinance has constituted the Public Trustee as the sole supervising authority of the trustees.

The Buddhist Temporalities Ordinance deals with Sanghika property which has been dedicated to the Sangha of a particular Vihare. It declares that such property is vested in the trustee or the controlling Viharadhipati of the Vihare. Property can be given to the Sangha only as Sanghika property and in accordance with the customary mode of dedication, but a person is not prevented from creating a trust for the benefit of a Vihare in accordance with the Trusts Ordinance.

Such property does not become Sanghika or Pudgalika property. Nor does such property vest in the trustee of the temple appointed in terms of the Ordinance. Such property would be governed by the trust created by the author of the trust (l). Section 20, which vests all property belonging to a temple in the trustee, deals only with Sanghika property which has been dedicated to the Sangha as a whole with all the ceremonies and forms necessary to effect dedication, but with special attention to the bhikkus of a particular temple. This section did not apply to all the property which was vested in private trustees for the benefit of the temple as a charitable trust (m).

(l) Wijeyawardene vs Buddarakkita Thero (1957) 59 N. L. R. 121.
(m) Buddharakkita Thero vs Wijeyawardene Pr. C. (1960) 62 N. L. R. 49.

Where a society which was formed to establish a Buddhist temple executed a deed entrusting the charge of the temple and its premises provisionally, intending to effect a permanent transfer and dedication at some later time, it was held that the deed did not divest the society of all its rights and prevent it from subsequently entrusting the control and management to persons other than those named in the deed (n). Section 20 vests all Sanghika properties in the trustees or the controlling Viharadhipati. Hence only a trustee or the controlling Viharadhipati can sue for the recovery of any Sanghika property belonging to a temple (o). Where a provisional trustee is appointed by the Public Trustee pending an action between two rival claimants to the incumbency of a temple, it was held that until the status of the person legally entitled to the incumbency was decided by the Court, the temporalities of the temple were lawfully vested in the provisional trustee who was therefore entitled to call upon the rival claimants to surrender to him all the temporalities which were in their possession (p).

The incumbent of a Buddhist temple which is not exempted from the operation of Section 4 (1) of the Ordinance is not entitled to vindicate title to land belonging to the temple as all properties are vested in the trustee (q). A de jure trustee may maintain an action for an injunction against persons who unlawfully prevent him from entering upon his office or who interfere with him in the exercise of the said office (r). An action by the Chief Bhikku of a Vihare for a declaration of his right to the custody and possession of the Gabadage and Multenge may be maintained in a Civil Court. While the trustee is vested with legal title to the Gabadage and Multenge, the High Priest is entitled to the unhampered use of the same for the purpose of maintaining the religious

(n) Wijeramawansa Thero vs Abraham Silva (1958) 60 N.L.R.276. (o) Maraliya vs Gunasekera (1921) 23 N. L. R. 261. (p) Algama vs Buddarakkita (1950) 52 N. L. R. 150. (q) Dias vs Ratnapala Terunnanse (1938) 40 N. L. R. 41; see also 34 N. L. R. 348. (r) Silva vs Banda (1926) 28 N. L. R. 239.

rites and ceremonies of the Vihare. A trustee is not entitled to appoint or dismiss the ministerial officers attached to the temple (s).

Section 4 (2) provides that the management of the property belonging to every temple exempted from the operation of the last preceding sub-section but not exempted from the operation of the entire Ordinance shall be vested in the Viharadhipati of such temple hereinafter referred to as the controlling Viharadhipati. The controlling Viharadhipati need not be resident in the temple (k). A block of land was purchased and living quarters for a bhikku were erected by the Dayakayas. The land was formally donated to the Sangha in the customary manner on the date of occupation of the new avasa by the plaintiff. Thereafter the Dayakas collected subscriptions and handed same to the defendant who was the treasurer of the society. Under Section 20 of the Ordinance the plainiiff was controlling Viharadhipati and hence was declared entitled to recover the monies collected from the defendant (t).

The trustees should collect all monies due to the temples. All issues, rents, moneys, profits and offerings received by any trustee shall, with the sanction of the Public Trustee be appropriated for the following purposes namely:– (1) The proper repair and furnishing of such temple and the upkeep of the roads and buildings belonging thereto; (2) The maintenance of the Bhikkus and ministerial officers attached to such temples; (3) The due performance of religious worship and such customary ceremonies as heretobefore maintained; (4) The promotion of education; (5) The customary hospitality to Bhikkus and others; (6) The payment of compensation and legal expenses where any mortgage sale or alienation has been set aside under section 28; (7) Payment of such share of expenses incurred in carrying out the provisions of this Ordinance; and (8) The remuneration of trustees and the payment of expenses incurred by them.

(s) Gunaratana Nayake Thero vs Punchi Banda Korale (1926) 28 N. L. R. 145. (t) Romanis Fernando vs Wimalasiri Thero (1951) 53 N. L. R. 245.

Mortgage or alienation of immovable property. No mortgage, sale, or other alienation of immovable property belonging to any temple shall be valid or of any effect in law. Provided that this section shall not apply either to a paraveni pangu or to a sale in execution of any property if the writ for the seizure thereof was issued after written notice of three months to the Public Trustee (u). This section applies only to transfers and does not extend to leases (v).

It is lawful for a trustee or controlling Viharadhipati to lease all or any of the lands belonging to his temple but except in the case of a lease for not more than one year of land worth more than Rs. 500/- or not more than five acres in extent, such leases shall be subject to the following preliminary formalities:- (1) they shall not be made without the written sanction of the Public Trustee; (2) they shall be granted after calling for tenders ordinarily to the person making the highest tender unless the Public Trustee shall authorize that they be entered into by auction or private treaty; (3) the trustee or controlling Viharadhiapti shall, if the Public Trustee so directs, publish the full conditions of the lease in the newspapers; (4) such tenders shall be sent to the trustee or controlling Viharadhipati and to the Public Trustee by the tenderer; (5) the trustee or controlling Viharadhipati shall schedule such tenders and send them with his reccommendation to the Public Trustee, who may make such order as he may think fit. No land belonging to a temple which is thus leased shall be used for any purpose which is opposed to the principles of Buddhism.

No lease in any case shall be for a period exceeding ninety-nine years. All leases made in contravention of any of the provisions of this Ordinance shall be null and void and of no effect whatsoever in law (w).

Whenever the Public Trustee is satisfied that any immovable property belonging to any temple other than a paraveni pangu has been before the commencement of this Ordinance mortgaged, sold, or otherwise

(u) Section 26. (v) Piyaratana Udnanse vs Nandina 1933) 37 N- L. R. 109. (w) Section 29.

alienated to the detriment of such temple, or has been thereafter mortgaged, sold, or otherwise alienated contrary to the provisions of this Ordinance, it shall be the duty of the Public Trustee to direct the trustee, or the controlling Viharadhipati to institute legal proceedings to set aside such mortgage, sale or alienation, and to recover possession of such property. In the absence of collusion between the parties, in setting aside any mortgage, sale or alienation the Court shall award to the mortgagee, vendee, or alienee, compensation for any permanent improvements made by him to or upon such property (x).

Whenever it is proved to the satisfaction of a competent Court that (1) any property of any temple has before the commencement of this Ordinance been leased for a longer term of years than is consistent with the interest of such temple, or on terms showing an improvident alienation, or for clearly inadequate consideration, or for the private benefit of the lessor or any of his relatives or servants, or with a fraudulent intent; (2) any lease of the property of any temple or assignment thereof has been made in contravention of the provisions of this Ordinance, such Court shall either set aside such lease or modify the conditions of the same (y).

In the case of any claim for the recovery of any property movable, or immovable, belonging or alleged to belong to any temple, or for the assertion of title to any such property, the claim shall not be held to be barred or prejudiced by any provision of the Prescription Ordinance. This section shall not affect rights acquired pirior to the commencement of the Ordinance (z). The expression "immovable property" is used in the sense of corporeal immovable property only. This section therefore, is not a bar to a claim of right of cartway, over temple land, on the ground of prescriptive user (a). Section III (c) of the Trusts Ordinance which provides that any claim in the interests of any charitable trust for the recovery of any property comprised in the trust or for the assertion of title to

(x) Section 28. (y) Section 31. (z) Section 34. (a) Sri Pannaloka Thero vs Jinorasa Thero (1957) 60 N. L. R. 256.

such property shall not be held to be barred or prejudiced by any provision of the Prescription Ordinance, applies to the Buddhist Temporalities (b).

Dewales. Under section 2 of the Buddhist Temporalities Ordinance of 1931, a temple is defined as a Vihare, Dagoba, **Dewale,** Kovila, Avasa, or any place of Buddhist worship. The non- Buddhist Dewales were quite distinct in their origin in the mode of worship practised in them and in the tenures of lands granted to them, from the Buddhist Vihares except the English word "temple" which was promiscously employed by persons unacquainted with Buddhism, to describe the two distinct classes. of edifices. The Dewales were dedicated to aboriginal spirit worship and to Hindu Gods and Goddesses and the persons who officiate in those temples are not Buddhist priests but laymen called Kapuralas. The lands granted to Dewales were always placed under the control and management of lay Chiefs (c).

The organisation of the Dewale worship is not less ostentatious, and more secret than that of the Buddha. The priests, called Kapuwas Kapuralas or Pattinihamis (in the case of a Pattini Dewale), appointed by the villagers or lay managers, do not belong to any order but conduct the ceremonies of each temple according to custom, usually learned from relations, whom they succeed in office. When not engaged in religious duties, they till their fields or otherwise employ themselves as ordinary laymen. The general management of a temple of importance is in the hands of a lay officer called the Basnayaka Nilame who, in the case of the four Chief Dewales of Natha, Vishnu, Kataragama and Pattini in Kandy, were formerly, appointed by the King and were officers of considerable importance, who usually held other high Civil offices at the same time (d).

The important Dewales may be classed as follows:– (1) Natha Dewales, (2) Vishnu Dewales, (3) Kataragama Dewales, (4) Pattini Dewales, and (5) Saman

(b) Sobitha Thero vs Wimala Buddhi Thera (1941) 42 N. L. R. 453.
(c) Sessional Paper 4 of 1907. (d) Hayley 532.

Dewales. There were, besides Dewales subsidiary to the principal Dewales such as the historic Alut Nuwara Dewala in Kegalle District which is dedicated to Alut Nuwara Bandara Dewathavo, lieutenant of Maha Vishnu. Sinhalese Kings from earliest times erected many such Dewales, which form part and parcel of the National religious establishments of the day, and endowed them with extensive domains. King Dappula built a temple to God Vishnu. King Parakramabahu I built thirteen Dewales in Polonnaruwa and twenty four in Ruhuna. King Parakramabahu II effected repairs to Vishnu Dewale or Dewi Nuwara (Dondra) and instituted the annual Esala Perahera there. The same King is said to have founded the Sabaragamuwa Maha Saman Dewale at Ratnapura.

Basnayake Nilames or trustees of Dewales were, under the Sinhalese Kings annually selected by the Dissawa or Governor of the district on the payment of a fee and appointed by the King. These offices carried with them certain perquisites and the personal remuneration of the Basnayaka Nilames consisted in (1) the right to possess and appropriate the produce of official lands such as fields set apart for their use and so much of what remained, after deduction of expenses, of the produce of the Muttetu which belong exclusively to the Dewale; (2) the fees coming in from the distribution of appointments which were annually changeable, such as Mohottalas, Vidanes, Lekamas, etc. The ancient practice was to confer such appointments alternately on members of the same families, receiving from the person appointed a fixed sum; (3) the dues or presents given by the Nilakarayas, such as pingos of rice and vegetables, sweets and jaggery, betel, etc., which formed the legitimate emoluments of the office; (4) the fines levied by them in the exercise of their judicial authority over the Nilakarayas. All the other Dewale officials hold pangu consisting of fields, gardens, and chenas, in relation to their status in the Heirarchy, besides receiving betel and other presents which the Nilakarayas have to render as dues.

The Basnayake Nilame was the principal functionary and superintending officer of the Dewale. He exercised a general supervision over the affairs of the dewale chiefly in regard to the maintenance of the buildings in good condition; in seeing that festivals, rites and ceremonies were duly conducted or performed; in securing the attendance of the nilakarayas for purposes connected with the dewale; in receiving the income of the lands and keeping a regular account of all payments and expenses. It was also his duty to reserve a fund in the dewale chest, the keys of which had always to be left in the charge of an officer called the Ratnekarala.

The Basnayake Nilame is assisted by a staff of subordinate officials called the "Etul Kattale" which comprises (a) Kapuralas, the principal officiating ministers; (b) the Battanaralas or Kattiyaralas, assistant ministers, who convey the food in a pingo to the sanctum; (c) Murutenralas or Uyannas, who prepare the food; (d) the Ratnekarala, custodian of the keys of the chest; (e) the Attanayakarala or Kankanamrala, storekeeper, who also functions as a general assistant at ceremonies; (f) the Wattorurala, the record keeper, who is in addition, responsible for keeping the premises clean and sometimes accompanies the Basnayaka Nilame at Peraheras; (g) the Ganitayas, astrologers; (h) the Murakarayas, guards; (i) the Henayas, washermen and a few others. The Kapuralas and the Battanaralas only are permitted to enter thc shrine room or the holy of holies to replenish the altar with the meals of the God. Each of the other officers has certain well defined duties. The Basnayaka Nilame, although he holds a position of authority, has no control over the "Etul Kattale" as long as the rites and ceremonies are duly performdd (e)

The Buddhist Temporalities Ordinance of 1905 made provision for the election of Basanayake Nilames by a majority of the members of the District Committee of the District within which such dewale is situated, the Ratemahatmayas and Koralas, being Buddhists holding office within the Revenue District

(e) Sessional Paper no 1 of 1956.

and the Basnayaka Nilames of Dewalas situated within such district. Under the present Ordinance of 1931 a Basnayake Nilame has to be elected at a meeting of the Ratemahtmayas, Koralas, Divisional Revenue Offlcers holding offlce in the district, the Basnayake Nilames of the Dewales in the administrative district in which the dewale is situated and the trustees, not being Bhikkus of all temples within the Divisional Revenue Officer's Division.

The trustees for a dewale to which it has been customary to appoint a Basnayke Nilame shall be the Basnayake Nilame. The trustee for every other Dewale shall be a person appointed by the Public trustee. The Basnayake Nilame or the Trustee of a Dewale is elected or appointed for a period of five years. Every trustee should before entering upon his duties, give security for the due exercise and performance of his powers, duties and responsibilities. All property movable and immovable belonging to any Dewale is vested in the trustee. His duties are the same as those prescribed for aTrustee of a Vihare. He has to collect all the monies due to the Dewale and use same for the purposes mentioned in Section 25 of the Buddhist Temporalities Ordinance. He has no right to mortgage or alienate any immovable property belonging to the Dewale. He may lease such immovable property in terms of Section 29 with or without the sanction of the Public Trustee. No lease should be for a period exceeding ninety-nine years. All leases in contravention of the provisions of the Ordinance are null and void. A trustee may take steps to have any mortgage, sale, lease or other alienation made before or after the commencement of the Ordinance set aside. He has to keep accounts of all the income and expenditure and make up a statement of such accounts at the close of every half year ending on the 30th June and 31st December in each year. Within thirty days of each half year he should submit his accounts to the Public Trustee.

By Section 7 of the Ordinance provision is made for the appointment of a trustee for the Dalada Maligawa. Section 8 relates to the appointment of a

trustee for a Dewale, where it is customary to appoint a Basnayake Nilame as a trustee; in the case of every other Dewale the trustee is to be appointed by the Public Trustee. Then Section 9 provides for the appointment of a trustee for the Atamasthana. Section 10 refers to a trustee of a temple where no special provision is made in the Ordinance. He is to be nominated by the Viharadhipati of such temple, who shall report such nomination to the Public Trustee. Under Section 11 it is provided that it will be lawful for the Viharadhipati to nominate himself as such trustee. By Subsection (3) the Public Trustee is bound to issue a letter of appointment to the person so nominated. So that it will be seen that there is ample provision for the appointment of a trustee by the Public Trustee under Section 8 for a Dewale which stands by itself. If it happens to be a Dewale attached to a temple, as it appears to be in this case, the procedure indicated in Sections 10 and 11 would apply. In either event, in tne case of a Devale it is the letter of appointment by the Public Trustee which is legally binding. The Public Trustee has the power under the Buddhist Temporalities Ordinance No.19 of 1931, to appoint a trustee for a Dewale attached to a Vihare (f).

By Section 3 the provisions of the Ordinance are made applicable to every temple in the island but the Minister is given the power to exempt any temple other than the Dalada Maligawa, the Sri Padasthana and the Atamasthana from the operation of all or any of its provisions. A list of Dewales regulated by this Ordinance is given in the Schedule at the end of this Chapter. All other Devales have been exempted from the operation of Section 4 (1) of the Ordinance. Section 4 (1)vests the management of the property beloging to a temple not exempted from the operation of that subsection in the trustee duly appointed under the provisions of the Ordinance. Section 4 (2) vests the management of the property belonging to a temple exempted from the operation of Section

(f) Punchappuhamy vs Appuhamy (1936) 39 N. L. R. 329.

4 (1) in the Viharadhipati of the temple referred to in the Ordinance as the controlling Viharadhipati. It is admitted that the particular Devale is a temple within the meaning of the Ordinance (vide Section 2) and also that it is a temple exempted from the operation of Section 4 (1). This Dewale should therefore come under Section 4 (2) if it is regulated by the Ordinance. But 4 (2) as indicated earlier vests the management of the property of such a "temple" in a "Viharadhipati". This term "Viharadhipati" is defined in the Ordinance as the principal Bhikku of a temple other than a Devala or Kovila whether resident or not".It is clear from a consideration of these Sections that a Devale which is not brought under Section 4 (1) does not fall under Section 4 (2) as there is no Viharadhipati for a dewale. It is only in case of a Dewale not exempted from the operation of Section 4 (1) that the Ordinance authorises the appointment of a trustee who may in certain circumstances be called a Basnayake Nilame. Section 5 of the Ordinance subjects only trustees appointed under the Ordinance, and the controlling Viharadhipatis to the general supervision of the Public Trustee (g).

Kapuralas. Pattini Dewale is a shrine dedicated to a female divinity in the Hindu Theogony. Kapuwa is one whose vocation is to minister at a Dewale, and to perform religious ceremonies there or elsewhere in connection therewith. If he is the headman in whom such property of the Dewale vests, and who is the principal manager of its concerns, he is dignified by an honorific addition, and becomes Kapurala. Not unnaturally, in the case of a Pattini Dewale, his designation is Pattinihamy. The Pattinihamy is evidently the principal person, and responsible officer in the Dewale. He can do all that the Kapurala can do, and whatever the Kapurala does is by way of assistance to the Pattinihamy. In a suit brought by two persons against the Pattinihamy of a Pattini Dewale where the principal issue was whether or not the plaintiffs and their predecessors had, by hereditary right continuously exercised the offlce of Kapurala in the Pattini

(g) Peter Singho vs Appuhamy (1940) 41 N. L. R. 527

Dewale, it was incumbent on the plaintiffs to give some evidence of the specific duties of the Kapurala. General assertions and statements are quite worthless for any probative purpose (h). The successive Basnayake Nilames of the Kandy Pattini Dewale have exercised rights of supervision and management over all lands dedicated to Pattini in the Kandyan Districts. Where a land was dedicated to the Pattni Dewala at Attenekumbura and where the Basnayake Nilame of the Pattini Dewale at Hanguranketa set up a claim to the land by prescription as against the Kapurala of the Attanekumbura Dewale, it was held that the Basnayake Nilame's lessees had no such exclusive and uninterrupted possession as to give the Hanguranketa Dewale a right of property in the land. The Basnayake Nilame had at most, only a certain supervision (i).

The village dewales, according to the report of the Service Tenure Commissioners for 1857-1859, are left in charge of a Kapurala or hereditary priest of the "deyo" who is generally the largest tenant of the dewale and holds his lands as officiating priest. The officiating Kapurala is entitled to the offerings made and to any other rights or privileges attached to the office during his term of office. The report of the Service Tenure Commissioners for 1857 to 1858 calls the Basnayake Nilame the head landlord of these dewales; he generally lived at Kandy or wherever the Provincial Dewale was. It also records the fact that the other officers of the Dewale purchase their appointments from him and reimburse themselves from the nilakarayas and out of the offerings. The Basnayake Nilame also got a share of the offerings. This shows that the Basnayake Nilame appointed the Kapurala for the year. He would in practice, appoint a member of one of the kapurala families, for to discharge the duties of the office of Kapurala a special training is required, and he would also follow, as far as possible, any rule established by custom, in making such appointments, for the office is regarded as hereditary. In respect of this dewale, there is a sittu (a writing) which shows that

(h) Silva Kapurala vs Silva Pattinihamy (1879) 2 S. C. C. 39.
(i) Basnayake Nilame vs Appuhamy (1896) 7 Tamb. 34.

so far back as the year 1872, the Basnayake Nilame exercised the right of appointment and appointed persons to officiate as Kapurala. This practice had continued up to date of action. When the Buddhist Temporalities Ordinance was passed in 1889, the Basnayake Nilame purported to act under the powers vested in him as trustee under the Ordinance. It seems to be therefore clear that, according to the usages of this dewale hereditary right alone is insufficient to enable a person to act as Kapurala. He must also be appointed to the office by the Basnayake Nilame (j).

In this case the learned District Judge came to the conclusion that the plaintiffs had been performing the functions of Kapuralas of the Alutnuwara Dewale by hereditary right. The first defendant appellant who, as Basnayake Nilame, had the general management and control of the chief dewales maintained that although these plaintiffs and their ascendants had always filled the office of Kapurala, they had done so not in virtue of any hereditary right but because the Basnayake Nilames had thought fit on grounds of expediency and convenience quieta non movere, and it was open to them at any time to appoint anyone to the office provided he was a Buddhist of the Goigama caste. The defendant Basnayake Nilame was unable to adduce a single instance in respect of any dewale in which a stranger has been appointed Kapurala. Neither the Basnayake Nilame nor his Counsel was able to show that the hereditary quality of a Kapurala's office was dependent on whether or not a "panguwa" was attached to the office. The dictum in Dr Hayley's book on Sinhalese Laws and Customs at page 532 indicates that this hereditary quality of the office applied without any discrimination to all Kapuralaships. He says "The priests called Kapuwas, Kapuralas or Pattinihamis..... appointed by the villagers or lay managers do not belong to any order, but conduct the ceremonies of each temple according to custom, usually learned from relations whom they succeed in office. The contention that the words "whom they succeed in office" mean nothing more than a fortuitous succession of

(j) Kusalhamy vs Dingirirala (1924) 26 N. L. R. 283.

instances and do not mean that such is the established custom cannot be accepted. The Supreme Court held that the office (of Kapurala) was hereditary, it being left to the Kapurala family to make such arrangements for the performance of the services as expediency and convenience dictated subject to the approval of the Basnayake Nilame who clearly enjoys the control and management of the dewales and could, therefore, impose reasonable terms and conditions which, in the long course of time, have become more or less well established. In the social order of today and in the light of modern legal conceptions, the rights and obligations of an office such as this cannot be rigidly defined, and it must be left to the sense of fairplay on the part of so high an official as the Basnayake Nilame on the one hand, and to the sense of service and discipline of the Kapuralas on the other hand to ensure that the interests of the dewales and of the devotees who resort to them are maintained with dignity and efficiency, and that personal motives are repressed (k),

The right to succeed to the office of Kapurala may be controlled by rules established by custom. A custom to be valid must have four essential attributes. First it must be immemorial; secondly it must be reasonable; thirdly it must have continued without interruption since its immemorial origin; and fourthly it must be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect (l).

It is a well established principle that an outsider cannot under any circumstances succeed a Kapurala. The successor should always be a member of one of the Kapurala families.

Schedule showing list of temples brought under the operation of Section 4 (1).

Kandy District. 1. Dalada Maligawa. 2. Maha Devale in Kandy with Aluthnuwara devale in four Korales. 3. Nata dewale. 4. Pattini Dewale in Kandy with Hanguranketa Pattini Dewale. 5. Kataragama Dewale

(k) Nugawela vs Mohottala (1945) 47 N. L. R. 17. (l) W. P. 143.

6. Gangarama Vihare. 7. Lankatilleke Vihare with Katugodella Vihare and Poyamalu Pansala and Balagalla Vihare. 8. Lankatilake Devale. 9. Dodan wela Dewale. 10. Alawatugoda Saman Dewale. 11. Niyangampaya Vihare. 12. Hunduhunpola Vihare. 13. Degaldoruwa Vihare. 14. Nittawela Vihare. 15. Talawa Vihare. 16. Bambaragala Vihare. 17. Kondadeniya Vihare. 18. Wallahagoda Dewale. 19. Wegiriya Dewale. 20. Embekke Dewale. 21. Gadaladeniya. Dewale. 22. Ganegoda Dewale. 23. Pasgama Dewale. 24. Kaluwane Vihare. 25. Sri Narendrarama Raja Maha Vihare. 26. Matgamuwa Uda Vihare. 27. Wije yasundararama Purana Vihare. 28. Hindagala Raja Maha Vihare. 29. Udawela Hantane Vihare. 30. Walgampaya Vihare. 31. Dalukgolle Vihare. 32. Uda Aludeniya Vihare. 33. Pitiyagedera Vihare. 34. Gallengolla Vihare with Urulewatta Vihare. 35. Deldeniya Vihare. 36. Inguruwatte Vihare. 37. Malagammana Vihare. 38. Danture Vihare. 39. Kotakedeniya Vihare. 40. Kobbekaduwa Vihare. 41. Mawature Gal Vihare. 42. Ankumbura Raja Maha Vihare. 43. Botota Vihare. 44. Kundasale Vihare. 45. Meegammana Vihare. 46. Gedige Vihare. 47. Wijeyasundara Aramaya alias Alut Vihare. 48. Walala Raja Maha Vihare. 49. Mulgame Vihare. 50. Sri Siddhartha Potgul Vihare. 51. Srimalwatte Vihare. 52. Udugoda Vihare. 53. Dalukgala Vihare. 54. Galmaduwe Purana Raja Maha Vihare. 55. Rajopawanaramaya.

Of these, 1-25 have been proclaimed by order published in Government Gazette of 4th December 1931. The others have been proclaimed by later orders published in the Gazette.

Nuwara Eliya District. 1. Hanguranketa Maha Dewale. 2. Pusulpitiya Vihare. 3. Morape Dewale. 4. Hanguranketa Potgul Vihare. 5. Arattana Raja Maha Vihare. 6. Kebelgamu Devel Dewale.

Of these 1-3 have been proclaimed by order published in Gazette of 4th December 1931. The others have been proclaimed by later orders.

Matale District. 1. Dambulla Vihare and Maha Dewale. 2. Aluvihare Uda and Palle Vihares. 3 Ambekka Dewale. 4. Bamba Raja Maha Vihare.

5. Pallegane Potgul Viharé. 6. Sulum Pahure Vihare. 7. Gangarama Vihare. 8. Pidurangala Sigiri Raja Maha Vihare.

Of these 1-3 and 5 have been proclaimed by order published in Gazette aforesaid. The others have been proclaimed by later orders.

Badulla District. 1. Ruhunu Maha Kataragama Dewale. 2. Badulla Kataragama Dewale. 3. Badulla Pattini Dewale. 4. Mutiyangane Vihare. 5. Soragune Dewale. 6. Mahiyangane Vihare. 7. Bogoda Vihare. 8. Rambukpotha Vihare. 9. Alutnuwara Saman Dewale. 10. Kotabawa Dewale. 11. Muppane Vihare. 12. Ulugala Raja Maha Vihare. 13. Passara Raja Maha Vihare. 14. Kiri Vehera. 15. Kataragama Vihare. 16. Moneragala Purana Raja Maha Vihare alias Bukkiriyagalle Sri Sudharmananda Vihare. alias Siksakara Pirivena. 17. Godagama Dissanayaka Mukalindaramaya (Godagama Vihare).

Of these 1-10 have been proclaimed by order published in Gazette aforesaid. The others have been proclaimed by later orders.

Ratnapura District. 1. Sabaragamu Maha Saman Dewale. 2. Aluthnuwara Dewale. 3. Kottimbulwala Vihare. 4. Aramanapola alias Gaṇegama Vihare. 5. Pelmadulla Vihare. 6. Potgul Vihare. 7. Sripadasthana. 8. Kiriella Nedun Vihare. 9. Boltumbe Dewale. 10. Ammaduwa Dewale. 11. Migahagoda Vihare. 12. Manandanarama Vihare. 13. Sudharmasalawa Vihare 14. Sankapala Vihare alias Pallebedda Vihare. 15. Abhayatilakaramaya. 16. Budulena Raja Maha Vihare. 17. Sri Sudarsana Dharmasalawa.

Of these I-10 and 14 have been proclaimed by order published in Gazette aforesaid. The others have been proclaimed by later orders.

Kegalle District. 1. Ambulugala Vihare. 2. Wattarama Vihare. 3. Alutnuwara and Ganewatte Vihares. 4. Selawa Vihare. 5. Wanduradeniya alias Iddamalpana Vihare. 6. Dorawaka Nata Dewale. 7. Bamunugama Kataragama Dewale. 8. Dedigama Raja Maha Vihare. 9. Danagirigala Raja Maha Vihare. 10. Dodantale Vihare alias Sri Seneviratne Uposatharamaya.

11. Uduwa Purana Vihare. 12. Alawala Vihare. 13. Menikkadawara Vihare. 14. Bingalatenne Vihare. 15. Wagirigala Raja Maha Vihare. 16. Beligala Raja Maha Vihare. 17. Kadigamuwa Nagawanaramaya. 18. Kaudugama Purana Raja Maha Vihare. 19. Medagoda Pattini Dewale.

Of these 1-5 and 19 have been proclaimed by order published in Gazette aforesaid. The others have been proclaimed by later orders. Deraniyagala Saman Dewale, Mediliya Kataragama Dewale, Kabulumulla Pattini Dewale and Pelellegama Pattini Dewale which are included in the order published in the Gazette of 4th December 1931 are omitted in the certified list issued by the Public Trustee. Presumably they have been exempted by a later proclamation.

Anuradhapura District. 1. Atamasthana viz Bodhinwahansa, Jetawanarama, Abahayagiriya, Lankarama, Lowamahapaya, Mirisawetiya, Ruwanweliseya and Thuparama. 2. Mihintale Vihare.

These have been proclaimed by order published in Gazette of 4th December 1931. In the said Gazette are also included Minneriya Dewale and Hurulle Dewale. But these two dewales are not included in the Public Trustee's lists. Presumably they have been excluded by a later proclamation.

Colombo District. 1. Kelaniya Vihare. 2. Pepiliyana Vihare. 3. Pilikuttuwa Vihare. 4 Warana Purana Vihare. 5. Lenawara Vihare. 6. Mahaleluwa Vihare. 7. Ahugammana Vihare. 8. Sapugaskande Vihare. 9. Rajamaha Vihare, Kotte. 10. Ganewatte Purana Bodhimalu Vihare. 11. Karunatillekeramaya, Kotahena. 12. Dangalle Raja Maha Vihare. 13. Nawagamuwe Sugatabimbarama Vihare together with Dewales. 14. Attanagalla Pahala Vihare. 15. Gangarama Vihare, Horetuduwa. 16. Lunugama Sri Perakumba Raja Maha Vihare. 17. Jayasekeraramaya. 18. Veragoda Vihare. 19. Sri Sumangalarama Purana Vihare. 20. Attanagalla Ihala Vihare. 21. Kolonnawa Raja Maha Vihare.

Of these, 1, 2, 14 and 20 have been proclaimed by order published in the aforesaid Gazette. The others have been proclaimed by later orders.

Galle District. 1, Yatagama Raja Maha Vihare. 2. Ambarukkaramaya. 3. Gonagoda Vihare. 4. Totagamu Raja Maha Vihare.

Matara District. 1. Sri Vishnu Maha Dewale Dondra. 2. Raja Maha Vihare, Hittetiya. 3. Suddarsanarama Vihare. 4. Arambegoda Vihare. 5. Sunandarama Vihare. 6. Kelawenigama Raja Maha Vihare. 7. Murutamure Vihare. 8. Kotikagoda Vihare. 9. Habarale Temple 10. Elamaldeniya Raja Maha Vihare. 11. Pallewela Kirti Sri Tojewararamaya. 12. Wijayasiri Bimbarama Vihare. 13. Sasanawansaramaya. 14. Galkande Purana Vihare. 15. Ganegoda Purana Vihare. 16. Siri Pavara Nivesaramaya.

Hambantota District. 1. Tissamaharama Maha Vihare. 2. Yatala Menik Vihare. 3. Mulkirigala Vihare. 4, Kasgal Vihare. 5. Hatagala Vihare. 6. Sri Nagarama Vihare. 7. Sri Sudharsanaramaya. 8. Niyagala Raja Maha Vihare.

No. 1 in Matara District and 1–5 in Hambantota District have been proclaimed by order published in the aforementioned Gazette. The others have been proclaimed by later orders. Wanawasa alias Kuda Vihare of Tangalle which was included in the order published in the Gazette of 4th December 1931 is not included in the Public Trustee's list. Presumably this has been exempted by a later order.

Kurunegala District. 1. Ridi Vihare. 2. Maraluwawa Vihare. 3. Ginikarawa Vihare. 4. Angangala Vihare. 5. Meddepola Vihare. 6 Bingiriya Vihare. 7. Madawala Vihare. 8. Gonnawa Vishnu Dewale. 9. Padeniya Vihare. 10. Budumuttawa Vihare. 11. Wilbawa Dewale. 12. Jankure Dewale. 13. Kendawala Dewale. 14. Kirindigala Dewale. 15. Medagoda Vihare. 16. Ratmale Vihare. 17. Kohilapokuna Vihare. 18. Raja Maha Vihare, Viharegama. 19. Ethkanda Vihare. 20. Sengelena Vihare. 21. Vallagala Vihare. 22. Panaliya Raja MahaVihare. 23. Jakaduwa Vihare. 24. Wijesundararama Vihare. 25. Seruwawa Yakgirilen Raja Maha Vihare. 26. Watukana Vihare. 27. Sri Wijayarama Vihare. 28. Sulugal Vihare. 29. Algama Vihare. 30. Uturupahu Vihare. 31. Degalassagedara Vihare.

32. Sudarsanarama Vihare Epaldeniya. 33. Maurawathie Sri Bodhiraja Vihare. 34. Periyakaduwa Raja Maha Vihare. 35. Warawala Vihare. 36. Lunukadawella Vihare. 37. Wewagedara Vihare.

Nos. 1–14 have been proclaimed by order published in Gazette of 4th December 1931. The rest have been proclaimed by later orders. Dambadeniya Vihare and Humbuluwa Vihare which were included in the order published in the aforementioned Gazette are not included in the Public Trustee's list.

Kalutara District. 1. Saila Chetiya Rama Vihare. 2. Karandagoda Vihare. 3. Maduwala Sri Sudarsanarama Vihare. 4. Horana Raja Maha Vihare. 5. Vidiyasekara Pirivena. 6. Pahiongala Vihare. 7. Kottarama Kande Vihare. 8. Girikela Walukaramaya. 9. Prathiraja Pirivena Purana Vihare. 10. Gorakana Kande Vihare.

Eastern Province. Digavapi Vihare.

CHAPTER XV

SUCCESSION TO INCUMBENCIES AND RIGHTS AND DUTIES OF BHIKKUS

Pupils. There are four classes of pupils, or antevasika namely:– (1) Pabbajjantevasika. (2) Upasampadantevasika, (3) Nissayantevasika and (4) Dhammantevasika. The word antevasika or pupil is equivalent to the Sinhalese Sishiya.

(1) **Pabbajjantevasika** or pupil by robing is a pupil who has been admitted by robing to the Pabbajja (or Samanera) Ordination by his preceptor, or upagghaya (upadhiyaya).

(2) **Upasampadantevasika** or pupil by ordination is a pupil who receives the Upasampada ordination from his preceptor. No person under 20 years of age can receive this ordination, and it can only be

conferred by an ordained Bhikku of 10 years' standing. It is nowhere said that the bhikku who conferred the Upasmpada ordination as upagghaya should be the same bhikku who admitted the person ordained to the Pabbajja ordination; but it is customary to record the name of the robing preceptor as that of the ordaining preceptor.

(3) **Nissayantevasika** or pupil by obedience (or dependence). After the Upasampada ordination, every bhikku so ordained must undergo a period of dependence or Nissaya. This period was at first ten years. This was afterwards reduced to five years in the case of learned competent Bhikkus. Nissaya (that is the dependence) is the relation between achariya and antevasika. The antevasika lives Nissaya with regard to the achariya, that is, dependent on him; the achariya gives his Nissaya to the antevasika, that is he receives him into his protection and care.

(4) **Dhammantevasika** or pupil by instruction. There is nothing to prevent a bhikku choosing for his instructor a bhikku other than those who have robed or ordained him, or given him a Nissaya.

All the four classes of pupils are alike pupils under the Buddhist Sacred Law. They rank as pupils of the bhikkus who have robed, ordained, instructed them, or given them a Nissaya (a).

Succession to the incumbency of a Buddhist Temple. There are only two rules of succession known to the Buddhist Law, namely Sishiyanu Sishiya paramparawa or pupillary succession and siwuru paramparawa which is also a form of pupillary succession, but with the special characteristic that the pupil is a blood relation of the original priestly incumbent. In the absence of any evidence to the contrary, the presumption is that the incumbency is subject to the Sishiyanu Sishiya paramparawa rule of succession (b).

The former strictly speaking is the succession by a priest to temple property by right of its tutor, as the eldest and the most qualified pupil; whereas the

(a) Saranankara Unanse vs Indajoti Unanse (1918) 20 N. L. R. 385.
(b) Unanse vs Unanse (1921) 22 N. L. R. 323.

latter is only by right of having been robed and intended for succession to the property by the living incumbent, and such are very often near relatives of the incumbent priest (c).

In the absence of definite terms attached to a dedication, sishiya paramparawa must be presumed to be the rule of succession, in not only the Kandyan Provinces but also in the Maritime Provinces (d).

The following is the definition of the two modes of succession as given by experts whose evidence was taken in the leading Kurunegala case No. 366:-

Sishiyanu paramparawa. (1) The lands, Vihara, etc. belonging to Bhikshu (or upasampada priest) will, although he had so many as five pupils, devolve on that pupil to whom an absolute gift was made thereof, and that pupil alone of the said donor will afterwards succeed thereto, who received a regular gift of the same from him. The uninterrupted succession of pupils in this manner is termed Sishiya Paramparawa.

(2) Should the priest, the original proprietor, declare his bequest common to all his five pupils, they will all become entitled thereto, and one of them being elected to the superiority, the other four may participate in the benefits; the said superior being dead, the next in rank will succeed to the superiority, and along with the rest (of the survivors) will enjoy the benefits. This order having subsisted the last survivor will enjoy the benefit and have the power to make a gift in favour of any other person.

(3) But the original proprietor priest may transfer his rights to any other person he may choose, passing by his own pupils.

(4) In the event of the original proprietor dying intestate, the priests who happened to be assembled (at his death) become entitled in common.

(5) Things which belonged equally to two priests devolve wholly to the survivor (e).

(c) Per Coll 259. (d) Sangharatana Unanse vs Weerasekara (1903) 6 N. L. R. 313 (e) Gunananda Unanse vs Dewarakkitta Unanse (1924) 26 N. L. R. 257.

Sivuru paramparawa. The priest who was the original proprietor, ordaining a relation to the priesthood, and bestowing his property on him, and the latter in like manner ordaining a relation, and making a gift in his favour; the ordaining of relations for the succession in this manner is termed Siwuru paramparawa. However, the practice has also subsisted in this Island, of a priest who had himself failed to appoint a relation to the succession, authorising another to ordain a relation to the priesthood, and to deliver up the property to him (c).

There is no reference to the Sishiyanu Sishiya paramparawa in Buddhist Ecclesiastical Works but, it has been in existence for about five hundred years, and it is by a purely customary rule that a pupil inherits what his tutor possessed. The above definition of Sishiyanu Sishiya paramparawa is not complete or exhaustive, and some of these propositions have been considerably modified by judicial decisions. The **third proposition** which says that the original proprietor priest may transfer his right to any other person passing by his own pupils would only apply where a priest founds a temple and becomes its incumbent without defining the mode of succession to it. It can have no application to a temple, the succession to which is regulated by the Sishiyanu Sishiya paramparawa. The **fourth proposition** says that if an original proprietor priest dies intestate, the priests assembled at his death becomes entitled to the temple in common. In such a case, according to the decisions, in the absence of definite terms attaching to the dedication, the rule of succession will be presumed to be the Sishiyanu Sishiya paramparawa. The **fifth proposition** which says that things which belong equally to two priests devolve wholly to the other, means that where there are two original proprietors, or possibly, where there are two or more persons entitled to the benefit of residence at the temple they are entitled in due succession to benefit of survivorship.

The rules regulating the succession to temples and Vihares may be summarised as follows:–

(1) Succession to an incumbency is regulated by the terms of the original dedication (f).

(2) If the original dedication is silent as to the mode of succession, then the succession is presumed to be in accordance with the rule of Sishiyanu Sishiya paramparawa or pupillary succession, to the exclusion of even the succession known as siwuru paramparawa and the grantors or dedicators cease to have any control over it (g).

(3) The general rule of succession is the Sishiyanu Sishiya paramparawa.

(4) The incumbent can appoint or nominate one of his pupils to succeed him, the pupil so appointed or nominated, if a junior, succeeds to the exclusion of the senior pupils (e).

It is open to an incumbent to appoint by deed or will any particular pupil as his successor (h). An incumbent cannot bequeath his trust and will away the temple and its endowments to his fellow pupil to the exclusion of his own pupils (i). Nor could he transfer the incumbency to a stranger or a priest of another sect. Ratanapala Thero was at one time the Viharadhipathi of a temple and he by deed P1 in the year 1897 gifted the temple together with its temporalities to his only pupil Reverend Wanaratana Thero, and Reverend Sobita who was not in the line of pupillary succession. Wanaratana Thero gave up his robes in the year 1902. Thereafter, in the same year, Reverend Sobita by deed P2 purported to gift this temple and the lands belonging to it to Reverend Randewella Piyadassi Thero who died in the year 1937. No rights passed on this deed P2 as neither the donor nor the donee was in the pupillary succession of Ratanapala Thero. The deed P1 also did not confer any rights on Sobita Thero as he was not in this line of succession. When Wanaratana Thero gave up his robes the pupillary succession which existed so far came to an end. On the extinction of that line of succession the temple vested in the Sangha (j). An incumbent of a

(f) 59 N. L. R. 412. (g) 39 N. L. R. 253. (h) Dhammajoti vs Sobhita (1913) 16 N. L. R. 408. see also 48 N. L. R. 11. (i) Grenier (1874) 66; see also 4 S. C. C. 121. (j) Dhammaloka Thero vs Saranapala Thero (1956) 57 N. L. R. 518; see also 56 N. L. R. 284.

Vihare under the Sishiyanu Sishiya paramparawa, if he has more than one pupil, is at liberty to appoint one of his pupils to be his successor to the exclusion of the others. Such appointment may be made by deed, and such deed may be revoked by another deed and a fresh appointment may be made by him (k). The selection or appointment need not necessarily be by deed or last will. A writing clearly indicating a selection for appointment would be sufficient. The more solemn the form in which a nomination is made, the easier will be the proof of such nomination (l). The act of apointment may be done even by word of mouth (m).

The incumbent of a temple who had an only pupil, the defendant, a Samanera, applied to the Mahanayake to have the plaintiff an Upasampada pupil of another bhikku, to be disrobed and rerobed in his name as his pupil. In his application the grounds alleged were that he was sick and confined to bed since two months and that there was no elderly Upasampada pupil or junior suited to render assistance to him and to take care of the place and pansala. This document did not constitute a selection or appointment of the plaintiff to succeed to the incumbency (n).

Where an incumbency has been properly gifted or bequeathed to one pupil priest, the others have not the slightest right to interfere with the management of the trust property nor the possession of any part of it (o).

Not only may a pupil who succeeds to the office of Viharadhipathi by virtue of being the senior pupil of his tutor renounce his office but also a junior pupil nominated by his tutor as his successor is free to renounce his right. Dhammadara was the original Viharadhipathi who gifted Ogaspe Vihare to his junior pupil Jinaratana. There was trouble between Jinaratana and the senior pupil Sumana. Parties interested in the

(k) 5 S. S. C. 235; see also 47 N. L. R. 228. (l) Piyatissa Terunnanse vs SaranaPala Therunnanse (1938) 40 N. L. R. 262. (m) Rewata Unanse vs Ratanajoti Unanse (1916) 3 C. W. R. 193. (n) Dhammananda Thero vs vs Dhammapala Thero (1939) 41 N. L. R. 285. (o) Vand 224.

welfare of the temple brought about a settlement by which Sumana was recognised as incumbent of Ogaspe Vihare and Jinaratana was recognised as an incumbent of another Vihare which belonged to their tutor. The surrender of Jinaratana of whatever rights he obtained under the deed excuted by his tutor was valid and effectual (p),

(5) If an incumbent dies leaving several pupils, the senior pupil succeeds. The selection of the incumbent, however, rests with the pupils and the right of the senior pupil might in certain circumstances be disregarded (e). The right attaching to seniority is not so unqualified as some of our decisions appear to suggest (q).

A senior pupil who deserts a temple, forfeits his rights to the incumbency (r). The abandonment by a bhikku of an incumbency results in the forfeiture of the rights of his pupil to inherit the incumbency. Abandonment may take place by means of the bhikku consenting to a decree of Court disentitling him to the incumbency (s). The abandonment by a bhikku of his rights to the incumbency of a Buddhist Temple does not require any notarial deed or other prescribed formality, but it is a question of fact, and the intention to abandon may be inferred from the circumstances (51 N. L. R. 372). The pupils have the right to elect one of their own number, other than the senior pupil, as incumbent when the senior pupil consents to or acquiesces in such election (t). Where the first two pupils, who had no pupils of their own formally proposed and seconded a resolution, at a meeting of the Sangha Sabha, that the third pupil in order of seniority be placed in charge of the temple, it was correct to infer from the passing of such resolution that the first two renounced their respective claims to the temple and that the third pupil in order of seniority was the de jure

(p) Nandarama vs Ratanapala (1955) 57 N. L. R. 445. (q) Dhammaratana Unanse vs Sumanapala Unanse (1910) 14 N. L. R. 400. (r) Dhammapala Unanse vs Sumanapala Unanse (1939) 41 N. L. R. 235. (s) Podiya vs Sumangala Thero (1956) 58 N. L. R. 29. (t) Dhammarakkita vs Wijitha (1940) 41 N. L. R. 401.

Viharadhipati (u). An intention of a Bhikku to renounce his status as Viharadhipati of a Vihare will not be inferred unless that intention is already expressed by facts and circumstances. A Viharadhipati does not forfeit his right to the office when he leaves the temple of which he is Viharadhipati and takes up residence in another of which also he is Viharadhipati (v).

A priest does not lose seniority by disrobing temporarily. Disrobing to produce such a result must be voluntary and with a clear intention to renounce the sangha. It follows that a temporary, and obviously pro forma departure from the priesthood in the emergency of a grave illness cannot produce such a result (w).

(6) If a pupil dies before his tutor, his pupil does not thereby lose his right to succeed his tutor's tutor. If a tutor disrobes himself for any cause, the status of his pupils will in no way be affected by it, but they will succeed him as in the case of his death (x).

(7) Where the senior pupil of an incumbent predeceases him, the pupil next in order succeeds to the incumbency to the exclusion of the pupils of the predeceased senior pupil (y).

(8) Upon the extinction of the line of pupillary succession to a Buddhist temple governed by the Sishiyanu Sishiya paramparawa, the temple vests in the Sangha and the right of appointment of a new Viharadhipati vests in the Mahanayake of the fraternity which has jurisdiction over it (z).

(9) It cannot be contended that the claim of pupillary succession includes not only the descending line, but also the ascending line. It is quite clear that when an incumbent dies leaving no pupils, the line is extinct and his successor must be appointed by the Sangha Sabawa of the fraternity to which he belongs (a).

(u) Panditha Amaraseela Thero vs Tittagala Sasanatilleke F. B. (1957) 59 N. L. R. 289. (v) Jinaratana Thero vs Dhammaratana Thero (1955) 57 N. L. R. 372. (w) Somaratne vs Jinaratana (1941) 42 N. L. R. 361. (x) Dhammaratna Unanse vs Sumangala Unanse (1910) 14 N. L. R. 400. (y) Vipulananda Therunnanse vs Sedawatte Pannasara (1941) 20 Cey. Law Rec. 1. (z) Dammaloka Thero vs Saranapala Thero (1956) 57 N. L. R. 518. (a) Attadassi Unanse vs Indajoti Unanse (1957) 59 N. L. R. 79.

The Supreme Court has consistently interpreted the word "Sishiyanu Sishiya" to mean from pupil to pupil. That is to say on the death of the first Viharadhipati, he is succeeded by his senior pupil who in turn is succeeded by his own senior pupil and the succession continues in that manner as long as each succeeding Viharadhipati leaves a pupil or pupils. "Sishiyanu Sishiya" consists of two words, namely "Sishiya" and "Anusishiya". By the word "Anusishiya" is meant a "co-pupil". So that according to "Sishiyanu Sishiya paramparawa" when a Viharadhipati dies, he should be succeeded by his co-pupil, if any, and not by his own pupil; otherwise no singificance would be attached to the word "Anusishiya". What passes off as "Sishiyanu Sishiya paramparawa" today is in reality "Sishiya paramparawa" which means succession from pupil to pupil. But as this interpretation has long been established and consistently recognized by our Courts, it is too late in the day to follow a different interpretation in keeping with the correct meaning (aa). The Full Court has held that the rule requiring the transmission of the incumbency from senior pupil to senior pupil produces certainty and creates a sort of primogeniture which is easily understood and applied (b).

Qualifications of pupils for succession. All the four classes of pupils mentioned above are alike pupils under the Buddhist Sacred Law, that is they rank as the pupils of the bhikkus who have robed, ordained, instructed them, or given them a Nissaya. But for purposes of pupillary succession, unless a distinction has been made in the instrument of dedication the first two forms of pupillage namely robing and ordaining are alone regarded. Presentation for ordination, apart from robing is in itself sufficient to constitute pupillage. These functions may validly be performed by delegation. A bhikku presented for ordination by a bhikku other than the robbing bhikku in his own name will be the pupil of both (c).

(aa) Amaraseela Thero vs Sasanatilaka Thero (1957) 59 N.L.R. 289.
(b) 26 N. L. R. 257 (c) 20 N. L. R. 385.

Robing precedes ordination and the pupil who is the first to be robed is the senior pupil who is entitled to succeed unless there are other directions given by the tutor, or forfeiture or surrender. Ratanajoti was the incumbent of Rajamaha Vihare. Plaintiff was presented for ordination only, by Ratanajoti prior to defendant's ordination. The defendant was robed by Ratanajoti before the plaintiff was ordained. Ratanajoti later presented defendant for ordination It was held that the defendant was entitled to succeed (d). Samanera bhikkus that is, those who have attained the first step in the priesthood by robing, can be invested with the incumbency of a Vihare (e). The robing or ordination of a bhikku may be proved by oral evidence. The failure to produce documentary evidence of the robing or Upasampada does not render oral evidence of any of those events liable to be rejected on that ground alone. The fact that the Upasampada Register and the register maintained under Section 41 of the Buddhist Temporalities Ordinance have not been produced does not afford sufficient ground for rejecting oral evidence. The Buddhist Temporalities Ordinance does not declare that the register maintained thereunder is the only evidence of the robing or ordination of a Bhikku, nor does the fact that an Upasampada register is maintained by the Nikaya exclude the proof, by other evidence, of the fact that a Bhikku obtained the higher ordination (f).

The relationship of tutor and pupil is sufficient to make the pupil bound by a judgment against the tutor in a case in which he seeks to reagitate a decision against his tutor by virtue of being his pupil. The decree itself is not a test of what is or is not res judicata. The determining factor is not the decree but the decision of the matter in contraversy (g). A pupil is a privy of his tutor for purposes of res judicata. The abandonment by a priest of an incumbency results in the forfeiture of rights of his pupil to inherit the incumbency (h).

(d) Somaratne vs Jinaratne (1941) 42 N.L.R. 361. (e) Dhammajothi vs Sarananda (1881) 5 S.C.C. 8 (f) Saranajoti Thero vs Dharmarama Thero (1959) 61 N. L. R. 76 (g) Piyaratana Thero vs Pemananda Thero (1960) 62 N. L. R. 193 (h) Podiya vs Sumangala Thero (1956) 58 N. L. R. 29.

Registration of Bhikkus. Section 41 of the Buddhist Temporalities Ordinance provides for the registration of both Samanera as well as Upasampada Bhikkus. In the case of a Samanera the name of the robing tutor has to be entered. In the case of an Upasampada bhikku the name of the robing tutor as well as the name of the Upaddhyaya have to be entered. The application for registration in either case has to be made in duplicate. On receipt of same the Registrar General should retain one copy for his use and forward the other to the Mahanayaka Thera of the Nikaya mentioned therein. It is the duty of both the Registrar General and the said Mahanayaka Thera to file their respective copies and make registers thereof.

The Mahanayake Thera or Nayaka Thera of every Nikaya shall from time to time make all such corrections, additions or alterations in his register as may be necessary to keep up to date his registers of Upasampada Bhikkus and Samaneras of his Nikaya and the relevant details regarding them; and whenever he makes any modification in his registers he should forthwith convey that fact to the Registrar General who should similarly modify the registers he is required to keep. Such registers kept by the Registrar General would be prima facie evidence of the facts contained therein.

The Registrar General is under a legal duty to remove the name of a bhikku from the register on being required to do so by the Mahanayake on the ground that the bhikku has been expelled from the Order. Death and disrobing are two events that necessarily affect the "up-to-dateness" of the register. And no less must expulsion affect it, provided of course the expulsion is recognized in the Buddhist Law (i).

The corrections, additions or alterations which fall within the ambit of this section are only such as are of a routine nature and are undisputed and do not prejudice the rights of others. An Upasampada Bhikku had declared that he was robed on 15th October 1940. Seven years later the date of robing was, at his instance, altered in the registers to 15th October 1938. This alteration was unauthorized as the same was not

(i) Mahanayake vs Registrar General 39 N. L. R. 186.

necessary to keep the registers up to date (j). Section 42 makes it an offence punishable with a fine of Rs. 50/– for any Upasampada Bhikku or Samanera to hold himself out as such if his name does not appear on the register. The register mentioned is the Registrar General's register and not the register kept by the Mahanayake. The purpose of this section was clearly for the protection of the public against the impostor, the rogue who under cover of the yellow robe, might fatten on the goodwill and charity of the pious laity (jj).

Rights of Bhikkus. The priests who are in the line of pupillary succession of a Vihare have by religious custom, a special right to reside at the Vihare and to be maintained out of its endowments. This special right may be due either to the original dedication where such dedication left the temple to a particular bhikku and his pupils and the pupils of those pupils in perpetual succession, or it may be due to the fact that each of these pupils has a spes successionis to the incumbency. As regards other members of the Sangha who do not belong to the pupillary succession of the Vihare, this right is not an exclusive right but a preferential right, accorded by religious custom (k).

A pupil is entitled to reside in the Vihare and to be maintained from its funds (l). The pupil of a former incumbent is entitled to sue for maintenance from the date of the plaint up to the date of decree and also to ask for a further order declaring him entitled to future maintenance (m).

A Bhikku cannot be ejected from a Buddhist Vihare except for some personal cause, irrespective of the rights of property. This right does not mean that an individual priest can select for himself a particular place in the Vihare independently of the chief incumbent and against his wishes. Any persistent assertion or an insistence of such an alleged right

(j) Jinananda Therunanse vs Ratanapala Terunanse (1959) 61 N. L. R. 273. (jj) Jayasuriya vs Ratnajoti (1939) 41 N. L. R. 78. (k) Saranankara Unanse vs Indajoti Unanse (1918) 20 N. L. R. 385. (l) Sirinivasa vs Sarananda (1921) 22 N. L. R. 318. (m) Pemananda vs Saranapala (1945) 46 N. L. R. 538.

is a personal cause, for which he may properly be ejected (n). Where the plaintiff the controlling Viharadhipati permitted the defendant who was his pupil, to occupy temporarily the room in the temple known as the Poyage but the defendant persisted in his occupation of the room and refused to leave it though requested to do, it was held that the defendant was guilty of contumacy and was liable to be ejected from the temple permises (o). Though a priest has the right to reside in the Vihare and to be maintained from the income he will lose the right if he has been guilty of Parajika or contumacious conduct (p).

Duties of Bhikkus. All priests must observe the several precepts. They must refrain from committing any of the 227 offences mentioned in the Patimokkha. They must be obedient to the Viharadhipati under whom they have been robed or ordained.

Inquiries into offences. We have mentioned in Chapter XIII page 242. the seven kinds of offences together with the punishments laid down by the Vinaya for such offences. Any charge against a delinquent bhikku could be made at the reciting of the Patimokkha.

A complaint could also be made to the Maha Sangha Sabhawa or the Nayaka Thero of the District. When a complaint is made at the Patimokkha ceremony or to the Nayaka Thero, such complaint is referred to the Maha Sangha Sabbha who would either inquire into the charge themselves or refer the matter to the Nayaka Thero for inquiry.

According to the Vinaya a Sangha Sabha may be comprised of four members, five members, ten members, twenty members or more than twenty members. A Sangha Sabha comprised of four members could do any formal act excepting ordination (Upasampada), the formal ceremony at the end of the vassa season (pavarana) and rehabilitation (Abbhana) of a Bhikku who has undergone a penance for an expiable offence. A Sangha Sabha consisting of five members

(n) Piyadasa vs Dewamitta (1921) 23 N.L.R. 24. (o) Dharmaratane vs Indasara Thero (1946) 47 N. L. R. 460. (p) Morantuduwe Sr Naneswara vs Baddegama Piyaratana Thero (1958) 59 N. L. R. 412.

can do any formal act except the pavarana and Abbhana. A Sangha Sabha consisting of ten members can do any formal act except the Abbhana. A Sangha Sabha of twenty or more members can do all formal acts.

The four parajika offences of (1) having sexual intercourse, (2) committing murder, (3) committing theft and (4) pretending to possess miraculous powers are serious offences punishable with expulsion from the Order.

Hence a Sangha Sabha that inquires into one of these offences should be comprised of at least ten Upasampada Bhikkus, who are well versed in the Vinaya and who are free from blame and who are not undergoing any punishment for any offence. The delinquent Bhikku must be given notice of the charge against him and he should be given an opportunity of defending himself. The delinquent Bhikku may object to any of the Bhikkus forming the Sabha taking part in the Trial. Before the Trial one of the Bhikkus would be selected as Arbitrator and one as Secretary. After the recording of evidence of both parties the Sangha Sabha will decide, by a majority vote, in favour of or against the delinquent Bhikku. In a case where the Nayaka Thero presides the decision is conveyed to the Maha Sangha Sabha.

In case he is found guilty of one of the parajika offences the order would be that he be debarred for ever from the rights of priesthood and their communion and that he be expelled from ecclesiastical premises. The delinquent priest has a right of appeal to the Maha Sangha Sabha whose decision is final.

Admittedly, the Maha Sangha Sabhawa is the highest ecclesiastical Court of the Buddhist Church. The Mahanayaka or Chief High Priest is the president of that assembly, and its decisions, so for as they relate to the internal discipline of the Sangha and the conduct of Bhikkus are final. It has no right of deprivation, and its decisions can only be enforced in a negative way, namely by an interdict ordering all other priests to boycott the delinquent by ceasing to associate with him

in any religious functions (q). Persons who voluntarily submit a dispute to an extra-judicial tribunal must abide by its decision unless it be vitiated by misconduct or substantial irregularity of procedure or by a violation of the principles of natural justice (r).

A Bhikku does not cease to be a member of the order by reason of immoral conduct until he is expelled for the offence by a Tribunal having jurisdiction in that behalf. The mere fact that there is evidence that the Bhikku had sexual intercourse with a woman is not sufficient to establish that he had ceased to be a bhikku. There must be evidence that he had been expelled from the Sangha for the offence by a Tribunal having jurisdiction to make an order of expulsion (s). A Bhikku who has been expelled from the Sangha for the commission of any parajika offence must be considered to have suffered a degradation to the rank of a layman (t). Where the delinquent is found guilty of a parajika, he is for all practical purposes no longer a bhikku (u).

Our Courts of law are exceedingly slow to interfere with the exercise of the jurisdiction of domestic tribunals to which each of their members has expressly or by implication submitted himself. That jurisdiction must however not be exercised arbitrarily, but with due regard to regularity and fairness (v).

There can be no doubt that so far as our Courts are concerned, expulsions from the sangha have long been recognized (w). A Bhikku who has been expelled from the sangha cannot claim to retain an incumbency on the ground of prescription (w).

It is open of course to an individual, if his civil rights be involved, to question the finding of any such tribunal before the Civil Courts on the ground of gross irregularity or improper conduct on the part of the tribunal, but the onus of establishing such or any other grounds he may urge is upon the person averring them(w).

(q) Sumangala Unanse vs Dhammarakkita (1909) 11 N. L. R. 360. (r) Kirikitta Saranankara Thero vs Dhammananda Thero (1954) 55 N. L. R. 313. (s) Premaratane vs Indasara (1938) 40 N. L. R. 235. (t) Terunanse vs Abeyenayake (1908) 2 Mat. cases 21 (u) Mahanayake Thero vs Registrar General (1937) 39 N.L.R. 186. (v) Dhammarama vs Wimalaratne 5 Bal. N. 57. (w) Attadassi Unanse vs Rewata Unanse (1928) 29 N. L. R. 261.

The Maha Sangha Sabhawa, or the Great Council of Buddhists, is not a recognized tribunal and its decisions have not the effect of res judicata. Even if the decision of the Maha Sangha Sabhawa be considered as the award of arbitrators, such decision is liable to be set aside on the ground of irregularity or misconduct in the proceedings. When a complaint is made to the Sabha, either an inquiry is held at Kandy, the headquarters of the Malwatta Sangha Sabhawa or if the place is distant from Kandy, the High Priest of the District is delegated to hold an inquiry. In this case the dispute was not referred to the Sabha by agreement, nor was there any agreement at the inception of the proceedings that the parties should be bound by the decision of the Sabha. The complaint was made to the Nayaka Thero who held an inquiry but without delivering judgment forwarded the proceedings to the Malwatta Sangha Sabha who arrived at a decision mainly on the notes of evidence recorded by the Nayaka Thero. Hence the proceedings were irregular and invalid (x). It is an irregularity that vitiates the proceedings of an arbitrator for him to refuse to allow one of the parties to adduce evidence in support of his case. In this case the defendant sought to prove that he was a pupil of the last incumbent and requested the Mahanayaka to produce the Lekanmitiya or register of ordinations which was in his custody and which the Mahanayaka refused to do except on an order of a competent Court. The finding of the Sabha was therefore held to be void (q). In case, a Chief incumbent is found guilty, there comes in trouble because these tribunals have no power to implement their decisions. In such a case the Maha Sangha Sabha, after ordering the expulsion of such incumbent bhikku from the Sangha would appoint another bhikku as the new incumbent of such temple. Threafter, the newly appointed bhikku will have to bring an action in the Civil Courts to have the decision of the Maha Sangha Sabha implemented by having the delinquent bhikku evicted from the premises.

(x) Terunanse vs Terunanse (1929) 31 N. L. R. 161.

As already stated, a Bhikku who is guilty of contumacy is liable to be evicted from the temple premises (y).

Bhikkus and Private Property. A Bhikku cannot make any claim to a share of the paternal estate where there were lay brothers and sisters. Yet if he be the only child, he has a right to inherit his father's lands in preference to collateral heirs. The rule that a Bhikku taking the robe renounces all wealth is not universal. He may take by gift, bequest, or purchase and inherit from the mother and from brothers and sisters. But Ordinance No. 39 of 1939 has amended the law by declaring a bhikku not entitled to a share in the maternal estate where the mother was married in binna on her father's property and where the mother has died after the commencement of this ordinance.

Although the proprietor was a bhikku at the period of his death, his landed property will not remain to the surviving Bhikkus of his fraternity, nor to the temple whereof he was the incumbent, but the same will revert to his next of kin.

The Buddhist Temporalities Ordinance of 1931 has amended the law by declaring that all pudgalika property acquired by any individual Bhikku for his exclusive personal use, if not alienated by him during his lifetime, will be deemed to be the property of the temple to which he belonged unless such property had been inherited by him. Uninherited pudgalika property acquired by a Bhikku for his exclusive personal use and not alienated by him during his lifetime becomes, on his death the property of the temple to which he belonged, even though he abandoned the robes and became a layman.

For further particulars see Chapter VIII at page 150 and Chapter IX at page 180.

(y) 31 N. L. R. 412.

CHAPTER XVI.

TENURE OF VIHAREGAM AND DEWALAGAM LANDS.

The Sinhalese Kings were for many centuries lords paramount of the soil, and all property was derived from them and reverted to them by way of escheat.

The Kings granted lands and even whole villages to Temples and Dewalas. These villages were known as Viharagam and Devalagam. The Kings also made grants of lands and villages to individual relatives, courtiers and Chiefs. These lands were known as Nindagam. The Ninda proprietors had to perform services to the King and furnish a certain quota of men for the King in time of war, but the tenants in those villages performed their services or paid their contributions direct to their Ninda Lord. The lands so granted were not only forest and waste lands, Malapala and Nilapala and confiscated lands but also included villages already tenanted. These villages were known as Koralegam. The grantees of such villages became their overlords and those who held lands subject to their overlordship came to be known as Gilakarayas or tenants (a).

Thus there were five kinds of gam or villages:- (1) Gabadagam or Royal villages. These were appropriated entirely to the Kings household. They contained the Muttettu fields which were cultivated gratuitously by the tenants who delivered the entire produce to the Royal store; the tenants who cultivated them were allowed other lands which they cultivated for their own use.

(2) Koralegam. The paraveni tenants in these villages held their pangu from the King and hence could not be dispossessed by their new Ninda lords. If their pangu had been previously registered in the Lekammiti, they continued to render services to the Department of State to which their lands were attached for service and not to their new ninda lords. If

(a) Sessional Papr 1 of 1956.

their village was not so attached to a Department, then the tenants had to contribute a tax known as Kath hal, a pingo of rice, to the King.

(3) Viharagam. Villages granted to temples and Viharas.

(4) Dewalagam. Villages granted to Dewalas.

(5) Nindagam. Villages granted to individuals (a).

A village usually contained (1) Muttettu fields of the overlord which may be **ninda muttettu** cultivated entirely for the benefit of the nindalord, as a feudal service, by the nilakaraya in consideration of the lands which they possess, or **anda muttettu**, acquired by the overlord by way of escheat, gift or purchase in respect of which he is not entitled to exact free services, but where the cultivator is entitled to half share of the crop; (2) the **paraveni pangu** or holdings of the Nilakarayas which descended from generation to generation, and from which the tenants could not be dispossessed except for default in rendering the services or paying the taxes attached to their lands; (3) **Maruvena pangu** or a tenancy at will, where the holding was given to a Nilakaraya for a cultivation season and which could be terminated at the will and pleasure of the overlord; (4) **high land** held as appurtenant to the muttettu and to the fields of the paraveni pangu (a).

The overlords however, were not the absolute owners of the lands granted to them by the King except,,of course, the Walawwa in a Nindagama and the Muttettu lands, but they became entitled to the services to be performed by the Nilakarayas of the gama. The Nilakarayas had the right to possess the paraveni pangu in return, not for payment of money, but for the performance of certain services to the overlord,

Any paraveni Nilakaraya who was unwilling to render services, could surrender his interest in the pangu or holding and free himself from the obligation of continuing to perform them. On such an abandonment the liability to perform services ceased and the land escheated to the Crown, but in practice, the overlord usually admitted a new Nilakaraya

or appropriated the produce himself becoming personally responsible for whatever might be due to the Treasury. Such abandoned lands were termed "**Purappadu**" and were of two kinds, namely, "Nilapala" which were lands that reverted to the Crown on the failure or suppression of the office to which they were attached and "Malapala" which were lands that escheated to the Crown on the relinquishment of services or on the death of the grantee without heirs (a).

In addition to the grants by Kings of Viharagam and Dewalagam, temples also received gifts of land called "pidiwillas" from private individuals.

The services to be performed by the paraveni nilakarayas of a Nindagama were mainly personal and were the cultivation, care and delivery at the granary of the ninda lord, of the crop of the muttettu fields, attendance on the ninda lord in all his journeys, and at his annual appearance before the King. It was their duty to follow him and carry his provisions and baggage. It is very clear that in nindagam, services have well nigh fallen into complete desuetude. The end of this service system is therefore clearly in sight (a).

The services required from the nilakarayas of a Viharagama were the giving of the food and robes to the bhikkus, maintenance and repair of buildings, attendance at festivals, beating of the tom toms, blowing of conch shells, and the performance of other duties of a ceremonial nature. Other services were to convey the offerings of food according to custom from the kitchen of the Maligawa to the temple of the Tooth at the proper time of the Thewawas; to clear the Maluwa of a Vihare with a mammoty; to whitewash the Vihare and Dewale; at every mangallaya to give two hunu mallas (bags of lime) to The Vihare; to give one man to be in mura (guard) at the Sri Maha Bodhin Vahanse; to supply flowers, to strain water for the thewawa; to keep watch over the premises and to drive away monkeys and bats (a).

The services of the nilakarayas of a dewalagama were more varied. Some had to attend personally on

the Basnayake Nilame (Trustee of the Dewala and administrator of its estate and revenues), and others had to play their respective parts in the various peraheras which were held throughout the year. Some had to attend at the Kandy perahera, carry flags and pandam (torches) in the perahera, light panas (lamps) at the Dewale, repair the Dewale, feed the Basnayake Nilame or the Vidane when either of them visited the village, others had to convey the muttettuwa crop to the Dewale give yearly a certain quantity of salt, rice, coconuts, vegetables, etc. and give yearly to the dewale one iron lamp, a sickle, an arecanut cutter etc.; work as a blacksmith for the dewale etc. (a).

The Order in Council of 12th April 1832 abolished Rajakariya or forced services to the state but expressly reserved the rights of the crown to services as priviate proprietor of the Gabadagam(Royal-Villages), and the service which the tenants of any lands in any temple villages in the Kandyan Provinces might be bound to render to any temple so long as they continued tenants of such lands.

Ordinance No. 10 of 1856 was enacted to provide for the settlement of claims to exemption from taxation of temple lands in the Kandyan Provinces and for the registration of all lands belonging to such temples.

In the year 1869 while presenting the draft of the service Tenures Ordinance No. 4 of 1870 to the Legislative Council, the Governor stated as follows:- "I find that the services to be performed in respect of such tenures are varied in character and differs in every village. They appear in the Nindagamas to include every description of labour, which one man can perform for another as a cultivator, artisan, or menial. whilst in the temple villages in addition to the performance of the usual agricultural and menial tasks, there are allotted to the nilakarayas, irrespective of their superstitious feelings, the temple services, consisting of repairing the temples and Idols, furnishing the daily guards, carrying the Images at festivals and providing musicians and devil dancers. The whole system

in short, is described by those who have carefully watched its effects as degrading to humanity. Under it men are bought and sold with the land, industrial enterprise is blighted, agricultural improvement is barred, litigation is encouraged, oppression is legalized, and, in the case of temple tenants the freedom of conscience is interfered with".

The reference to the freedom of conscience in this speech may have been occasioned by the fact that non-Buddhists acquired the interests of nilakarayas of Viharagam and Dewalagam and were compelled to render services to the Vihares and Devales. It is however, not easy to accept as correct all the charges made against the system of tenure. The argument that non-Buddhists need not buy the interests of nilakarayas of such lands, if they had any religious scruples about the performance of service, and that they could divest themselves of the liability to perform services by reselling such lands to others did not find favour with the Government. Among the Village tenants there is still a great enthusiasm to perform the services at vihares and dewales. They insist they must be allowed to perform their assigned services. This enthusiasm is perhaps begotten from a sense of religious devotion and reverence for the Buddha or the deity concerned (a).

In the year 1870 the Service Tenures Ordinance No. 4 of 1870 was enacted to define the services due by the paraveni tenants of Viharagama, Dewalagama and Nindagama lands and to provide for the commutation of those services.

It provides for the appointment of Commissioners (Section 3) for carrying into effect the provisions of the Ordinance. The Commissioners were required particularly to determine:- (1) the tenure of each pangu subject to service in the village, whether it be paraveni or maruvena; (2) the names, so far as can be ascertained of the proprietors and holders of each paraveni pangu; (3) the nature and extent of the services due for each paravenipangu; (4) the annual amount of money for which such services may be fairly commuted at the time the registers are made.

The Commissioners were also required to register the information so ascertained in a Book. The findings of the Commissioners so registered as to the nature of the tenure, the nature of the service due in respect of each paraveni pangu, and the annual amount of money payment for which services may be commuted at the time the registers were made are declared final and conclusive (Sections 9 and 10). Any paraveni nilakaraya could apply to the Commissioners or the Government Agents for a commutation of any service. If there is more than one paraveni nilakaraya in any paraveni pangu, the application to commute must be made or acquiesced in by a majority of the entire number of nilakarayas who shall have attained the age of sixteen years (Section 14). The Commissioners or the Government Agents were empowered after notice to the proprietor to ascertain whether the services may still be fairly commuted at the amount fixed in the Registry, or whether they have risen or fallen in value, and to what extent. After ascertaining the amount the commissioners or the Government Agents were authorized to make an order that the service in respect of the pangu shall stand commuted for the annual payment mentioned in the Registry or for any other sum that the Commissioners or the Government Agents may consider just or reasonable. The order so made is final and conclusive as to the liability of the nilakarayas of the pangu to pay commuted dues and not to render services and as to the amount to be paid by the nilakarayas as a head rent due to the proprietor (Section 15). The Commissioners or the Govenment Agents should make an entry of the commutation in their registers and such entries or certified copies thereof is the best evidence of the nilakarayas right to pay commuted dues and not to render services for such pangu (Section 16). Any person aggrieved with the determination of the Commissioners under Section 9 or of the Commissioners or of the Government Agents under Section 15 have the right to apply to the Governor General for relief.

Jurisdiction. An action for recovery of damages must be instituted in the Court within whose jurisdiction the defendants reside (b). When a nindagama overlord institutes an action in the Court of Requests against nilakarayas for the recovery of the value of services due in respect of a field belonging to a panguwa, it is competent to the Court to decide the question of title to the field although the plaintiff's share of the field is worth more than Rs. 300/– (c). Even though a defence involves consideration of a question which could not be made the direct subject matter of a prayer for relief by the Court, the Court can still deal with and decide the question for the purpose of deciding whether the plaintiff is entitled to the relief he claims (d). Where two out of three owners of a panguwa sued the tenants for their share of the commuted payment due in respect of certain service lands, it was held that there was a non-joinder of plaintiffs, and in the absence of an application to add the remaining co-owner, the action was rightly dismissed (e).

Ownership of Nilakarayas. A pangu under the Ordinance does not belong to the ninda proprietor but is a holding of the nilakaraya himself subject only to the performance of service, and the nilakaraya becomes free even of his burden if the right to service is lost, as for instance by non-performance of service for ten years (f). The rights of an owner under the general law are comprised under three heads namely:– (1) the right of possession and the right to recover possession; (2) the right of use and enjoyment; (3) the right to alienate. These three factors are all essential to the idea of ownership but need not all be present in an equal degree at one and the same time. A paraveni nilakaraya is an owner within the meaning of the term in Section 3 of the Land Redemption Ordinance (g). Land which forms part of a paraveni pangu in a Nindagama and in respect of which no services have been performed nor dues

(b) 6 Bal. 50. (c) Keppetipola vs Jayatu (1957) 61 N. L. R. 327. (d) Heen Banda vs Aluvihare F. B. 31 N. L. R. 152. (e) Banda vs Lapaya (1891) 2 C. L. R. 38. (f) Marikar vs Assanapillai (1916) C. A. C. 85. (g) Attorney General vs Herat Pr. C. 62 N. L. R. 145.

paid to the overlord for over a period of ten years may be the subject of a partition action among the Nilakarayas as the overlord has lost the rights he had in the property (h). A Nilakaraya is entitled to the timber growing on the pangu. The Ninda Lord has no rights to any such timber (i). The Supreme Court has held that in the absence of any proof of any custom neither the Ninda Lord nor the Nilakaraya could gem on the land without the others consent (j).

The cultivation of Muttettuwa fields or high land is an obligation cast on paraveni pangukarayas as paraveni nilakarayas, and they have no right or interest in such lands (k). The Paddy Lands Act No. 1 of 1958 has made a change by declaring the cultivator of a paddy field entitled to carry on with the cultivation of same indefinitely, giving to the owner a share of the produce as laid down in the regulations.

The paraveni nilakarayas of a Nindagama are not bound to cultivate fields which do not form part of the Nindagama to which they are attached. They are bound to render personal services whenever the Ninda lord gives them notice. Palanquins being now obsolete, the obligation on the part of paraveni nilakarayas to carry palanquins for the Ninda lord is not enforceable by law (l).

As the services due by tenants of a Nindagama are agricultural, that is, work to be done on lands in the possession of the proprietor, the right to demand the services cannot be transferred by way of lease to another unless at the same time the lands on which services are to be performed are likewise leased. When the services are personal the Ninda lord cannot under any circumstances lease the right to demand such services (m).

Paraveni Pangu. The obligation to pay the commuted dues is an indivisible obligation. It is clear that the services as well as the dues are attached to the

(h) Bandara vs Dingirimenika 44 N.L.R. 393. (i) Ratwatte vs Rahim 23 N.L.R. 155. (j) Siripina vs Kribanda 5 N.L.R. 326. (k) Gunadara vs Ratwatte 5 Cey. Law Rec. 26. (l) Ratwatte vs Hatana 3 N.L.R. 110. (m) Siyatu vs Kirisaduwa F.B. 3 C.L.R. 17.

panguwa and are indivisible and owned jointly and severally by the Nilakarayas and are exigible from any of them subject to his or their right to claim contribution. Sections 14 and 15 make it clearer still that the unit is the pangu and not the nilakaraya for Section 14 requires the application for commutation to be made or acquiesced in by a majority of those above sixteen years of age, and Section 15 requires the Commissioner to ascertain as far as practicable whether all the nilakarayas above sixteen years of age desire the commutation. This view is supported by the terms of Section 25 which enacts that if the dues be not paid they shall be recovered by seizure and sale of the crop or fruits on the pangu, or failing these by the personal property of the nilakaraya, or failing both by a sale of the pangu (n).

Commutation of Services. The determination of the Commissioner under Section 9 is final and conclusive as to the tenure of the pangu whether it be paraveni or maruvena, the nature of the service due for and in respect of each paraveni pangu, and the annual amount of money payment for which the services due for each paraveni pangu may be commuted at the time those registers were made.

The entry of any land in the register as a paraveni land belonging to a specified tenant is conclusive evidence as to the nature of the tenure and relevant, but not conclusive evidence, as to the identity of the tenant. When a temple land is not entered in the list of paraveni lands, the necessary inference, at any rate unless some adequate explanation is given for the omission, is that the commissioners had determined that the tenure of the lands was not paraveni but Maruwena (o). If the services had not been commuted under Section 15, the proprietor must be content with exacting the service, and if that becomes impossible, he must suffer the loss (p). The amount entered in the Register (under section 10) as payable

(n) Jayaratne vs Gunaratana Thero F. B. (1944) 45 N. L. R. 97.
(o) Hewav.tarana vs Dungan Rubber Co. (1913) 17 N. L. R. 19.
(d) Marikar vs Asana pillai 4 C. A. C. 85 see also, 2 C. W. R. 229. 17 N. L. R. 19.

by a tenant is not conclusive, as this amount represents the sum at which the services may be fairly commuted at the time the registers were made. In an action for damages for non-performance of services the Court may allow itself to be guided by this assessment if the proprietor does not prove that he is entitled to a larger sum (q). The value of customary services due by a nilakaraya should be calculated as at the present time (r).

A commutation made under Section 15 on an application by the Nilakaraya is final and conclusive and binding on all the proprietors and nilakarayas as to the liability of the nilakarayas to pay commuted dues and not to render services for such pangu. Such commuted dues shall thenceforth be deemed to be a head rent due to the proprietor in respect of the pangu.

Once the Commissioner had, under section 15, ascertained the amounts payable in lieu of services, and the Register had been completed, the legal right to demand services was gone, and the right to recover commuted dues only exists; thereafter the nilakarayas could not perform the services as a legal right and the proprietor if he thought fit could sue for the commuted dues (s). When a nilakaraya has elected to commute his service by a money payment, the proprietor can claim the money irrespective of any change in the circumstances (t). The obligation to give a share of produce from chena land is a service that may be commuted under the Ordinance (u).

Recovery of damages. If the services have been commuted under Section 15 the proprietor is entitled to the commuted dues. If such sum is not paid the proprietor is entitled to recover same by action. This claim is prescribed in two years.

(q) Yatawara vs Lekamalage (1912) 16 N. L. R. 14. (r) Medankara Sthavira vs Subramaniam Chetty (1939) 41 N. L. R. 329. (s) Weragama vs Appunamy (1916) 2 C. W. R. 63. (t) Ratwatte vs Pulinguwa (1916) 2 C. W. R. 229. (u) Heen Mahatmaya vs L. R. P. Estates 31 N. L. R. 318.

A proprietor is entitled to recover damages against the holders of the pangu who have not commuted under Section 14 and 15, and who have failed to render the sevices defined in the registry (made under Section 10). The amount recoverable as damages is not only the sum for which the services shall have been assessed under Section 9, but such further sum as the Court shall consider fair and reasonable to cover the actual damages sustained by the proprietor through the default of the Nilakarayas to render such personal services at the time when they were due (Section 25). The scheme of the Ordinance clearly shows that it was never intended that a determination under Section 9 (d) should have the same force and effect as a determination under Section 15. The words "holders of any paraveni pangu who shall not have commuted" in Section 25 excludes those who have commuted under Sections 14 and 15 from this ambit. The words "perpetual commutation" cannot therefore refer to the annual payment determined under Section 15, and can therefore only refer to the sum assessed under Section 9 (d). This assessment is perpetual in the sense that it is final and conclusive as to the amount for which the services may be fairly commuted at the time the registers were made. It appears that this sum is a basic figure which the proprietor is in any case entitled to claim in the event of non-performance of services by a nilakaraya. It is quite clear that a proprietor is not confined to the basic or perpetual commutation but he is entitled to claim, in addition, the actual damages sustained by him. In assessing the damages the Court is free to award more than the amount stated in the register under Section 9 (d). Neither the scheme of the Ordinance nor Section 25 gives the Court the liberty to reduce the amount stated in the register under Section 9 (d) . The proprietor is entitled to this amount mentioned in the register even if he is unable to prove actual damages (v).

The services as well as the commuted dues are attached to the pangu and are indivisible and

(v) Brampy Appuhamy vs Gunasekera (1948) 50 N. L. R. 249.

owed jointly and severally by the nilakarayas and are exigible from any of them subject to his or their right to claim contribution (w).

Limitation of actions and prescription. Arrears of personal services in cases where the paraveni nilakarayas shall not have commuted shall not be recoverable for any period beyond a year; arrears of commuted dues, where the paraveni nilakarayas shall have commuted, shall not be recoverable for any period beyond two years. If no services shall have been rendered, and no commuted dues be paid for ten years, and no action shall have been brought therefor, the right to claim services or commuted dues shall be deemed to have been lost for ever, and the pangu shall be deemed free thereafter from any liability on the part of the nilakarayas to render services or pay commuted dues therefor. Provided however, that, if at the time of such right of action accruing the proprietor shall not be resident within the Island, or if by reason of his minority or insanity, he shall be disabled from instituting such action, the period of prescription on such actoin shall begin to run, in every such case, from the time when such absence or disability shall have ceased (Section

Where the services had been commuted under Section 15, the nilakarayas still continued to perform the services and such services were accepted by the proprietor. In such a case the claim not being for services but for commuted dues is prescribed in two years (s).

The above mentioned section 24 contemplates two kinds of arrears - arrears of personal services and arrears of commuted dues. The former cannot be recovered for a period beyond a year, the latter cannot be recovered for a period beyond two years. The personal services referred to in the section are services which have not been commuted and the commuted dues refer to services which have been commuted. The

(w) Jayaratne vs Gunaratana Thero F. B. (1944) 45 N. L. R. 97.
(x) Pananwala vs Gabriel Appuhamy (1951) 53 N. L. R. 258.

right to recover damages as provided in section 25 is something entirely different. That section fixes no time limit for recovery of damages (x).

Section 24 declares that if services are not rendered or commuted dues are not paid by the paraveni nilakarayas for a period of ten years, the pangu shall be deemed free thereafter from any liability on the part of the nilakarayas to render services or pay commuted dues. In such a case the Ordinance intends that what was previously qualified ownership shall become absolute ownership (y).

No prescriptive title to a land belonging to a pangu can be acquired so long as some part of the dues have been recovered by the proprietor in respect of a land belonging to the pangu within the last ten years. As stated earlier, the liability to perform services or pay commuted dues is an indivisible obligation owed jointly and severally by the nilakarayas and are exigible from any of them (w).

Ejectment of nilakarayas or sale of the pangu. Section 25 declares that it shall not be lawful for any proprietor to proceed to ejectment against his paraveni nilakaraya for default of performing services or paying commuted dues; the value of these services or dues shall be recoverable by seizure and sale of the crop of fruits on the pangu, or failing these, by the personal property of such nilakaraya, or failing both, by a sale of the pangu subject to the personal services or commuted dues due thereon to the proprietor. Where the law directs that a certain order should be observed in the seizure of property in execution of a judgment, the provision is imperative and a sale under which that order is not observed is not a good sale (z).

(y) Bandara vs Dingirimenike (1943) 44 N. L. R. 393. (z) Setuhamy vs Kiribanda (1922) 1 Times 51; see also 22 N. L. R. 427.