1904.
June 13.

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

LOKU BANDA *v.* DEHIGAMA KUMARIHAMY

D. C., Kandy, 2,241.

Kandyan law—Adoption, requisites of—Proof—Adoption for the purpose of inheritance.

In order to constitute a valid adoption under the Kandyan Law no particular formalities or ceremonies are required; but it is necessary that the parties should be of the same caste and that the adoption should be public and formally and openly declared and acknowledged; and it must also clearly appear that the adoption was for the purpose of inheriting the property of the adoptive parents.

APPEAL from a judgment of the Acting District Judge of Kandy (C. A. Labrooy, Esq.). The facts and arguments sufficiently appear in the judgments.

Dornhorst, K.C. (with him *H. Jayewardene*), for the appellant. (Counter-petitioner.)

Walter Pereira, for the respondent (Petitioner).

Cur. adv. vult.

13th June, 1904. WENDT J.—

This is a contest for letters of administration to the intestate estate of Dingiri Amma Dehigama Kumarihamy, widow of the late Girahagama Dewa Nilame. The petitioner, Loku Banda, claims to be the " nephew " and adopted son of the intestate, and therefore her sole heir. Both the relationship and the adoption are denied by the respondent, the counter-petitioner, who is admittedly the niece of the intestate, and, if the petitioner did not exist, her sole heiress. The parties are all of the same caste. According to the petitioner's evidence his father and the intestate were first cousins. According to the counter-petitioner the petitioner's only connection with the intestate was that he was distinctly related to Girahagama. The District Judge held that petitioner was in no way related to the intestate, and this finding was not contested before us. He, however, held that petitioner had proved his adoption, and the question is whether that ruling was correct. The petitioner suggested that he had been adopted by the intestate (who had no children of her own) in early childhood, but the District Judge believes the evidence called by the appellant to show that he first came to the intestate's residence Dehigama

Walawwa when he was 13 or 14 years of age, that he came there in order to attend school, the petitioner's parents being residents of Matale. It is, I think, a most significant circumstance upon which the District Judge rightly remarks that the petitioner did not call his own father, who was in attendance, as a witness, and who, if petitioner's case is true, would have been in a position to give most material evidence as to the circumstances under which the petitioner became an inmate of the intestate's household. The District Judge found that after Girahagama's death the petitioner, who continued to reside with the intestate, rendered her assistance, and in turn received from her substantial marks of kindness and favour; and that the intestate went with petitioner to Uva to arrange the petitioner's marriage with his present wife; but that, on the other hand, the intestate had never told her friends or relations that she had adopted the petitioner. The petitioner called evidence to prove that, at the treaty for the marriage and on the occasion of the marriage itself, the intestate made statements to the effect that petitioner would inherit her property; but the learned Acting District Judge was not impressed with this evidence, and has refused to act upon it. He has, however, decided in petitioner's favour on the strength of the statements in two documents marked A and B, together with the evidence of Appuhamy Notary, which he considers " prove a clear intention on the part of the intestate to regard the petitioner as her adopted son, " and are, " according to the decisions of the Supreme Court, sufficient publication of such adoption. " Were the matter *res integra*, the District Judge would have held that petitioner had not proved he was the adopted son, for he not only agreed with the District Judge's decisions in two previous cases, No. 2,178 and No. 14,459 of his own Court, but also considered that no declaration of adoption contained in any deed would satisfy the requirements of the Kandyan Law, unless the deed also comprised an express clause of disinherison of the legal heirs. The Supreme Court decisions referred to were those in D. C., Kandy, 29,605 and 55,778, and D. C., Kegalla, 860.

The documentary evidence in the case was as follows. On 13th March, 1897, the intestate and her husband executed a deed of gift (A M D 2) in favour of petitioner, described as " closely connected to us as a nephew by relationship. " A M D 1 was another deed of gift, a " deed of assistance, " executed in petitioner's favour in October, 1899, by the intestate and the appellant, in which petitioner is merely described by name and as " of Asgiriya korale in Matale, presently residing at Siyambalagoda Walawwa " (the intestate's walawwa). On the same day intestate gifted her interest in that walawwa to the appellant. A M D 3, dated 23rd February, 1901, is a " deed of assistance " by intestate to petitioner, described as her " nephew, " who had for twelve years rendered her all succour and maintenance. On 9th August, 1901,

1904. *June* 13.

WENDT J.

the intestate addressed to the Government Agent, as Provincial Registrar, the petition A, stating that she had proposed a marriage for her " adopted nephew, " the petitioner, and asking that the Registrar might be authorized to solemnize the marriage at the bride's residence in Yatinuwara. This petition was in the English language, with which intestate was unacquainted, and there was no proof of its having been explained to her, but the District Judge considered that from the fact of her having signed it she must be taken to have understood and approved of its contents. On 12th August, 1901 (a week before the day fixed for the marriage), the intestate, at Kandy, executed in petitioner's favour a deed of gift of certain lands, describing him as " my nephew (by relationship) adopted by me " (*mavisin tanaget mage bena vana*). Appuhamy Notary, who drew and attested this deed (as also deed A M D 3), was called, and stated that he prepared it on the instructions of the intestate, and that she asked him to describe the petitioner as her adopted nephew, but had not so instructed him in reference to deed A M D 3.

The Acting District Judge, who was left to discover for himself the authorities bearing upon the question involved, has made a careful examination of many of the cases. He has not, however, referred to the decision of Sir Richard Cayley, as Acting District Judge of Kandy, in D. C., Kandy, 53,309 (1), which has always been regarded as the leading case. This Court, in affirming that decision, adopted the reasons given by the District Judge. It was there laid down that, while the law prescribes no particular formalities or ceremonies for a valid adoption, it is necessary that the parties should be of the same caste, and that " the adoption should be public and formally and openly declared and acknowledged; " and further, that (as decided by the case in *Austin*, p. 74) " it should be clearly understood that the child was adopted on purpose to inherit the adoptive parent's property. " Accordingly, Sir Richard Cayley held that the parent's refusal of a proposed *diga* marriage for the adopted child, on the ground that he had adopted her and wished her to inherit his lands, was a sufficiently public and formal declaration to satisfy the law. It also appeared that the child " was always recognized by the family as the adopted daughter of the Basnayaka Nilame, " whose niece she was. There was no documentary evidence relied upon in that case.

That case was followed in *Karunaratne v. Andrewewe* (2). In *Pusumbahamy v. Keerala* (3), Dias J. said: " The adoption which the defendant had to prove was an adoption for the purpose of inheritance. The mere taking and bringing up of a child in the house and settling it in life is not such an adoption, and all that has been proved by the defendant was nothing more. This question has often been

(1) *Grenier* (1873), 117.

(2) *Wendt*, 285.

(3) (1891) 2 *C. L. R.* 53.

raised, and was dealt with by the Supreme Court, and we always required strict proof of the adoption by evidence amounting to a public declaration of the adoption for purposes of inheritance. It is hardly necessary to refer to the decisions and opinions, which are many, and are the opinions of Judges who were well acquainted with the Kandyan Law on the subject." In *Tikiri Kumarihamy v. Punchi Banda* (1) Bonser C.J. said: "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 purposes of inheritance." The Chief Justice also pointed out the significance of the fact that the alleged adoption of the appellant (who had lived with the deceased for forty years) was not generally known.

As to the value of documentary evidence, I think the District Judge was right in saying that it must depend, as in the case of parol evidence, upon its establishing that the child was not merely adopted, but adopted in order to be heir. It must be remembered that the mere bringing up of a child, without any intention of making it one's heir, is also commonly spoken of as "adoption." It is this view of the nature of the documentary evidence necessary, which I understood was taken by the Judge of the District Court in cases Nos. 2,178 and 14,459, D. C., Kandy, and which the Acting District Judge considers the right view. In this view I do not think that the decision of Smedley D. J. in D. C., Kandy, 29,605 (2), would have been upheld after the date of Sir Richard Cayley's case. The Acting District Judge usefully supplements the report in *Beven and Siebel*. He says there was no parol evidence led, and only two deeds of the alleged adoptive parents (apparently deeds of gift to the child) put in. In one they described her as "our grandniece brought forth by the niece of me, Punchirala, and whom we have taken three years after her birth and adopted as our child;" and in the other as "our granddaughter, who was born of my, the said Punchirala's, niece, and whom we have brought up from the time she was three years of age." The Supreme Court's reasons for affirming this decision are not reported. In D. C., Kandy, 55,778, there was both parol and documentary evidence, the latter consisting of a non-notarial deed of the adopting parent, in which the first defendant was described as "my adopted son, who is rendering me assistance since the time of forty-five years." Sir Archibald Lawrie, as District Judge, is said to have relied on this document as strongly corroborating the oral evidence of adoption, and based his judgment principally upon it, and this Court "affirmed" his decision, but without giving reasons. This case is no authority for saying that the deed by itself would have been held sufficient. In D. C., Kegalla, 860 (the Acting District Judge tells us), the District Court

(1) (1901) 2 *Browne*, 299.

(2) *Beven and Siebel*, 61.

1904.
June 13.

WENDT J.

held that the fact of the alleged adopter signing the marriage register of the alleged adopted child as its parent was a sufficient public declaration of adoption. This was apparently not the only evidence in the case. The Supreme Court affirmed the decision, but without giving any recorded reasons, and the same observations would apply to the Marriage Registrar as applied to the deeds in case No. 29,605. It was no proof that the signatory regarded the adopted person as his heir.

Applying these principles to the present case, neither the petition A nor the deed B affords ground for believing that the petitioner had been adopted in order that he might be the sole heir of the intestate. Her statement to the notary goes no further, and it was, besides, not made on any formal or public occasion. Apparently only the intestate, the notary, and the petitioner were present when the instructions were given.

I consider that the order appealed from should be discharged, and the District Court directed to grant letters of administration to the counter-petitioner, Alice Maria Dehigama Kumarihamy, in due course. The petitioner must pay the costs of the appeal and of the contention in the Court below.

MIDDLETON J.—

In a system of law like the Kandyan, which permits adoption to give the status of heir to an adopted child, there ought not to be any doubt as to the intention of the adopter to do so. If we put on one side here the oral evidence led for the petitioner, which, in my opinion, the learned District Judge rightly rejects, there are only the two documents A and B. The other oral evidence points to the conclusion that it was not known that the deceased looked upon the petitioner as her heir.

As regards these documents the words used in them do not appear to express the indubitable intention of the alleged adopter that the petitioner should be regarded as her heir, but might prefer only to a bringing up without making him heir, nor do I think the notary's evidence carried it any further.

I agree, therefore, with my brother Wendt, that we should be guided in deciding this appeal by the principles laid down by Sir Richard Cayley in D. C., Kandy, 53,309 (1), and by Dias J. in *Pusumbahamy v. Keerala* (2), and by Bonser C.J. in *Tikirikumarihami v. Punchi Banda* (3), and I concur in the order he proposes.

Appeal allowed.

(1) *Grenier* (1875), 117. (2) (1891) 2 *C. L. R.* 53.
(3) (1901) 2 *Browne*, 299.

[In Review.]

The case was subsequently heard in review preparatory to an appeal to His Majesty in Council. 1907. *January* 17.

Walter Pereira, K.C., S.-G. (with him *Bawa*), appeared for the petitioner, appellant.

Sampayo, K.C. (with him *Van Langenberg* and *H. Jayewardene*), for the respondent.

Cur. adv. vult.

17th January, 1907. Hutchinson C.J.—

This is a hearing in review with a view to appeal to the Privy Council. The appellant applied to the District Court for administration to the estate of Dehigama Kumarihamy, who died intestate on the 3rd July, 1902, the appellant claiming to be her nephew and adopted son. It was opposed by the respondent, who is the niece of the intestate.

The District Judge found that the plaintiff was not a nephew of the intestate, and the correctness of the finding is not disputed. He was not satisfied with the oral evidence as to the alleged adoption of the plaintiff by the intestate as her heir; he said: "I propose to disregard this evidence and deal with this case as one depending on the documentary evidence and that of the notary." And he held that on the documentary evidence the fact of that adoption was established.

On appeal the Supreme Court held that the documents did not afford ground for believing that the appellant had been adopted in order that he might be the sole heir of the intestate, and it accordingly discharged the order of the District Court and directed that administration be granted to the present respondent.

The appellant admits that for a valid adoption by Kandyan Law, which is the law applicable in this case, it is necessary to prove that the intestate adopted the claimant for the purpose of making him her heir, and that the documents taken alone fall short of that; but he urges that the Supreme Court did not take sufficient account of the oral evidence; that the District Judge did not disbelieve the oral evidence, but merely placed it on one side and held that the documents alone were sufficient to prove the adoption; and that the oral and documentary evidence when taken together fully satisfy the requirements of the law.

The oral evidence on which the appellant mainly relies is that of statements made by the intestate on two occasions, the first at a meeting when she was asking the appellant's future father-in-law to give his daughter in marriage to the appellant, and the second at the marriage feast. On the first occasion several persons were present, besides the appellant, of whom only two gave evidence, the father-in-law and Madduma Banda.

1907.
January 17.
HUTCHINSON C.J.

And the same Banda and the appellant also depose to the statements made by the intestate at the marriage feast. The District Judge has set out the evidence fully enough in his judgment, and I need not set it out again. It was not sufficiently precise and exact to satisfy him. He thought that in all probabilities the intestate made some representation that the appellant would succeed to her property on her death. But it was not proved, and if it had been the fact it could have been proved by the evidence of persons present—that she made any public and formal declaration to the effect that he would succeed to her property as her heir by virtue of her adoption of him.

In my opinion the District Judge was right in disregarding the oral evidence, and the oral evidence taken together with the documentary evidence does not prove the adoption for which the appellant contends.

WENDT J.—

This is a hearing in review preparatory to an appeal to the Privy Council against the decision of my brother Middleton and myself, dated 13th June, 1904. The question is one of adoption by a Kandyan lady, and the facts are sufficiently stated in the judgments under review. Both parol and documentary evidence was relied upon for proof of the adoption. The learned Acting District Judge proceeding upon the documentary evidence, held the adoption proved. His own opinion was that the documents fell short of the requirements of the law, but he felt himself constrained to act upon a different view by certain decisions of the Supreme Court to which he referred. The counter-petitioner appealed, and my brother and I agreed with the District Judge's opinion, holding that the documents did not put it beyond doubt that the adoption was for the purpose of making the adopted person the heir of the adoptive parent, and were therefore insufficient. I see from my notes of the argument of that appeal that the present appellant's counsel did not seriously contest the insufficiency of the documentary evidence, standing alone, but contended that, taken with the parol evidence, it made out an "overwhelming case." It was therefore necessary for us to consider the parol evidence, which was directed to showing that the intestate had made the formal public declaration of an adoption as heir, which was essential to the present appellant's case. I said in my judgment that the District Judge had not been impressed with this evidence and had refused to act upon it; that is to say, I thought he had considered that evidence false and had rejected it. My brother Middleton said that in his opinion the learned District Judge had rightly rejected that evidence. Now, in review, the appellant does not attack the judgment of this Court as being erroneous upon the footing on which we treated the case,

but contends that the District Judge had not pronounced against the truth of the parol evidence in question, and that he (the appellant) is entitled to a definitive finding one way or the other upon that evidence. I listened with great attention to the argument of both the learned counsel who addressed us on this point, but in my opinion it is impossible to read the judgment of the Court below without being convinced that the Judge did not believe the evidence in question, and that that was the reason why he did not feel inclined to place reliance on it, but disregarded it. It was not as if he had not weighed that evidence; on the contrary, he discussed it very fully, and his remarks disclose ample grounds to support his conclusion.

For these reasons I think that the judgment under review should be confirmed, with costs of the hearing payable by the appellant.

MIDDLETON J.—

I am invited by counsel for the petitioner to review my judgment in this case principally on the ground that due weight was not given by this Court to the oral testimony called on behalf of the petitioner to support his contention that he was adopted as a son by the intestate for the purposes of inheritance, and so was the only person entitled to succeed to the estate of the intestate; and secondly, that the District Judge had not in reality rejected that testimony.

It was apparently considered by counsel for the appellant that the argument now used was a new one, *i.e.*, that the oral testimony led on behalf of the appellant, combined with the documents, constituted together clear and distinct evidence of a public declaration by the intestate of the adoption for the purposes of inheritance of the petitioner.

I pointed out, however, that the argument which was used by Mr. Walter Pereira on the first hearing before my brother Wendt and myself was in every respect similar to that adopted by the learned Solicitor-General on the hearing in review, and was duly considered by me before writing my original judgment.

In my opinion there should be no doubt whatever as to the happening of an event the consequence of which would be so important to a family as adoption for inheritance. There should be clear and unmistakable evidence of a deceased's intention to put a person in the place of an heir who without such a nomination would have no right whatever in the property of the deceased.

Sawer says (chapter 7 of the 3rd edition of his *Digest*) that a regular adoption must be publicly 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.

I think also the question of relationship is important, the probability of adoption for inheritance being increased by the fact of consanguinity with the adopter.

1907.
January 17.

MIDDLETON J.

In the present case the District Judge said, as regards the oral testimony, that he did not feel inclined to place reliance on those statements, and proposed to disregard that evidence, and deal with the case as one depending on the documentary evidence.

In my view that is a judicial declaration of his disbelief in the oral evidence, an opinion in which I entirely concur.

If the intestate had been minded to make the petitioner her heir by adoption, there were ample opportunities for making such a declaration in the various deeds which she executed in his favour, in which it might have been set forth in unmistakable language.

It was admitted by the learned Solicitor-General that the documents relied on do not by themselves conclusively show that petitioner was adopted for the purposes of inheritance. If, therefore, the oral testimony is rejected as untrustworthy, which I think is the view of the learned District Judge, and in which I concur, the appellant's case fails.

I am not prepared to subscribe to the argument used by the learned counsel who replied for the appellant, that there was no distinct and definite adjudication by the District Judge, and I would sustain the judgment of my brother Wendt, in which I concurred on the original hearing in appeal, and dismiss this further appeal with costs.

Judgment in appeal confirmed.