1914.

Present : Wood Renton C.J. and Ennis J.

UNGA *v.* MENIKE *et al.*

306—D. C. Ratnapura, 2,061.

Kandyan marriage—Entry in marriage register that the woman had children by the husband and by another associated husband—Is endorsement admissible in evidence to prove the associated marriage?—Evidence Ordinance, s. 35.

A certificate of marriage (of August 15, 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:———."

Held, that this endorsement was admissible in evidence to prove that the children were the children of Horatali by an associated marriage, as the endorsement was made by the certifying authority in the course of his official duty.

THE facts are set out in the judgment.

Bawa, K.C., for plaintiff, appellant.

Morgan, for defendants, respondents.

Cur. adv. vult.

November 18, 1914. WOOD RENTON C.J.—

This is an action for declaration of title to land claimed by the plaintiff through his father Balaya, whom he alleges to have been the sole heir of one Sottana. The defendants, on the other hand, say that Sottana and his brother Sarana were the associated husbands of a woman, Horatali, and that they, together with Balaya, are the offspring of that union, and on that basis deny the plaintiff's title to more than one-third of the land in suit.

The District Judge (Mr. Beven) before whom the case originally came practically discarded the *vivâ voce* evidence on both sides as inconclusive, held on the documentary evidence that Balaya was the sole heir of Sottana, and gave judgment for the plaintiff. The defendants appealed. On the hearing of the appeal they produced, verified by affidavit, what purported to be a certificate (D 4) of the marriage on August 15, 1871, of Sarana with Horatali. This certificate bears the following endorsement:—

At the time of this marriage this woman had by this man and by this man's brother Wattemannannalaye Sottana the following children: (1) Balaya, age seventeen, (2) Adari, age fifteen, (3) Menika, age thirteen, (4) Ukku, age eleven, (5) Kira, age nine, (6) Kiribali, age seven. This woman had previously to this, by one Waduge Menika, a child, Tambiya, age twenty-two years.

The Supreme Court sent the case back for further inquiry and adjudication on this new evidence. The certificate was proved, and the District Judge, from whose decision the present appeal is brought (Mr. Crossman), held that it turned the scale in the defendants' favour, and dismissed the plaintiff's action with costs. There is no reason to doubt the genuineness of the endorsement on the certificate, and as the learned District Judge says, it disposes of the plaintiff's case if it is admissible in evidence. It would be admissible under section 35 of the Evidence Ordinance, 1895 (No. 14 of 1895), if it was made by the certifying authority in the course of his official duty. There is no proof of that on the record as it stands. But in view of the statement of Mr. Pieris, a clerk in the Registry of Births and Deaths, Ratnapura, at the further trial, that "other indorsements of a similar nature are found on other entries," we thought it right to investigate the matter for ourselves. We have now, through the kindness of the Registrar-General, been supplied with information which sets all doubt on the matter at rest, and which shows that, although these cannot actually be traced, instructions were issued to the Provincial Registrars in the Ratnapura District (but apparently not in the Kandy District) to insert the names of children already born in certificates of marriage under the Kandyan Marriage Ordinance, 1870 (No. 3 of 1870), from and after March, 1871, after the receipt of the following letter from the Queen's Advocate. The "clauses" referred to are those of the Ordinance of 1870, which had come into force on January 1, 1871:—

Clause 8 declares all marriages contracted before the Ordinance No. 13 of 1859 came into operation valid, if they were contracted according to the laws, institutions, and customs in force amongst the Kandyans at the time of the contract. It is open to the parties to register such marriages, and clause 9 imposes this duty on the Provincial or Assistant Provincial Registrar. It is true that the form to be observed is simply that of "registering," and that there is "no notice, no ceremony," but the Registrar must be satisfied that the marriage had been contracted according to the Kandyan laws, institutions, and customs. The power to register such marriages was formerly given to District Registrars, but they had also the power (No. 8 of 1861) to require parties to prove their marriage before some competent District Court. This reference to the Court is taken away by the new Ordinance, and the duty cast on the Provincial and Assistant Provincial Registrars.

The Ordinance prescribes no form or notice for registering such marriages; no public notice of registration is necessary; it would be sufficient to give copies to the parties themselves. Such registrations should be entered in the registry book.

Clause 11 provides that, "except as is hereinafter provided," no marriages since No. 13 of 1859 came into force, or to be hereinafter contracted, shall be valid. The words "except as herein 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 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 still be legal under clause 25, if they had been contracted according to the Kandyan customs and subject to the proviso in that clause.

Queen's Advocate's Office,
Colombo, February 4, 1871.

R. Morgan.

It appears to me that we are now in presence of sufficient material to support the endorsement on the certificate D as an entry made in the course of official duty, and I would accordingly dismiss this appeal with costs.

Ennis J.—I agree.

Appeal dismissed.