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UKKU *v.* KIRIHONDA.

C. R., Kegalla, 4,433.

Kandyan Law—Cohabitation before marriage—Subsequent registration—Ordinance No. 8 of 1870, ss. 11 and 39—Best evidence of marriage—Validation of what had been before a void marriage—Marriage in bina *or* diga.

A Kandyan woman, having for two years cohabited with a Kandyan man in the *mulgedara* or ancestral house of her father, went with that man to his house and lived in it for some years, and their marriage was then registered. The marriage certificate described the marriage to be in *bina*.

Held, that the entry in the register of marriages, good as it is *primâ facie*, may be rebutted by evidence which contradicts it.

Held also, *per* MONCREIFF, J., with diffidence, that the effect of registration dates back to the original beginning of the connection between the parties and validates what had been before a void marriage. It also validates the legitimacy of the children born before the registration.

THE plaintiff claimed to be a daughter of one Lappaiya, who died intestate about the year 1896, leaving as his heirs the plaintiff, the three defendants, and one Dingiri. The plaintiff alleged that the defendants were in wrongful possession of the share belonging to her, and prayed for ejectment and declaration of title in her favour. The defendants pleaded that the plaintiff, during her father's lifetime, was married out in *diga*, and thus forfeited her right to any share of her father's estate.

The onus of proof being ruled to be on the defendants, they called, among other witnesses, their mother, who deposed that, after her husband's death, she gave plaintiff out in *diga;* that the plaintiff and her husband left her house about twenty-eight years before action; and that the plaintiff took no produce from any of the lands claimed.

The plaintiff proved that after her father's death one Pina came and lived with her in *bina* in the *mulgedara* (ancestral home) for two years; that she then went with her husband to live on his property in the neighbourhood; that after living so for about eight years, her husband registered her marriage eight years before the present action; that she possessed the land claimed in *tatumaru;* and that she was refused her share last year.

The marriage certificate bore date 17th December, 1894, and described the marriage registered to be *bina*.

The Commissioner (Mr. Allan Beven) believed the evidence given by the mother of the plaintiff, and held that the plaintiff was married out in *diga*, notwithstanding the entry in the marriage

certificate, which he thought was "of not much importance," and was possibly intended to meet "future contingencies, especially as plaintiff's husband lived so close and could easily prove possession of the land." He dismissed the plaintiff's case.

The plaintiff appealed.

Bawa, for appellant.—The plaintiff and her husband cohabited for some years before their marriage was registered, but such cohabitation does not, as in the maritime provinces, constitute marriage. The evidence of cohabitation in *diga* therefore counts for nothing. The marriage certificate is the best proof in the case, and it describes the marriage to be *bina* (Ordinance No. 3 of 1870, section 39). The plaintiff is therefore entitled to her inheritance.

H. J. C. Pereira, for respondent.—The certificate of registration does not exclude the reception of other evidence as to the real nature of the marriage. Assuming that the plaintiff's cohabitation with Pina before 1894 was not a marriage proper, it has been found that she was living in the house of her husband at the time of the registration. The entry in the certificate that the marriage was *bina* was therefore wrong. It was intended to defraud the defendants. The registration of the marriage in 1894 dates back to, and legalizes the *de facto* marriage which had already taken place some years before.

Bawa, in reply.—The question of a *bina* or *diga* marriage is one of intention of the parties, and not residence here or there. The declaration of their intention before the registrar is not to be rebutted by proof that they lived away from the *mulgedara*. There was no marriage before 1894, and the certificate is conclusive as to the intention of the plaintiff and her husband to live in *bina*. How and where they lived previously to 1894 is not relevant to the case.

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The only question in this case is whether the plaintiff Ukku was married to Pina in *diga* or *bina*. A considerable body of evidence on both sides was produced, but the Commissioner believed the story put forward by the defendant, viz., that Ukku had left the parental house many years ago and married in *diga*. If the matter rested there, I should not feel justified in interfering with the finding, although some of the reasons given by the Commissioner are not altogether convincing.

It is admitted on both sides that for a considerable number of years, at all events, the parties have been living

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away from the paternal residence. It is urged on behalf of the plaintiff that, whatever may have happened when she first lived with Pina, the registration of her marriage in 1894 placed her and her husband on a different footing.

Reference was made to section 39 of the Kandyan Marriage Ordinance, No. 3 of 1870, which provides that "the entry (as aforesaid) in the register of marriages and in the register of divorces shall be the best evidence of the marriage contracted or dissolved by the parties and of the other facts stated therein."

Among the facts stated in the register relating to this case we find that the date of the marriage was the 17th December, 1894, and that the marriage was in *bina*. Mr. Bawa urged that the entries were conclusive. I think, however, that the evidence of the register, good as it is *primâ facie*, may be rebutted by evidence which contradicts it.

The point upon which Mr. Bawa has endeavoured to base his observation was that the marriage having taken place in 1894, and the parties having declared when entering into the marriage that the marriage was in *bina*, the question was settled by the declaration of the parties. If he is right with regard to the date of the marriage, I think it is possible that his argument would hold, because if the parties married in 1894 and at the time declared they were marrying in *bina*, and the date given was the real date of the marriage, I am not aware of any reason to prevent them from doing what they intended to do, *i.e.*, to contract a marriage in *bina;* so that the argument put forward on the other side to the effect that, as the parties were living together in 1894 in the husband's house, a marriage in *bina* could not be set up, would probably fail. But Mr. Pereira further urged that the date of the marriage given in the register does not conclude the parties, and that the real date of the marriage is clearly shown from the terms of the Ordinance to mean the date at which the parties began to treat themselves as married persons and to live as married persons.

Reference on that point was made to section 11, according to which "no marriage contracted since the Ordinance No. 13 of 1859 came into operation, or to be hereafter contracted, shall be valid unless registered in the manner and form" as therein provided.

The question is what the word "marriage" means there. Mr. Pereira suggested, and with some reason I think, that it means any connection instituted by rites or ceremonies which, according to custom, would be considered a valid marriage but for the special provisions of the statute law. If that interpretation of the word is correct, I am inclined to think his argument to the effect

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that subsequent registration dates back to the institution of their irregular marriage is correct, because the provision is to the effect that something shall be valid upon registration, and that something is an irregular marriage, which is void for want of registration, and possibly took place some years before.

With some diffidence I am inclined to think that subsequent registration does date back to the original beginning of the connection between the parties, although it is quite true that the provisions of section 30 for rendering legitimate children procreated before registration might suggest that the intention of the Legislature was different. I therefore think there was in this case, and was intended to be by registration under section 31 of the Ordinance, a validation of what had been before a void marriage—a validation dating from the time the void marriage was entered into, and a validation also of the legitimacy of the children. On that view of the matter, which I entertain with some diffidence, I think the appeal should be dismissed, inasmuch as the question comes ultimately to be, what the conduct of the parties was when they came to live together.