hearing with the aid of assessors the criminal Court may be of an opposite opinion to that of the Magistrate. Accordingly all that I now decide is that no sufficient cause has been shown to this Court to entertain an appeal from the Magistrate's order but in view of any possibility that may arise I vary the order of the Acting Chief Police Magistrate to the extent that the copies of the publication which he has been ordered to be destroyed shall not be destroyed until 14 days after the termination of the next criminal sessions. This variation will give all parties opportunity to consider their position in the light of the criminal proceedings and the result thereof.

The motion stands dismissed with costs.

IN RE SUDAMMA.

[Civil Jurisdiction (Maxwell Anderson, C.J.) August 17, 1932.]

Custody of infant—Rights of parents inter se—Marriage Ordinance, 1928[1]*—Validity of Hindu marriage questioned.*

In this case the father of an infant aged about three years sought the custody of the child as against the mother who was living in adultery. The question was raised that the marriage was void under the laws of the Colony. Evidence was adduced that the marriage was celebrated by two Hindu priests registered as Marriage Officers under the Marriage Ordinance (No. 2 of 1918), as amended by Ordinance No. 27 of 1928. It was admitted that the marriage was valid under Hindu law.

HELD.—Despite the age of the child the Court will give the custody to the father if the mother is deemed not a fit and proper person to have such custody.

Obiter dictum.—Failure to obtain a certificate of marriage will not *ipso facto* render a marriage null and void.

[**EDITORIAL NOTE.**—*Vide* Marriage Ordinance Cap. 118 (Revised Edition Vol. II p. 1176). The relevant provisions of the Marriage Ordinance in force at the time of this decision were substantially as in the present Ordinance except for s. 42 (Revised Edition p. 1189) which was added by amendment in 1945 to replace the amendment of s. 41 effected by the Marriage (Amendment) Ordinance (1928) the amendment being otherwise spent.]

Vide also the cases of *R. v. Surajpal* [1934] 1 Fiji L.R., *R. v. Sarjudei* [1937] 1 Fiji L.R., *In re Dukhan* [1939] 1 Fiji L.R. and *R. v. Rama* [1946] 1 Fiji L.R.]

Cases referred to :—

(1) *R. v. Gyngall* [1893] 2 Q.B. 232 ; 9 T.L.R. 471 ; 62 L.J.Q.B. 559 ; 69 L.T. 481 ; 28 Dig. 142.

(2) *R. v. Inhabitants of Wroxton* [1833] 4 B. & Ad. 640 ; 27 Dig. 48 ; 110 E.R. 595.

(3) *Thorpe v. Taylor* [1926] Ch. 689.

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[1] *Vide Editorial Note.*

Hollins Crompton, for the Respondent.—The child is under three years of age. The mother is legal guardian. The interests of the child are paramount and it is of secondary importance whether the marriage is or is not valid. He referred to the Marriage Ordinance, s. 3 (27 of 1928), and to *Thorpe v. Taylor.*

G. F. Grahame for the Applicant.—The marriage is valid. The mother is living in adultery and the father is the proper guardian. *Reg. v. Gingall* [1893] 2 Q. B. 242. The evidence of the marriage officer shows that no books or forms of certificate were issued at the time of the marriage.

MAXWELL ANDERSON, C.J.—This is an application by the husband Surajpal, that this child a boy of three, be discharged from the custody of his wife Rampiari.

The facts are that the parties were married in 1927 by a registered marriage priest under the Marriage Ordinance. No certificate for marriage was, however, obtained. The parties lived together for some time and a child was born in 1929. At some date in 1930 Rampiari left her husband, for reasons which have not been gone into in detail, and ultimately misconducted herself with one Atma Singh, with whom she is now living in adultery. She has up to the present retained the child.

It is urged by Mr. Crompton that owing to the age of the child it is in his interest that Rampiari should be given his custody. He bases his argument on the accepted principle that the Court should be guided above all by consideration of the welfare of the child. He has produced no argument other than that of age to rebut the prima facie right of the father and does not allege any misconduct or inability on the father's part which would disentitle him.

Against that, it is admitted that the wife is living in adultery, having left her husband without (so far as any evidence before me is concerned) sufficient ground. She is, I infer, likely to be outcast by the Hindu community to which the child would normally belong ; there is some evidence that the man Atma Singh is of a different race and religion ; there is no evidence that the mother has any means, and she appears to be dependent upon the generosity of the man with whom she is living. If she is given the custody of this child it is difficult to see what legal obligation there would be upon anybody to maintain it.

In order to deprive an innocent party of the custody of the children in favour of a party guilty of matrimonial misconduct, very exceptional circumstances must be shown. No such circumstances exist in this case.

In my view it is clearly in the interest of the child Sudamma that he should be restored to his father, whose parents will be able to care for him.

A great deal of argument has taken place as to whether this is or is not a valid marriage under the Ordinance. It is admitted that it is valid according to Hindu law, but I am asked to say that on account of the omission to obtain a certificate for marriage the marriage is void and a nullity for all purposes, and that the child must be regarded as illegitimate and in the same position as a child born of illicit intercourse. Taking the view I do of the facts it is perhaps unnecessary for the decision of this case that it should be made known that in my judgment failure to obtain a certificate does not *ipso facto* void a marriage and

that only if it be proved that both parties wilfully and knowingly went through what they knew was an irregular marriage can it be made void (see *R. v. Inhabitants of Wroxton*, 4 B and Ad. 640).[1]

I am far from satisfied that the parties have had the necessary knowledge or intent, but that point it is not necessary to decide.

The order of the Court is that Sudamma is discharged from the custody of Rampiari, and Surajpal is entitled to his custody.

RE ESTATE OF HARPER DECEASED.

[Civil Jurisdiction (Howell, Acting C.J.) November 26, 1932.]

Death Duties Ordinance 1920[2]*—bequest to Parish Councils in Scotland for Charitable objects—whether liable to succession Duty.*

A testator bequeathed to certain parish councils in Aberdeenshire, Scotland, pecuniary legacies for charitable objects. The Commissioner of Stamp Duties assessed the legacies for succession duty under the provisions of the Death Duties Ordinance 1920. The Executors of the will required the Commissioner to state a case for the opinion of the Supreme Court. It was agreed that by virtue of s. 6 of the Local Government (Scotland) Act 1929 the County Council of Aberdeenshire had succeeded to the rights and trusteeships of the parish councils and that the stated objects of the bequests were within the administrative functions of the Parish Councils in Scotland as they existed at the date of the testator's will. The question of law for the opinion of the Court was whether the successor to the above legacies is a corporation of persons for religious, charitable or educational purposes and whether the legacies are exempt from succession duty.

HELD.—The corporations contemplated by the exemption in the Death Duties Ordinance, 1920, are corporations either wholly or at any rate primarily formed for charitable purposes.

[EDITORIAL NOTE.—See *In re Diplock, Wintle v. Diplock* (1941) Ch. 253 at p. 264 for reference to a charitable purpose to be achieved in a non-charitable institution.]

CASE STATED by the Commissioner of Stamp Duties to determine whether certain legacies are exempt from succession duty.

G. F. Grahame for the Executors.—Some of the objects of the corporation (County Council) are charitable—the Council is a corporation for charitable purposes.

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1 *Vide Marriage Ordinance Cap.* 118 *s.* 15—(2) (*Revised Edition Vol.* 1 *page* 1180). *This section was in force at the date of the decision here reported.*

2 *Cap.* 151 *Revised Edition Vol.* II *Page* 1617.