1941 *Present :* **Hearne and de Kretser JJ.**

AMBALAVANAR *v.* PONNAMMA *et al.*

120—D. C. (Inty.) Colombo, 3,484.

Guardianship proceedings—Father's right to custody of child—Thesawalamai—Jaffna Matrimonial Rights and Inheritance Ordinance, s. 40 (Cap. 48)—Stamping of documents—Stamp Ordinance, Schedule A, Part II., para F (f). (Cap. 184).

In guardianship proceedings documents other than those mentioned in paragraph F (*f*) of Schedule A, Part II. of the Stamp Ordinance are exempt from stamp duty.

The father of a child subject to the *Thesawalamai* is entitled to its custody on the death of the mother.

***Kanapathipillai v. Sivakolunthu* (*14 N. L. R. 484*), referred to.**

APPEAL from an order of the District Judge of Colombo.

N. Kumarasingham (with him *C. Renganathan*).—There are two preliminary objections to the hearing of this appeal, viz. :—(1) The appellant has failed to deliver to the Secretary of the District Court together with his petition of appeal proper stamps for the decree and order of the Supreme Court and the certificate in appeal.

(2) The appellant has failed to affix to the petition of appeal the necessary stamps. In fact no stamps have been supplied at all ; the appellant taking the view that in guardianship proceedings no stamps are necessary.

Chapter 189 of the Legislative Enactments, section 2, states what instruments are chargeable with duty. Every document mentioned in Parts II., III., IV., and V. of the Schedule comes under that provision.

Section 5 saves certain instruments and does not affect the requirements or exemptions created by other Ordinances. In the Civil Procedure Code section 10 makes provision for exemption when a case is transferred from one Court to another, section 449 makes provision for actions by paupers. Section 581 specially exempts Lunacy Proceedings. There is no such exemption for guardianship proceedings under Chapter XL. of the Civil Procedure Code. By implication it follows that Guardianship Proceedings should be stamped unless otherwise exempted.

Under the Stamp Ordinance the position is quite clear. Schedule A, Part II., contains the duties on Law Proceedings in the various Courts. In Part II., head F, " Miscellaneous " defines the duties specially fixed in certain cases and the exemptions. Under this head special provision has been made for matrimonial actions, actions under the Small Tenements Ordinance, actions to give effect to public charity partition actions, Claim Proceedings, Actions under that Patents Ordinance, &c. No such provision has been made for guardianship proceedings. The legislature intended that guardianship proceedings should bear the ordinary class stamp.

Special rates have been fixed for two items in guardianship proceedings under head F (f) certificate of curatorship and the half-yearly accounts, except where the Court has ordered the proceedings to be in blank. No such order has been made in this case. The reference to the order of Court that proceedings may be in blank again shows that the proceedings ordinarily should be stamped as any other proceedings. Similar provision has been made fixing special rates for certain documents in Part III. of the Schedule in Testamentary Proceedings under sub-head (7). Every certified copy of any will or codicil or of any other document mentioned in Part III. shall bear a stamp of Rs. 3 and not the class stamp. Actions under the Trusts Ordinance have been held to be liable to the general provisions *re* stamps. See *Saddanatha Kurukkal v. Subramaniam* [1]. *Thambiah v. Kasipillai* [2]; *Saverimuttu v. Saiva Paripalana Sabha* [3]. *A fortiori* actions in Guardianship under Chapter XL. of the Civil Procedure Code should be stamped. Under section 583 the action is commenced by an application by way of summary procedure. Under section 273 every application to Court by way of summary procedure "shall be instituted upon a duly stamped written petition".

[DE KRETSER J.—What is the required stamp ?]

If the application is for the appointment of a guardian and curator then the value will be determined by the value of the assets of the minor. If the child has no such assets, then the smallest class will apply. The smallest class in Part II. of the Stamp Ordinance in the District Court is the class up to and including Rs. 1,000. That would include all matters from zero up to and including Rs. 1,000. In this case that difficulty is obviated as the minor is already entitled to certain assets. On the death of her mother she became entitled to the same and the mother's estate is being administered in th District Court, Colombo.

N. Nadarajah, (with *Chelvanayagam* and *H. W. Tambiah*) for appellant.—A proceeding for the appointment of a guardian or curator over the minor is not a civil proceeding and is not stampable. The Courts Ordinance states that the District Court is vested with Civil Jurisdiction, Insolvency Jurisdiction, Matrimonial Jurisdiction, &c., and Jurisdiction over Minors and Idiots.

Therefore Civil Jurisdiction is something different from the Jurisdiction Courts exercise over minors. The Stamp Ordinance adopts this division *mutatis mutandis.*

It is only in the case of civil proceedings Schedule A, Part II. will apply.

There is a letter from the Registrar of the Supreme Court and the Secretary of the District Court of Colombo to the effect that it is a long standing practice that guardianship and curatorship proceedings are never stamped. This practice amounts to a *cursus curiae* and in the matter of procedure *cursus curiae* must be followed, *Boyagoda v. Mendis* [4].

Even if it is regarded as a civil proceeding, the only provision regarding the stamping of curatorship proceedings is found in the proviso which says that every certificate of curatorship under Chapter XL. of the Civil Procedure Code, section 582, shall bear a stamp of Rs. 6 and every account filed thereunder shall bear a stamp of Rs. 3, unless the Court shall order

[1] *39 N. L. R. 387.*
[2] *40 N. L. R. 298.*
[3] *13 C. L. W. 141.*
[4] *30 N. L. R. 321.*

the proceedings to be on blank. None of the other documents have been stamped in the lower Court and therefore the District Judge has impliedly ordered that the proceedings must be in blank.

N. Kumarasingham (in reply).—The definition of the Civil Jurisdiction of the District Court in the Courts Ordinance has no bearing on this question. On the question of stamps we have only to look to the Stamp Ordinance or other Ordinances where special exemptions have been created. The Stamp Ordinance makes provision for all proceedings in Court. It does not speak of Civil Proceedings but of Law Proceedings. The only exemption it creates in guardianship proceedings is in the case of affidavits. That exemption appears under the head Civil Proceedings. That again shows that guardianship proceedings come under the general head. The whole scheme of the Stamp Ordinance supports my proposition. The Courts Ordinance does not help the appellant. Matrimonial jurisdiction is defined there as something other than Civil jurisdiction, yet provision for it is made under head (*f*) in Part II. and a special rate is mentioned. Guardianship proceedings have all been similarly treated. That again shows that the ordinary stamp duty is payable. A special part of the schedule deals with testamentary matters, probably because that has been a substantial source of revenue. One cannot think of any other reason.

The case *Boyagoda v. Mendis* (*supra*) has no application. This is not a matter of procedure. If by long established practice the revenue has been defrauded then that practice must go. See the observations of Bertram C.J. in *Sathasivam v. Vaithianathan*[1].

The Stamp Ordinance does not create any exemption in the case of Guardianship proceedings. The absence of stamps is a fatal objection. Guardianship proceedings on the question of stamps are in the same position as proceedings under the Trust Ordinance.

[At this stage their Lordships intimated that they will hear the case on the merits also.]

N. Nadarajah, (with *Chelvanayagam* and *H. W. Tambiah*) for appellant.—This raises the question whether under the law of *Thesawalamai* a father who remarries loses the custody of the minor child. Under the old *Thesawalamai* the law on this subject is contained in section 1, sub-section (11) of the *Thesawalamai* Code which states "If a father wishes to marry a second time the mother-in-law or nearest relation *generally* takes the child or children in order to bring them up; and in such a case the father is obliged to give at the same time with his child or children the whole of the property". The words "generally takes" show that the provision was not obligatory and it was a matter of arrangement, but was revived in *Kanapathipillai v. Sivakolunthu.*[2]

Even under the old *Thesawalamai* the law governing guardianship was the Roman-Dutch law. Since there was no definite provision in *Thesawalamai* under the Roman-Dutch law the father did not cease to be a guardian on his remarriage.

Section 1, sub-section (11) of the *Thesawalamai* Code was long obsolete. *Vide* the dictum of Pereira J. in *Theivanapillai v. Ponniah*[3]. It was

[1] *24 N. L. R. 94.*

[2] *14 N. L. R. 448.*

[3] *17 N. L. R. 437.*

only revived by the case of *Kanapathipillai v. Sivakolunthu.* This case is distinguishable from the present case. The case of *Kanapathipillai v. Sivakolunthu* (*supra*) was decided before Ordinance No. 1 of 1911 came into operation.

The effect of sections 39 and 40 of Ordinance No. 1 of 1911, now sections 37 and 38 of the Jaffna Matrimonial Rights Ordinance, is to repeal by implication section 1, sub-section (11) of the *Thesawalamai* Code. Section 1, sub-section (11) primarily deals with the right to manage the minor's property. The right of guardianship was only incidental. The property had to be handed over to the grandmother when the father remarried. But section 39 of Ordinance No. 1 of 1911 gives the father the right to retain the property even on the remarriage. These are inconsistent provisions of law. Section 2 of Ordinance No. 1 of 1911 (now section 40 of the Jaffna Matrimonial Rights Ordinance) states that if some provision of Ordinance No. 1 of 1911 is inconsistent with a provision of the collection of customary law known as *Thesawalamai* then the latter provision is repealed (*vide Annapillai v. Saravanamuttu*).[1] Therefore section 1, sub-section (11), is repealed and the law of guardianship is governed by the Roman-Dutch law.

The learned District Judge holds that the child will be happy in both places and hence the custody must be given to the father who has a legal right.

N. Kumarasingham, for respondent.—Section 11 of the *Thesawalamai* Regulation provides that "if a father wishes to marry a second time the mother-in-law or the nearest relation generally takes the child or children (if they be still young) in order to bring them up; and in such a case the father is obliged to give at the same time with his child or children the whole of the property brought in marriage by the deceased wife, and half of the property acquired during his first marriage". The words "generally takes the child or children" does not mean that the taking of the children by the grandmother was a matter of arrangement. If it was a matter of arrangement, the handing over of the property to the grandmother might as well be a matter of arrangement. But the language used is "the father is *obliged to give*". The expression "generally takes" has been used to denote the idea that the grandmother cannot be compelled to take the child. In other words, she is under no obligation or duty to take the child. She has the right which she generally exercises. *Kanapathipillai v. Sivakolunthu* (*supra*) is the only case in point. It is a judgement of a bench of two Judges where the grandmother's right to guardianship of the children on the remarriage of the father was recognized. (*Theivanapillai v. Ponnaiah*) (*supra*) and (*Annapillai v. Saravanamuttu*) (*supra*) are cases under the Maintenance Ordinance. The obligation of the father to maintain the child under the Maintenance Ordinance is independent of the Provision of *Thesawalamai.*

In interpreting the provisions of the *Thesawalamai* Regulation, one must have regard to the fact that it is a compilation of Customs and not a statute drafted in precise language.

[1] *40 N. L. R. 1.*

It is correct that the provision regarding the custody of children appears in a section dealing with succession to property. Nevertheless, it forms part of the *Thesawalamai* Regulation where it is recognized as custom having the force of law.

The provisions of section 11 of the *Thesawalamai* Regulation regarding the custody of children on the remarriage of the father are not inconsistent with sections 37 and 38 of Ordinance No. 1 of 1911. Under section 11 the father was obliged to hand over the property to the grandmother when she took the children. Under sections 37 and 38 the father is given the right to continue in possession and enjoy the income till the child marries or attains majority. If he continues in possession, he is obliged to maintain the child till the child attains majority or marries.

The grandmother's right to the custody of the children is unaffected by sections 37 and 38.

Cur. adv. vult.

March 7, 1941. DE KRETSER J.—

Respondent's Counsel took a preliminary objection to the appeal being heard, viz., that the petition of appeal was not stamped nor had stamps been supplied for the decree of the Supreme Court and the certificate in appeal. He urged that guardianship proceedings were civil proceedings and as such fell to be stamped under Part II. of Schedule A to the Stamp Ordinance. He proposed that the lowest class should be taken for the purpose of stamping, urged that the provisions in paragraph F (*b*) was supplemental so far as it related to the certificate of curatorship and to accounts, and that the concluding sentence indicated that the proceedings had to be stamped. He drew attention to the fact that special provision was made for exempting proceedings in Lunacy from stamp duty in section 581 of the Civil Procedure Code, for Pauper Actions in section 449, and for Affidavits in proceedings under chapter XL., in Part I. of Schedule A. He also drew our attention to decisions of this Court on the stamping of appeals under the Trusts Ordinance.

For the appellant our attention was invited to section 62 of the Courts Ordinance which showed that proceedings in District Courts were of different types and were not divided merely into civil and criminal. Counsel argued that the Stamp Ordinance had had these different types of cases in mind. He also argued that the District Judge must be taken to have exempted the proceedings from stamp duty, and finally urged a *cursus curiae* in support of which he produced two letters from the Secretary of the District Court, Colombo, and the Registrar of this Court.

I may say at once that the Court was of opinion that even if these letters did establish a *cursus curiae* the Court would not give its sanction to the continuance of the practice if it felt the proceedings required to be stamped. Nor did it think the omission in the District Court amounted to exemption by the District Judge. There remain therefore the other points. It is not safe to argue that, because express provision was made regarding Lunacy and Pauper proceedings and none exempting guardianship proceedings, therefore, the latter ought to be stamped. One would require to know the history of the different enactments. It may be that the sections regarding Lunacy were taken bodily from one source and those regarding guardianship from another. Both lunatics and minors

may have valuable estates, both are placed under the special care of District Courts, and there seems to be no reason why the one class should be more favoured than the other.

The exemption regarding affidavits followed necessarily from the arrangement of the schedules in the Stamp Ordinance: once stamps for affidavits were required all exemptions had to come in under that head: it would be wise to make the exemptions clear even if it were not necessary.

It seems to me that the Stamp Ordinance does follow the lines of section 62 of the Courts Ordinance. Section 63 of that Ordinance defines the civil jurisdiction of a District Court and later sections define its jurisdiction with regard to revenue, matrimonial, testamentary, lunacy and guardianship matters. The District Court is also given jurisdiction by various other Ordinances, such as the Insolvency, the Trusts and Patents Ordinances. It will be noted that its civil jurisdiction is distinct from its jurisdiction over minors and lunatics. Its civil jurisdiction covers the type of case with which we are familiar and which the Civil Procedure Code requires to be valued with regard to the subject-matter of the action. That the Stamp Ordinance adopts this division and this definition of civil proceedings will be seen from the circumstance that the duties imposed in paragraph A all relate to the class of the case and the items specified are such as are found in, what I may call, the ordinary civil action. It makes special provision in Parts III. and V. for testamentary and insolvency proceedings. In paragraph F, as the very heading states, provision is made for a number of miscellaneous matters. In this paragraph are included different types of cases not otherwise provided for. Matrimonial suits are to be stamped on a specified class basis "according to the classification of suits in Civil Proceedings in District Courts". Note the reference to "Civil Proceedings". So also proceedings under the Small Tenements Ordinance are given a value, as are proceedings under the Patents Ordinance and actions for carrying into effect Trusts for Public Charity. Nothing is said about Lunacy or Pauper proceedings, probably because the Civil Procedure Code had already exempted them from stamp duty. Coming to proceedings under Chapter XL., *i.e.*, guardianship proceedings, it imposes stamp duty on only two instruments, and the duty imposed has no reference to the value of the estate and seems to be purely arbitrary. If the legislature considered that guardianship proceedings should be stamped according to value, or according to class, it could as easily have provided for that being done as it had with reference to other types of proceedings. It thus follows that no duty other than those specified in (*f*) have been imposed in guardianship proceedings, and even if the excepting clause indicates an intention to impose a duty that intention has not been given effect to. But that clause refers to the particular instruments previously named, a certificate or an account being a "proceeding", as paragraph A and Part III. show.

In my opinion no stamps were required for the petition of appeal or the certificate in appeal or the decree in appeal and the preliminary objection fails.

I pass to the appeal. The facts giving rise to it are these:—The appellant married the respondent's daughter and they had a child, regarding whose custody the appellant and his mother-in-law are quarrelling. The appellant's wife died and shortly afterwards the appellant, who is a medical man, married a second time and went to England. He then left his child with the respondent, who entered into a written agreement, filed of record, agreeing to return the child to him on his coming back but reserving her legal rights, if any.

On his return respondent did not abide by her undertaking but instead she started proceedings to have a curator appointed for the minor's estate and herself appointed as the guardian. The estate of the appellant's deceased wife is being administered by the Secretary of the District Court of Colombo, and as the minor is the sole heir and the respondent is her guardian *ad litem* there is no reason to believe that the full estate will not be ascertained and in due course pass to the minor. There being sufficient provision for administration of the estate and the testamentary proceedings being, I understand, far from complete, it seems to be quite unnecessary to appoint a curator of the minor's property at this stage. It will not be necessary even later, for according to section 37 of the Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 48) the appellant is entitled to possess the minor's estate until the child is " married or attains majority ".

These proceedings seem to have been taken purely for the purpose of having the question of guardianship decided and if the District Judge does decide to continue the curator and to have all accounts filed periodically I trust he will see that all the expenses for these useless proceedings are paid by the respondent personally. He is given full power to cancel his order appointing a curator.

Turning to the question of the guardian, in the absence of express provision the Roman-Dutch law would apply and both in that law and in English law the father would have a paramount right to the custody of his child, but overriding his right would be the welfare of the child. The learned District Judge has held that the child would be as well cared for and happy with either party but that perhaps the grandmother might bestow just a little more love on it. There would then be no adequate reason why the appellant should not have his own child except some legal right in the respondent overriding the natural rights of the father. The learned District Judge in a very careful and analytical judgment has found such a right for the grandmother in the provisions of paragraph 11 of the *Thesawalamai*. He is supported by the judgment of this Court in the case of *Kanapathipillai v. Sivakolanthu*[1]. The judgment is by a Bench of two Judges, and if we differed from the view there taken, as we do, we should ordinarily refer the question for decision by a fuller Bench. But this step is unnecessary in view of the fact that the passing of the Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 48) alters the situation and leaves us free to consider the question for overselves.

The first thing to decide is whether paragraph 11 of the *Thesawalamai* has been repealed. Chapter 48 deals with the matrimonial rights of

[1] *14 N. L. R. 484.*

husband and wife with reference to property and with rights of inheri-ance. Section 40 enacts that so much of the provisions of the *Thesawalamai* as are inconsistent with the Ordinance are repealed by it. The *Thesawalamai* (Chapter 51) purports to be a collection of customs of the Inhabitants of Jaffna made by Governor Simons in 1706, and the heading of this collection states the subjects covered by it. Guardianship of minors is not one of the subjects mentioned. Part I. expressly deals "Of Inheritance and Succession to Property". Presumably that part would be repealed by Chapter 48 which deals with the same matters. In Part I. are various sub-heads, all dealing with property. Paragraphs 9 and 10 deal with the position where the father dies and children and their mother are left. Paragraph 11 deals with the case of the mother dying and the father and children being left. The case of both the spouses is now dealt with by section 37 of Chapter 48. The obvious result is that paragraphs 9 to 11 are no longer of effect. Chapter 48 had not been brought into force at the time *Kanapathipillai v. Sivakolonthu* (*supra*) was decided and in the course of his judgment Lascelles C.J. repelled the suggestion that paragraph 11 had become obsolete. He seems to have thought that paragraph 11 contained a statement as regards the *rights* of the maternal relations with regard to the person and property of the child when the father is married a second time, and later he speaks of the *rule* of the *Thesawalamai* with regard to guardianship. With all respect to him, I think he went too far if he meant to say that the paragraph stated an absolute right and a universal rule as regards guardianship alone. He coupled guardianship of the child with custody of its property and there he has some support in the paragraph. If then custody of its property also decided the guardianship of the child, Chapter 48 gives the custody of the property to the surviving spouse and the surviving spouse should be its guardian also. The *Thesawalamai* imposed no forfeiture on the widow who married again but it did on the widower. The forfeiture was with respect to his possession of the child's property. Chapter 48 abolishes that forfeiture with regard to property and there must be a strong reason shown why it should attach to the custody of the children.

With all respect I would submit that guardianship of the children is only incidentally referred to and that it was not intended to be dealt with at all. The statement is too vague and general and finds too casual a place to be construed as a considered statement of the rights to guardianship. The scheme which the complier seems to have had in mind was somewhat as follows :—

(1) The father remains in possession so long as he does not marry again. That is a statement of his customary *right*. (2) If he marries again he forfeits the usufruct. The question at once arises—Who takes possession of the property ? It is a question which has practical importance only when the children are young. The compiler in effect says—" Well, that presents no difficulty, the mother-in-law or nearest relation *generally* takes the children, and with the children goes their property." With respect to the property, which alone he set out to deal with, he uses language showing the rights of the surviving spouse. He does not say the father is not entitled to the custody of the children or

that the maternal relations are so entitled but he says they generally have the children. That happens generally: there is no question of rights. It happens generally and not invariably. It is not confined to the maternal relations but any near relative may take the children. So casual is the reference to guardianship that he deals only with the case of the children being young and only with a situation that is often met with. There is no reference to the guardianship of tne children if there is no near relative nor to the case of there being one who is not willing to take them. He is content to deal with the father's rights to possession of the property and to leave the rare case of there being no one to take charge of the property to be dealt with if and when it arises.

The paragraph would indicate a family arrangement which very commonly was made, but it was an arrangement and nothing more. It was bound up with the possession of the property and the maintenance of the child. Both matters have been dealt with in Chapter 48. In my opinion paragraph 11 of the *Thesawalamai* has been repealed and the passing remark about the custody of the children has not escaped repeal.

The learned Judge having found that the father would be a suitable guardian of the child, there is no reason why his natural rights should not be recognized and the order will be that he be appointed its guardian and declared entitled to its custody. That custody is what the respondent promised him on the written agreement, an agreement which she ought to have honoured. The father is a medical man and presumably he is sensible enough not to let the question of his rights affect the relations of the child with its grandmother.

Now that the rights of parties are decided, I trust that suitable family arrangements will be made to secure the happiness of all concerned.

The appeal is allowed and order will be entered in appellant's favour with costs of the inquiry in the Court below and of this appeal.

HEARNE J.—I agree.

Appeal allowed.