1904.
February 10.

VISUVANTHER *v.* TIYAGARAJA.

D. C., Jaffna, 2,470.

Illegitimate children—Father's last will—Bequests to them thereunder—Validity thereof under the Tesavalamai.

Where a father had made certain bequests to the children of his concubine, and his heirs objected to them on the ground that such bequests contravened the *Tesavalamai*, which applied to the parties in the case, who were Jaffna Tamils—

Held, that though it was illegal under the *Tesavalamai* for illegitimate children to inherit paternal property, no provision is made incapacitating them from taking property given under a will or a deed of their parents.

THE plaintiffs in this case were the heirs of one Visuvanathar who, having separated from his wife *a mensa et thoro*, lived in concubinage with the fourth defendant, to whom were born the first, second, and third defendants.

There were no children by his wife. By his last will he made bequests to his illegitimate children. Probate of the will was obtained, and the concubine was made the administratrix of the estate of the deceased.

The heirs thereupon objected to the bequests made to the illegitimate children, because they alleged it contravened the *Tesavalamai*, which ought to govern the parties in this case, who were all Jaffna Tamils. The District Judge held that wills being apparently unknown to the *Tesavalamai*, we must apply the Roman-Dutch Law, under which the bequests in question were good. This decision was based on the ruling of the Supreme Court in *Karonchi Hami v. Ango Hami*, reported in *2 N. L. R. 276*. As the children were the result of neither an incestuous nor an adulterine union, they could take under the will. Against this order the plaintiffs appealed.

The case came on for argument on 10th February, 1904, before Layard, C.J., and Moncreiff, J.

Dornhorst, K.C., for appellants.—The Judge was wrong in saying that wills were unknown in the *Tesavalamai*, as there is a number of decisions which recognize their existence (*Sec. 1, ch. 18, p. 175*). But these wills cannot break the customary law (*Muttuk., pp. 15 and 17*).

The following references were also made by the learned counsel: *Vanderlinden, 2, 7, 353; Voet, 48, 5, 7; Censura Forensis, 3, 4, 39* and *5* (*Pt. I.*), *26, 1*.

Sampayo, K.C. (with him *Wadsworth*), for respondents.

10th February, 1904. LAYARD, C.J.— 1904. *February 10.*

It appears to me that this judgment should be affirmed. The Legislature in 1844 rendered it competent to any person in this Island to make a will in respect of property which at the time of his death belonged to him, or which he might be entitled to of whatsoever nature or description, in favour of any person or persons whatsoever, subject, however, to the proviso that such person or persons were not legally incapacitated from taking the same.

Now, at the time the Ordinance No. 21 of 1844 was passed the *Tesavalamai* was recognized as existing law, and was binding on the parties to this suit. No provision has been cited to us from the *Tesavalamai* which incapacitated persons from taking under a will. It is suggested, however, that the persons to whom the properties in this case were devised were prohibited from taking under the will, in view of the provisions of the Roman-Dutch Law, and that as the *Tesavalamai* did not incapacitate persons, situate as these were, from taking under a will, we must apply the Roman-Dutch Law in this case. Under the Roman-Dutch Law illegitimate children did not inherit the property of their father, but the *Tesavalamai* nowhere provided that the father should not donate or give property to any one or more of his illegitimate children, neither did it provide, as the Roman-Dutch Law does in certain cases, that an adulterine child is incapacitated from receiving property under his parents' will. Under these circumstances it appears to me that, although an illegitimate child under the *Tesavalamai* does not inherit his father's property, there is no provision in the *Tesavalamai* which legally incapacitates him from taking property willed to him by his parents.

For these reasons I think that the judgment of the District Judge should be affirmed.

MONCREIFF, J.—Agreed.