1931

Present: **Lyall Grant and Drieberg JJ.**

CHELLIAH *v.* KADIRAVELU *et al.*

29—D. C. (Inty.) Jaffna, 7,238.

Thesawalamai—Illegitimate woman—Intestacy—Dowry property—Contest between heirs of mother and husband.

Where a woman of illegitimate birth, subject to the Thesawalamai, died intestate leaving her husband and no issue,—

Held, that the legitimate issue of the mother of the intestate was entitled to succeed to her dowry property to the exclusion of her husband.

APPEAL from an order of the District Judge of Jaffna.

H. V. Perera (with him *Supramaniam*), for administrator, appellant.

Hayley, K.C. (with him *Thillainathan*), for respondents.

October 14, 1931. LYALL GRANT J.—

The question here is whether according to the Thesawalamai as amended by Ordinance No. 1 of 1911 the husband of a bastard succeeds to her dowry property in preference to the children of her mother or *vice versâ*.

The answer depends primarily on the construction of section 37 of Ordinance No. 1 of 1911. The learned District Judge has confessed that he cannot understand the section and he falls back on the well-known principle of Thesawalamai that dowry property of a wife reverts in the absence of children to her own family. The husband has no rights of inheritance to the dowry property of the widow or indeed to any of her property except on failure of all other heirs.

Section 37 of Ordinance No. 1 of 1911 provides that—

> " When an illegitimate person leaves no surviving spouse or descendants, his or her property will go to the mother, and then to the heirs of the mother so as to exclude the Crown."

Section 38 may conveniently be considered here.

It runs:—

> " In all questions relating to the distribution of the property of an intestate where this Ordinance is silent, the provisions of the ' Matrimonial Rights and Inheritance Ordinance, 1876 ', and such laws as apply to the Tamil inhabitants of the Western Province shall apply."

Admittedly, the common law of the Island, *i.e.*, the Roman-Dutch, applies to Tamils of the Western Province.

The Matrimonial Rights and Inheritance Ordinance, No. 15 of 1876, provides as follows:—

> " Section 37. Illegitimate children inherit the property of their intestate mother, but not that of their father or that of the relatives of their mother. Where an illegitimate person leaves no surviving spouse or descendants, his or her property will go to the heirs of the mother, so as to exclude the Crown."

It will be noted that this Ordinance makes no provision for what happens when the illegitimate person leaves a mother alive and in this respect differs from the Ordinance of 1911.

The 1876 Ordinance refers one to the rules of Roman-Dutch law as it prevailed in North Holland, and Walter Pereira in his *Laws of Ceylon, page 481*, says that in North Holland all the property went to the relatives of the maternal line. This has to be considered in conjunction with the rule prevalent in Zealand which is set out immediately before at page 480.

The Zealand law allowed the relatives of the maternal line to take one-half only, the remainder going to the Crown. If the mother was alive all went to the Crown and *Van der Keesel, 308*, from whom Pereira quoted, does not say that in North and South Holland the rule was different in this respect.

The law regard Zealand is taken from *Grotius II; 31, 4.*

It may be mentioned that the South African law, founded on the Political Ordinance of 1580, on the *States General Edict of 1594*, and

on the modification contained in the *Dutch East India Company's Charter of 1661* allows succession by the mother, whom failing, by her children, in preference to the husband.

I do not think it is necessary to consider further in the present case the question of whether the mother of an illegitimate child can by our law succeed in any event.

The mother is dead and the question we have to decide is, not whether she can succeed, but whether the collaterals on her side can succeed. That they could do so under Roman-Dutch law is settled by *Grotius II; 27, 28* and *Van der Keesel (341)*. See also *de Bruyn's Commentary on the Opinions of Grotius, page 366, paragraph 24.*

Ordinance No. 1 of 1911, section 37, provides expressly for the succession of the mother and after her of the children in a certain event which is not the event here, viz., when there is no surviving spouse or descendants.

The question therefore narrows itself down to this. Does section 37 of Ordinance No. 1 of 1911 introduce an exception to the General Roman-Dutch law by preferring the surviving spouse to the mother's children?

The order of inheritance laid down by Ordinance No. 1 of 1911 in the case of legitimate persons is broadly speaking the same as that prescribed by Roman-Dutch law.

The Ordinance of 1876 gave the surviving spouse one-half of the deceased's property. This is an extension of Roman-Dutch law, and it is not repeated in Ordinance No. 1 of 1911, which is therefore less favourable to the spouse.

Under that Ordinance the surviving spouse's prior right is only to half the tediatatem or property held in common, which strictly speaking is not a right of inheritance at all. His right of inheritance is postponed, as in Roman-Dutch law, to that of all other heirs.

There can be no doubt that descendants succeed in preference to all others, but it was argued that the prior mention of the surviving spouse to descendants in section 37 shows that the spouse of a bastard is to be preferred even to descendants, or, if this is not so, it was argued as an alternative that a spouse and descendants were preferred as being the bastard's only legitimate family connections.

This view has its fascinations but I do not think it can be supported.

Section 37 only provides for the case where there is no surviving spouse or descendants.

The case of the succession of a surviving spouse of a bastard is not expressly dealt with either in this Ordinance or in that of 1876.

We are accordingly referred back to the Roman-Dutch law and on that law there can be no doubt that the mother's children are preferred to the husband.

Only one question remains, whether the husband should remain administrator. I think the order made by the learned District Judge

that administration should be transferred to the first respondent is a convenient one and I do not think we should interfere with his discretion. I would therefore dismiss the appeal with costs.

DRIEBERG J.—

The matter for decision in this appeal is the succession to the intestate estate of Parupathipillai who was married to the appellant after the coming into operation of the Jaffna Matrimonial Rights and Inheritance Ordinance, No. 1 of 1911, and died leaving no issue. Parupathipillai was the daughter of Sinnapillai; Sinnapillai was married to Murugesu, by whom she had two children, the first and third respondents. After the death of Murugesu, she lived with Supramaniam and Parupathipillai was the child of that union. The appellant stated in his petition that Supramaniam lived with Sinnapillai when his wife was alive but this does not appear to be one of the admitted facts on which the matter was argued and it must be taken that Parupathipillai is merely illegitimate.

The appellant applied for letters claiming to be sole heir and stated, that if he was not, the heirs of Parupathipillai were the first and third respondents and he accordingly made them respondents to the application. The respondents deny that the appellant is an heir; as between themselves they agree that the property should go to the first respondent as he had given it in dowry to Parupathipillai and that such property should revert to the donor, but the ground on which their claim was based at the argument is that they were entitled to it under section 28 of Ordinance No. 1 of 1911, that Sinnapillai, her mother, being dead the intestate's property devolved on the first and third respondents who, it is contended, must be regarded as her hall-brother and half-sister. This section applies to property derived by the intestate from the mother's side; the bond for Rs. 15,000 given to her by the first respondent on the day of her marriage as dowry—this is not denied—is property derived from her mother's side under section 20 of the Ordinance.

For the appellant, it is said, that the sections of the Ordinance preceding section 37 do not deal with succession by persons affected by the illegitimacy of an intestate, such cases being governed solely by section 37, and that the first and third respondents, as the heirs of the intestate's mother, cannot succeed as her husband is alive.

The wording of section 37 is open to the construction that on failure of descendants the husband of a wife of illegitimate birth would take the entire estate to the exclusion of her mother and the mother's heirs, but I do not think this is the correct meaning of the section.

A husband is ordinarily not an heir to the estate of his wife; the half of the tediatetam which vests in him on the death of his wife does not devolve on him as an heir of his wife. It is a separation of his half of the property acquired during marriage which is regarded as common. The position is similar to the separation of the half share of the survivor of persons married in community of property under the Roman-Dutch law.

In my opinion section 37 in declaring the right of succession of the mother of an illegitimate and the heirs of the mother merely intended to make this right subject to the rights of the children and the husband as previously provided for in the Ordinance, that is to say, the right of the children to succeed to the entirety and the right of the husband to a separation of a half of her acquired property.

I agree that the appeal should be dismissed with costs.

Appeal dismissed.