Present : Ennis J. and Schneider A.J.

1921.

CHANMUGAM *et al.* *v.* KANDIAH *et al.*

8—D. C. Jaffna, 4,260.

Tesawalamai—*What law to be applied when* Tesawalamai *is silent—Mother living in concubinage with two men, one after the other—Daughters by each bed—Death of one daughter issueless—Extent to which Roman-Dutch law applies—" Mother makes no bastard."—Property devolves on step-sister and not on mother—*

V, who was subject to the *Tesawalamai,* lived in concubinage with two men, one after the other, and had two daughters, N and M. N married before 1911, and died intestate.

Held, that N's estate devolved on her stepsister M, and not her mother V.

The Roman-Dutch law, being the law applicable to the whole Island, applies where the *Tesawalamai* is silent. But the Roman-Dutch law does not apply even where the *Tesawalamai* has no express provision if a question can be decided by general principles deduced from the *Tesawalamai.*

" It is not a sound argument to say that when a contest involves several matters, in regard to some of which a special law has provisions and in regard to others it has not, that because the general law must be resorted to to decide the former matters, the latter should also be decided by that general law. The aid of the general law is invoked to fill in the omissions of the special law, and no more."

THE second respondent, Valliammai, was the mother of two illegitimate children, viz., the deceased Nagamuttu and the second (added respondent) appellant, Marimuttu. The deceased Nagamuttu was married to the first respondent before Ordinance No. 1 of 1911 came into force, and died intestate in May, 1920, leaving behind, besides her husband (the first respondent), her mother (second respondent), and her half-sister, second (added respondent) appellant.

The first respondent, who was administering the estate of the deceased Nagamuttu, filed a paper of consent from the second respondent, stating that she, as sole heiress, consented to dispense with security for purpose of administration. The added respondents, appellants, objected, and an inquiry was held as to who is the heiress of the deceased, *i.e.*, whether the mother, the second respondent, or the half-sister, the second appellant, was the heiress.

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The District Judge (G. W. Woodhouse, Esq.) delivered the following judgment:—

This is a question whether the half-sister of the intestate or their mother should succeed to the estate of the intestate where both sisters were born out of wedlock to different fathers.

By section 37 of Ordinance No. 1 of 1911: "Where an illegitimate person leaves no surviving spouse or descendant, his or her property will go to the mother, and then to the heirs of the mother so as to exclude the Crown."

It is admitted that this provision does not apply to this particular case, because the intestate was married before that Ordinance came into force; but the fact that the Legislature has adopted such a provision from the Roman-Dutch law and grafted it to the *Tesawalamai* indicates that, as there is no provision in the *Tesawalamai* for cases of this nature, resource must be paid to the Roman-Dutch law rather than that a rule be evolved from the general principles deducible from the *Tesawalamai*.

It is true that it is a fundamental rule of succession in Tamil law that collaterals have precedence over ascendants; but it is a question whether, for purposes of succession to intestate's estate, a half-sister born to the same mother by another father, could be called a collateral; I think not. The case would be different if, for instance, the mother's estate is involved.

I hold that this is a case where the Roman-Dutch law must be applied, and dismiss the application of the added respondents, with costs.

Balasingham, for the appellants.—Valliammai lived with two men in concubinage, and has by each a child, namely, Nagamuttu and Marimuttu. Nagamuttu, who married before 1911, died intestate. The question is whether Marimuttu or Valliammai succeed to Nagamuttu's estate. It is clear law that if Valliammai was married to the two fathers, the property would devolve on Marimuttu. The law under the *Tesawalamai* is that collaterals are to be preferred to ascendants. But the principle of all systems of law is that the mother makes no bastard. It is a principle of natural justice. Even if that principle does not exist in the *Tesawalamai*, it is the principle of the Roman-Dutch law. When the *Tesawalamai* is silent, the rule is that we should resort to the Roman-Dutch law. (See *Puthatamby v. Mailvakanam*[1] and *Teyvar v. Seevagamipillai*.[2])

But it does not follow that because we resort to the Roman-Dutch law to decide this question, that we should decide the further question of inheritance also by the Roman-Dutch law. The question of inheritance must be decided by the *Tesawalamai*, under which system the collaterals are preferred to ascendants.

No appearance for respondents.

Cur. adv. vult.

[1] *(1897) 3 N. L. R. 42.*

[2] *(1905) 2 Bal. 201.*

July 6, 1921. SCHNEIDER A.J.—

This appeal raises an interesting question as to intestate succession. The parties are Tamils of the Northern Province subject to the *Tesawalamai*. Valliammai, the second respondent, lived in concubinage with two men, one after the other, and had two daughters: Nagamuttu and Marimuttu, the second appellant. Nagamuttu was married to the first respondent before the Jaffna Matrimonial Rights and Inheritance Ordinance, 1911, came into operation. She died intestate. It is the succession to her estate which is now in question. By reason of the provision in section 16 of that Ordinance, the succession is not governed by that Ordinance. Her mother and her half-sister each claim to be the sole heir. It is admitted that the succession should be governed by the *Tesawalamai* if it contains the necessary provision, but it is also admitted that there is no provision whatever in that system of law regarding succession to the estate of an illegitimate person. The parties are also agreed that in the circumstances the Roman-Dutch law does apply, but they are at conflict as to the extent to which it should be applied. On behalf of the mother the contention is that the Roman-Dutch law should be applied to decide the whole of the contest. On behalf of the second appellant it is contended that only so much of the Roman-Dutch law should be applied as is absolutely necessary to fill the deficiency in the *Tesawalamai*.

The learned District Judge has held in favour of the contention on behalf of the mother. The sister has appealed. The principles to be deduced from the following cases :—*Puthatampy v. Mailvakanam*,[1] *Teyvar v. Seevagamipillai*,[2] *Theagarajah v. Paranchothipillai*,[3] *Kuddiar v. Sinnar*,[4] *Nagaratnam v. Muttutamby*[5] may be fairly stated to be—

(1) That the Roman-Dutch law, being the law generally applicable to the whole Island, applies where the *Tesawalamai* is silent.

(2) That the Roman-Dutch law does not apply even where the *Tesawalamai* has no express provision if a question can be decided by general principles deduced from the *Tesawalamai*. Apart, therefore, from the admissions or the agreement of the parties, the law is well settled and clear that it is the Roman-Dutch law which would apply in the absence in the *Tesawalamai* of any express provision or of any provision from which a principle could be deduced to decide the contest between these parties. The contest in this case comprises two distinct questions: (i.) In the law what relationship, if any, exists between the deceased and her mother and her half-sister ? (ii.) When that is ascertained, what law of intestate succession applies, the *Tesawalamai* or the Roman-Dutch law ?

[1] *(1897) 3 N. L. R. 42.*
[2] *(1905) 1 Bal. Rep. 201.*
[3] *(1907) 11 N. L. R. 46 ; (1908) 11 N. L. R. 345.*
[4] *(1914) 17 N. L. R. 243.*
[5] *(1915) 18 N. L. R. 257.*

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As regards the first question, the *Tesawalamai* is altogether silent. It is therefore beyond doubt that for its decision we must resort to the Roman-Dutch law. The principle that "the mother makes no bastard" is recognized by that system of law. That principle operates to make the second respondent the lawful mother, and the second appellant the lawful half-sister of the deceased.

The remainder of the contest then resolves itself into the question, Given that the deceased left her surviving her mother and her half-sister, who is her heir? According to the cases of the *Tesawalamai* as expressly provided for this case, or if a "principle for its decision can be drawn from the general provisions of the *Tesawalamai*," the Roman-Dutch law has no application. The *Tesawalamai* does contain an express provision. It declares the half-sister the sole heir upon the principle that collaterals exclude ascendants—a principle which is the very antithesis of the principle of the Roman-Dutch law which prefers ascendants to collaterals.

It seems to me, therefore, that the appeal must succeed, and that the second appellant must be declared the sole heir. It is not a sound argument to say that when a contest involves several matters, in regard to some of which a special law has provisions and in regard to others it has not, that because the general law must be resorted to to decide the former matters, the latter should also be decided by that general law. The aid of the general law is invoked to fill in the omissions of the special law, and no more. The only omission in the *Tesawalamai* in regard to this case is the absence of any principle as regards the relationship of persons born without a lawful father. For the purpose of filling that omission there was justification for resorting to the general law. That resort to the general law had to be made for that purpose is no justification for not applying the express provisions of the special law. Except for very grave reasons, the devolution of property by intestate succession, which is founded upon the immemorial customs of a community, should not be departed from. I, therefore, set aside the order appealed from, with costs of the lower and of this Court payable to the appellants by both respondents. The first respondent is liable personally, and not in any representative capacity.

ENNIS J.—I agree.

Appeal allowed.