Present: Ennis J. and De Sampayo A.J.

1914.

VALIPILLAI *v.* SARAVANAMUTTU *et al.*

22—D. C. Jaffna, 1,323.

Tesawalamai—*Man dying issueless leaving nephews and nieces by a deceased sister—Do nieces only succeed to the intestate ?*

Where a man died intestate and issueless, but leaving him surviving sons and daughters of a deceased sister, both the sons and daughters of the deceased sister succeed to his estate; the daughters do not exclude the sons of the deceased sister.

THE facts appear from the judgment.

H. J. C. Pereira (with him *Wadsworth*), for appellants.

Bawa, K.C. (with him *Kanagasabai* and *J. Joseph*), for respondent.

Cur. adv. vult.

March 4, 1914. ENNIS J.—

This is an appeal from an order of the District Court of Jaffna refusing to allow the twelfth, thirteenth, and fourteenth respondents in the original cause to take further part in an inquiry for a judicial settlement of a deceased's estate on the ground that they were not heirs of the deceased. It would seem that the first respondent also came within the scope of the order, but from some confusion has not been definitely mentioned. The first, twelfth, thirteenth, and fourteenth respondents appeal.

The learned District Judge says: "It is clear from the terms of the sections of the *Tesawalamai* (section 1, clause 5, paragraph 2; clause 7, paragraph 2; and clause 14) that the twelfth (original petitioner), thirteenth, and fourteenth respondents are not heirs." There is no record of the facts to which this finding of law can be applied, and there is no analysis of the sections of the *Tesawalamai* to show how the deduction is manifest.

On appeal it is admitted that the first respondent-appellant was the original petitioner, and should have been separately mentioned. The following are stated to be the facts by the respondent to the appeal, but counsel for the appellants was not in a position to say whether they are correct or not. The deceased had two sisters, who died before him; the twelfth and the first respondents are the sons of one of the sisters, the thirteenth and fourteenth respondents sons of the other. Both sisters also had daughters surviving at the time of the death of the deceased. The finding of the learned District Judge would mean that the daughters of the sisters of the

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deceased inherit the property to the exclusion of the sons. Clause 14 of section 1 of the *Tesawalamai*, after dealing with inheritance by daughters, children of a second marriage bed, who have no full brothers to inherit with them, says: "It is the same with a woman who has a child or children and whose brother or sister dies afterwards without leaving children, for this woman's daughter or daughters inherit both from the brother or sister of her or their deceased mother." It is to be observed that there is no mention here of the exclusion of the sons. The clause proceeds: "But if the said brother and sister die first, and if the mother of the before-mentioned daughter is still alive, then the mother inherits from the brother and sister, whereby the daughters remain deprived of that inheritance, for when the mother afterwards dies, her son or sons are justly entitled to all that their mother leaves at her death."

Clause 5, paragraph 2, deals with the dowry property of a daughter dying without issue, which is divided among her sisters, but if by chance it is allowed to revert to the mother and become part of her estate, then the sons inherit to the exclusion of the daughters. Clause 7, paragraph 2, provides that sons first inherit the *modesium* or inherited property of their parents, and after them their sons.

To me these provisions are unintelligible, unless the principle be that daughters inherit only by way of dowry, the sons taking the bulk of the property and being responsible for the debts. If this be so, the explanation of clause 14 may be that should a mother inherit the property of her brothers or sisters, so that it forms a part of her estate before her death, this property goes to the sons, presumably on the principle that she has had an opportunity of giving dower to her daughters out of this property. But should she die before so inheriting, the daughters are to be considered. I confess I fail to see any principle upon which in such an event the sons are to be entirely excluded, specially when to exclude them an inference of law must be made from clause 14, for that does not expressly exclude them. In these circumstances, I think it extremely doubtful whether the letter of the *Tesawalamai* can be construed in the way the learned District Judge has construed it.

Turning to the practice in questions of the sort, counsel on both sides are unable to cite any case, but we find that for ten years past, in this very case, the appellants have hitherto been regarded as heirs, and in the last appeal in the case, although the question of the heirship of one of them had been definitely raised before the District Judge, on the appeal Pereira J. records in his judgment: "The appellant was admittedly a person interested in the due administration of the estate," which could not have been the case had he not been regarded as an heir. Further, it appears that the Ordinance No. 1 of 1911, which now regulates succession in such case to the estate of Tamils dying after that Ordinance, the appellants would undoubtedly be heirs. That Ordinance probably

gave expression to an established custom, a custom which, in this case, has been regarded as the law of Jaffna Tamils during the progress of a long administration of the estate, the appellants having already been given some share of the inheritance.

In these circumstances, I do not consider it desirable to send the case back for further evidence as to the practice in such cases. It seems to me that a succession so long acquiesced in should not be disturbed, when to do so would be against the present law of succession, and contrary to any principle deducible from the *Tesawalamai*, the words of which are too vague and obscure to establish with certainly that the law is against the appellants' contention or in favour of the respondent.

I would allow the appeal with costs.

DE SAMPAYO A.J.—I agree.

Appeal allowed.