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1936 *Present :* **Macdonell C.J., Dalton S.P.J., Poyser and Koch JJ.**

SANGARAPILLAI *v.* DEVARAJA MUDALIYAR *et al.*

165—D. C. Colombo, 47,637.

Thesawalamai—*Husband's right to mortgage* tediatetam *property—Action on mortgage bond—Wife not a necessary party—Ordinance No. 1 of 1911, ss. 2, 21, 22—Mortgage Ordinance, No. 21 of 1927, s. 6 (1).*

Under the *Thesawalamai* the husband has the same right to mortgage property which forms part of the *tediatetam* property, after the passing of Ordinance No. 1 of 1911 as he had before the Ordinance was enacted. The wife is not a necessary party to a hypothecary action against the husband on a mortgage effected by him in respect of *tediatetam* property, in order to make her interest in the property bound by the decree.

THIS was a case referred to a Bench of four Judges on two points :— (1) Whether the Jaffna Matrimonial Rights and Inheritance Ordinance, No. 1 of 1911, abrogated the power of a husband to deal with property falling within the definition of *tediatetam,* and (2) whether, assuming that the husband still has that power, it is necessary in a hypothecary action to enforce a mortgage granted by husband over *tediatetam* property, to make the wife a party in terms of section 6 (1) of the Mortgage Ordinance, No. 21 of 1927.

The plaintiff was married to one Sangarapillai after Ordinance No. 1 of 1911. Both parties are Jaffna Tamils and are therefore subject to the Ordinance. By deed No. 712 of February 27, 1929, Sangarapillai purchased in his own name the land in question in the action from its owner. For part of the consideration which was not paid Sangarapillai executed a mortgage bond over the property in favour of the vendor. The vendor's administrator put the bond in suit against Sangarapillai and in execution the property was put up for sale and purchased by the defendants. The plaintiff claimed that one half of the property was vested in her under the *thesawalamai* and that her husband (Sangarapillai) could by his mortgage bind only his half of the property. It was also argued for the plaintiff that as she was not party to the mortgage action she was not bound by the decree.

H. V. Perera (with him *D. W. Fernando*), for plaintiff, appellant.— The plaintiff and her husband who are Jaffna Tamils were married in 1916. Therefore, the provisions of Ordinance No. 1 of 1911 and so much of the *Thesawalamai* as that Ordinance has not abrogated applied to them. The first point arising in this case is whether under the system of law which applies to the plaintiff and her husband, the latter had the power

to mortgage property falling within the definition of *tediatetam*. The law as interpreted by our Courts is that under the *Thesawalamai* the husband has during the subsistence of the marriage the power to alienate and mortgage the *tediatetam* property quite apart from any consent of the wife. The question therefore is whether Ordinance No. 1 of 1911 has expressly or by implication abrogated this power of the husband. The matrimonial rights of husband and wife in respect of all the property belonging to them or either of them are now governed by Ordinance No. 1 of 1911 and any provision or custom of the *Thesawalamai* in force before this Ordinance inconsistent with the provisions of this Ordinance has been repealed by section 2. Nowhere in this Ordinance is the power given to the husband to alienate or mortgage the entirety of the common property. The effect of section 7 coupled with the definition of matrimonial rights in section 5 is to give the wife as full rights over her interest in the common property as section 8 gives her over her separate estate subject however to the exception in section 22.

Even if the husband had the power to mortgage plaintiff was a necessary party to the mortgage action within the meaning of section 6 (1) of Ordinance No. 21 of 1927. Every person is a necessary party who has an interest in the mortgaged property to which the mortgage in suit has priority. Priority in this section does not mean priority in time but priority in interest. The plaintiff acquired an interest in the property when it was bought but that interest was subject to the subsequent mortgage created thereon by the plaintiff's husband. The plaintiff therefore was a necessary party and she, not having been made a party, is not bound by the decree.

Counsel cited *Avitchy Chettiar v. Rasamma* [1], *Kandar v. Sinnachipillai* [2], *Fernando v. Silva* [3], *Ambalavanar v. Kurunathan* [4].

F. A. Hayley, K.C. (with him *N. E. Weerasooria, N. Nadarajah,* and *B. H. Aluvihare*), for defendants, respondents.—Ordinance No. 1 of 1911 has not abrogated the power of the husband under the *Thesawalamai* to alienate and mortgage *tediatetam* property. This power is not inconsistent with the provisions of the Ordinance and is therefore not repealed by section 2. If the argument of plaintiff's Counsel is right then the Ordinance gives the wife a wider power of disposal over her share of the joint property than over her separate property. The power of the husband under the *Thesawalamai* to deal with the joint property would seem to be practically the same as the marital power of administration under the Common law before Ordinance No. 15 of 1876. It is an essential feature of community of property between spouses in almost all its forms that the husband should be the manager of the common property (*Seelachchy v. Visuvanathan Chetty* [5]).

The interest of the wife in *tediatetam* property does not give her a separate interest in one half. She only becomes entitled to one half on the dissolution of marriage either by death or otherwise. It is therefore not necessary to join the wife in a mortgage action in respect of *tediatetam* property during the subsistence of marriage in order to get a decree

[1] *35 N. L. R. 313.*
[2] *36 N. L. R. 362 at 367.*
[3] *23 N. L. R. 249.*
[4] *15 Law Rec. 28.*
[5] *23 N. L. R. 97.*

binding her interest. It would be otherwise if there is a dissolution of the marriage either by death or divorce. In such a case the heirs of the wife or the wife hereself as the case may be must be made a party defendant.

Counsel cited *Parasathy Ammah v. Setupulle* [1], *Seelachchy v. Visuvanathan Chetty* [2], *Iya Mattayer v. Kanapathipillai* [3].

H. V. Perera, in reply.

Cur. adv. vult.

March 6, 1936. MACDONELL C.J.—

This appeal came originally before Garvin and Maartensz JJ., and was by them referred for decision by a Full Bench generally but with particular reference to the points whether Ordinance No. 1 of 1911 reduces or abrogates the power of a husband to deal with property falling within the definition of *tediatetam*, and also whether, granting that the husband still has that power, it is necessary in a hypothecary action consequent on his having mortgaged the *tediatetam* property to join the wife as party to such action in consequence of section 6 (1) of the Mortgage Ordinance, No. 21 of 1927. The case was therefore argued before a Full Bench both generally and with reference to these two points.

The facts in this case were these. The plaintiff was married to one Sangarapillai on May 17, 1916, that is to say, some years after Ordinance No. 1 of 1911 took effect. It is conceded that both parties to the marriage are Jaffna Tamils and that they are therefore subject to Ordinance No. 1 of 1911, and likewise to so much of the *Thesawalamai* as that Ordinance has not abrogated. By notarial deed No. 712 of February 27, 1929, the husband Sangarapillai purchased in his own name the land in question from its then owner, and the attestation clause to that deed says, "As consideration a cheque for Rs. 18,000 in favour of the vendor was passed in my presence and the balance was secured by a mortgage bond executed the same day". The total consideration for the land was Rs. 43,000 and on the same day as the purchase the husband Sangarapillai did execute a mortgage bond 478 for the balance Rs. 25,000 in favour of the vendor. This mortgage bond is referred to in the conveyance by which Sangarapillai, plaintiff's husband, became owner of the land, and each notary attesting is a witness to the other deed, and the two documents clearly refer to the same transaction and must be considered as constituting one transaction; the husband would not have got a conveyance of the land unless he has executed the mortgage, and he would not have had to execute the mortgage unless he had got a conveyance of the land. As the Rs. 25,000 was not paid, the vendor's administrator (she having died) put the bond in suit against the mortgagor, the husband of the plaintiff. Decree was passed on August 7, 1931, for Rs. 25,850 and interest, the property to be sold by auction unless the amount of the decree was paid within a named time, and, payment not having been made within that time, the property was put up for sale on October 7, 1931, at which sale the defendants in the present action purchased it for Rs. 28,000. The plaintiff, wife of the mortgagor, went into possession of the land

[1] *3 N. L. R. 271.* [2] *23 N. L. R. 97.*

[3] *29 N. L. R. 301.*

shortly before the sale and issued, also before the sale, warnings both verbal and printed to intending purchasers that she was entitled to a half share. The issue by her of these notices is not disputed.

The plaintiff's case is that she and her husband, the mortgagor of this land, being persons to whom Ordinance No. 1 of 1911 and the *Thesawalamai* applied, one half of the property was vested in her, and that her husband Sangarapillai could only by his mortgage bind his own half of the property, the remaining half of the property being hers, unaffected by the mortgage. This was strenuously argued for her, she was entitled to a half and was under no obligation to repay the half or any portion of the mortgage money. As the husband could not have acquired the property at all without at the same time giving a mortgage over it, the argument that she could take her half and be under no obligation as to the mortgage carries its own refutation on its face ; it is as clear a case of attempting to approbate and reprobate as could well be imagined.

She also raised the point that as she had not been made a party to the mortgage action brought by the original vendor she was not bound by the decree in that action.

Before examining the law which admittedly binds these two persons, the plaintiff and her husband the mortgagor, namely, Ordinance No. 1 of 1911 and the *Thesawalamai*, it is necessary to say that in the Court below the learned Judge found, as a fact, that the Rs. 18,000 originally paid for the land was money of the husband and not of the plaintiff, and that "the mortgage bond was executed by the husband with the consent of the plaintiff and probably with her knowledge". In spite of the ambiguous word "probably", this was taken as a finding that she knew of and consented to the mortgage and was accepted as such in the argument before us.

If we examine the *Thesawalamai* in volume 1 of the Statutes, we find acquisition or *tediatetam* referred to therein as divisible among all the children of the marriage, section 1, paragraph 1, and as liable to debts contracted by either party during the marriage, paragraph 10. As interpreted by our Courts, the husband has during the subsistence of the marriage the power to alienate and mortgage the *tediatetam* property quite apart from any consent by the wife—see Mutukishna on the *Thesawalamai*, case No. 5,242 at pp. 121 *sqq*. This is in accordance with the Common Law, *Grotius, Introduction, bk. I., c. 5 s. 21*, "In this Country the guardianship of the husband over the wife's property is very extensive"; *section 22*, "By virtue of this guardianship the husband appears for his wife in Court. He alienates and encumbers her property, even that which she has kept out of the community, at his pleasure and without requiring her consent"; and *1 Van Leeuwen, c. 6, s. 7*, "Everything so far as the wife is concerned must and can be done by her husband who in law acts for his wife and encumbers and alienates her property . . . . without first requiring her consent thereto". Our Courts seem always to have accepted this interpretation of the *tediatetam*, therein applying the Common law. But it is argued that Ordinance No. 1 of 1911 has abrogated this power of the husband over the *tediatetam* or acquired property of the marriage, and that the meaning of *tediatetam* as affecting spouses married after the taking effect of

Ordinance No. 1 of 1911 must be found within the four corners of that Ordinance,—see *35 N. L. R. 313 at p. 317.* It is necessary then to examine Ordinance No. 1 of 1911.

Section 2 of that Ordinance says, "So much of the provisions of the collection of customary law known as the *Thesawalamai* . . . . as are inconsistent with the provisions of this Ordinance are hereby repealed". Section 8 of that Ordinance establishes and defines the right of a wife to separate property and gives her the power of "disposing of and dealing with such property by any lawful act *inter vivos* without the consent of the husband in case of movables and with his written consent in the case of immovables", but from such separate property *tediatetam* is expressly excluded by this same section 8 that creates it. Section 9 similarly establishes and defines the separate property of the husband, again excluding *tediatetam* therefrom, and giving the husband full power of disposing of and dealing with his separate property. As Ordinance No. 15 of 1876 had by section 8 abolished community of goods between husband and wife married after that Ordinance took effect, for all inhabitants of the Island other than Kandyans, or Muhammadans, or Tamils subject to the *Thesawalamai,* we can see that these sections of Ordinance No. 1 of 1911 were intended to give, but in a modified form, to a married woman subject to the *Thesawalamai* a right to acquire during the continuance of the marriage separate property, though not so fully as was enjoyed after 1876 by a married woman who came under the provisions of Ordinance No. 15 of 1876. From this separate estate, then, Ordinance No. 1 of 1911 expressly excludes *tediatetam.* After defining in section 17 *mudusam* or property devolving on the death of an ancestor, and in section 18 *urumai* or property devolving on the death of a relative, and after defining in section 19 property derived from the father's side and in section 20 property derived from the mother's side, the Ordinance goes on in section 21 to enact as follows: "The following property shall be known as the *tediatetam* of any husband or wife; (*a*) property acquired for valuable consideration by either husband or wife during the subsistence of marriage, (*b*) profits arising during the subsistence of marriage from the property of any husband or wife", and in section 22 to say, "The *tediatetam* of each spouse shall be property common to the two spouses, that is to say, although it is acquired by either spouse and retained in his or her name, both shall be equally entitled thereto. Subject to the provisions of the *Thesawalamai* relating to liability to be applied for payment or liquidation of debts contracted by the spouses or either of them"—this is a reference to section 1, paragraph 10 of the *Thesawalamai* —"on the death intestate of either spouse one-half of this joint property shall remain the property of the survivor and the other half shall vest in the heirs of the deceased; and on the dissolution of a marriage or a separation *a mensa et thoro* each spouse shall take for his or her own separate use one-half of the joint property aforesaid". The words as to separate use should be noticed. Apparently the Ordinance does not contemplate a separate use by either spouse of the *tediatetam* during the continuance of the marriage. Prior to the enactment of that Ordinance there clearly was no separate use in either spouse; the "use" of the property was vested in the husband in accordance with the rules of the

Common law quoted above, and it would seem to follow that this Ordinance No. 1 of 1911 has not made any alteration in the law in that respect. The Ordinance in section 11 gives the power to husband or wife to make gifts to each other, and adds, "All acquisitions made by a husband or wife out of or by means of the moneys or property of the other, shall be subject to the debts and engagements of each spouse in the same manner and to the same extent as if such . . . . gift . . . . or acquisition had not been made or had not occurred". This section 11 was necessary in view of the sections 8 and 9 empowering each spouse to have a separate estate and was clearly enacted to prevent either spouse making a gift of his or her separate estate so as to defraud his or her creditors, and acquisitions are subject to the same restriction. It should be noted that the part of section 11 quoted above, if read in conjunction with sections 17 to 20, is capable of giving to the word "acquisition" used in that section 11 a wider meaning than *tediatetam,* for the "acquisition" by husband or wife subjected thereby to debts might be an acquisition through *madusam*, paternal inheritance, or *urumai*, non-paternal inheritance, and not property acquired for valuable consideration during the subsistence of the marriage, or "profits arising during the subsistence of marriage from the property of any husband or wife", section 21.

It was argued to us for the appellant in this case that the words in section 22 of Ordinance No. 1 of 1911 saying that *tediatetam* "shall be property common to the two spouses", and that "both shall be equally entitled thereto", abrogated the interpretation which our Courts applying the Common law, have hitherto put upon *tediatetam,* namely, that the husband has the control and management of the *tediatetam* to the extent of being able to alienate or mortgage the same without the consent of the wife, and that, since the passing of that Ordinance No. 1 of 1911, the wife has the power to mortgage and alienate the *tediatetam* or any portion thereof and that the husband's power of doing so without the consent of the wife is by implication repealed by that section 22 of Ordinance No. 1 of 1911. The argument was put to us this way, that although this *tediatetam* as defined by section 21 was common property, this did not mean that there was a "community of goods". We do not think that this contention is sound. To abrogate so clear a rule of the Common law, or, if you prefer, so clear an interpretation which our Courts have put on *tediatetam,* a clear enactment would be necessary and so far from it being clear from the words of Ordinance No. 1 of 1911 that this marital power has been excluded, several things in the Ordinance seem to show that the legislators had this marital power in their minds and deliberately refrained from interfering with it. It is only her separate estate (section 8) which the wife can "dispose of and deal with", and from that separate estate *tediatetam* is, by the words of section 8, excluded. That section 8 does give to the wife a separate use in her separate property during the subsistence of the marriage but section 22 says that it is only after the dissolution of the marriage that the wife's separate use of the *tediatetam* or any portion thereof can arise.

If these considerations are correct, they will dispose of the first ground on which this case was referred to a full Bench; in the case of spouses

governed by the *Thesawalamai* the husband has the right to mortgage and to sell property which forms part of the *tediatetam* now, after the passing of Ordinance No. 1 of 1911, as he had before that Ordinance was enacted.

It only remains to examine the further point, namely, whether the wife, the plaintiff in this case, being a person to whom Ordinance No. 1 of 1911 and the *Thesawalamai* apply, was a necessary party to the mortgage action—decree in which passed on August 7, 1931—by virtue of section 6 (1) of the Mortgage Ordinance, No. 21 of 1927. Now to answer this question it is necessary to consider what is the nature of the right to *tediatetam* property which accrues to the wife when any particular piece of property becomes *tediatetam* by acquisition for valuable consideration or as arising during the subsistence of the marriage, section 21. The legal title to that property seems to be in the husband, though by operation of law the wife likewise acquires a title thereto. When the husband dies or the marriage is dissolved, the wife takes her half share by virtue of her previous position as a married woman but she has no power of mortgaging, still less of alienating, that *tediatetam* property. For those purposes the husband is the *persona* to whom alone the law looks. He is, if we care to put it that way, the sole and irremovable attorney of his wife with regard to alienations of that property by sale or mortgage. If that is so, then for purposes of such alienation the wife's *persona* is merged in that of the husband and there can be no requirement that she should be joined as a party to any mortgage action (section 6 (1) of Ordinance No. 21 of 1927), because she cannot on any correct analysis be described as a "party separate from her husband". When a husband sells or mortgages part of the *tediatetam* property he does so as acting for and with his wife, and the question of her being a "party" to such transaction does not, it would seem, arise.

In view of the dissenting judgment of Garvin J. in *Seelachy v. Visuvanathan Chetty*[1] *at p. 121*, and of the decision of Dalton J. in *Mattayar v. Kanapathipillai*[2], I would guard myself against saying anything as to what may happen if a husband attempts to alienate by gift more than half of the property acquired during marriage ; at Common law such alienation by gift would be good unless fraudulent or with intent to injure his wife ; see *Lee, 3rd ed., p. 64* and *1 Van Leeuwen, c. 6, s. 7.* That question does not arise in the present appeal and can be left until it does arise without any expression of opinion.

If the above considerations hold good, namely, that the husband of a marriage subject to the *Thesawalamai* and to Ordinance No. 1 of 1911 is the manager of the *tediatetam* property, with power to alienate the same by sale or mortgage without consent of the wife now as before the passing of Ordinance No. 1 of 1911, then it will follow that the husband can validly execute a mortgage over this land without joining the wife as party to that mortgage, and that the mortgagee was under no necessity to make the wife, the plaintiff, party to his action on the bond.

These considerations, then, will dispose of the present appeal and it will be unnecessary to consider the other points that were raised to us, particularly as to whether the wife, the plaintiff, was or was not estopped by her conduct from disputing the sale following on the mortgage decree.

[1] *23 N. L. R. 97.* [2] *29 N. L. R. 304.*

For the foregoing reasons I am of opinion that this appeal must be dismissed with costs and that the judgment below must be affirmed.

DALTON S.P.J.—

This appeal has been referred to a Bench of four Judges to be heard. The plaintiff, who is the appellant, instituted the action for a declaration of title to one-half share of a property, known as 41, Lauries road, Colombo. The defendants (respondents) had purchased the whole property at a sale in execution against the plaintiff's husband, W. Sangarapillai, and had obtained a conveyance thereof.

The material facts are shortly as follows :—The whole of the property in question formerly belonged to one Mrs. Silva. On February 27, 1929, she sold and conveyed (deed P 17) the property to W. Sangarapillai, described as of Wellawatta, Colombo, for the sum of Rs. 43,000. The attestation by the notary states that a cheque for Rs. 18,000 was passed in his presence, and the balance (Rs. 25,000) was secured by a mortgage bond executed the same day. The same day, a bond (D 3) was executed by Sangarapillai in favour of Mrs. Silva over the property purchased from her by him, to secure the sum of Rs. 25,000.

Mrs. Silva died, and the bond was put in suit by her administrator against the mortgagor, Sangarapillai. A decree was entered against him in the sum of Rs. 25,850 on August 7, 1931, and the property was put up for sale, under an order of the Court, on October 7, 1931, and purchased by the defendants for the sum of Rs. 28,000 and the property was conveyed to them. The plaintiff had at the time of the sale notified the defendants that she claimed to be entitled to half the property, the trial Judge finding that she had got into possession of the premises a few days before the sale with the intention of asserting title to a one-half share of the property.

The plaintiff and her husband Sangarapillai have been found by the learned trial Judge to be Jaffna Tamils, the balance of the evidence, he states, being in their favour on this question, and so are govered by the *Thesawalamai*. They were married in the year 1916 at Jaffna, but since then have lived almost continuously in Colombo, where the husband carries on business apparently as a dealer and speculator in real estate. The trial Judge states that the evidence clearly proves that the plaintiff always acquiesced in her husband's management of all the property, *tediatetam* as well as her dowry property ; that she allowed him to sell and purchase property exactly as he pleased, that the plaintiff was never consulted about these matters, and that he did not even discuss questions of sale and purchase with her. He holds further that the property in question was purchased with the husband's money and that the mortgage to Mrs. Silva was executed by the husband with the general consent of the plaintiff, and probably with her knowledge of the specific transaction, allowing him to mortgage the property and not bringing to the notice of the mortgagee that she herself was entitled to a share in the property. For this and other reasons her action was dismissed.

The plaintiff and her husband being Jaffna Tamils, and that finding not being questioned, the property acquired from Mrs. Silva by the husband on February 27, 1929, was *tediatetam* property, within the

meaning of section 21 of Ordinance No. 1 of 1911 (the Jaffna Matrimonial Rights and Inheritance Ordinance). There is no dispute now that the property was *tediatetam.*

The first matter for decision on the appeal is as to the powers of a husband in respect of *tediatetam.* It is urged for the appellant (plaintiff) that the matrimonial rights of husband and wife in respect of all property belonging to them or either of them are now governed by the provisions of Ordinance No. 1 of 1911, and that any provision or custom of the *Thesawalamai* in force before that Ordinance inconsistent with the provisions of that Ordinance has been repealed by section 2 of the Ordinance.

There is no question that prior to Ordinance No. 1 of 1911 the husband was the manager of the common property, with full power in himself to sell and mortgage it without the consent of his wife. This power would seem to be practically the same as the marital power of administration under the Common law, before Ordinance No. 15 of 1876 was enacted. That matter has been fully dealt with by Bertram C.J. in *Seelachchy v. Visuvanathan Chetty*[1], and Mr. Perera for the appellant does not question it. Bertram C.J. points out that it is an essential feature of community of property between spouses in almost all its forms that the husband should be the manager of the common property.

Ordinance No. 1 of 1911 did not abolish that common property but defined what *tediatetam* thereafter meant (section 21), with the result that there has been some change in the property that comes under this name (see decision in *Avitchy Chettiar v. Rasamma*[2] and in *Kandar v. Sinnachipillai*[3]). The first part of section 22 then states that *tediatetam* shall be the common property of the two spouses, both being equally entitled to it. There appears to be no change from the old law in that statement, and apparently it is a restatement of the *Thesawalamai* in the new Ordinance, prefacing what follows, since the section goes on to deal with the devolution of *tediatetam.* Possibly, as has been stated on more than one occasion in cases that have arisen under it, the Ordinance is not altogether a good example of skilful draughtsmanship. That may well be due to the fact that it deals with customary law, and is an attempt to improve upon and amend in some respects the collection of customary law in the *Thesawalamai,* which is itself somewhat vague and indefinite in various respects.

Earlier in the Ordinance is provided what is to be considered the separate property of the husband and wife respectively. As regards the wife's separate property, section 8 enacts that it shall not be liable for the debts and engagements of her husband unless incurred in the upkeep, management or improvement of such property, and that she shall have full power of disposing of and dealing with it, save that in the case of immovable property, and act *inter vivos* must be with his consent. This section specifically excepts *tediatetam* as defined in the Ordinance from its provisions. Who is to have the management and control of the common property ? Prior to the Ordinance the husband had such powers, including the right of selling or mortgaging it. There is certainly no such power given to the wife in this Ordinance.

[1] *23 N. L. R. 97.* [2] *35 N. L. R. 313.* [3] *36 N. L. R. 362 at p. 367.*

The reply to this question, counsel for the appellant states, is supplied by the provisions of section 7, which enacts that the respective matrimonial rights of every husband and wife married after the commencement of the Ordinance, in, to, or in respect of movable or immovable property shall during the subsistence of the marriage be governed by the provisions of the Ordinance. However, section 7 must be construed subject to the provisions of the following sections, and having in mind the provisions of section 2 also. As I understood the argument, Mr. Perera urged that the effect of section 7, coupled with the definition of matrimonial rights in section 5, is to give the wife as full rights over her interest in the common property as section 8 gives her over her separate estate, subject of course to the exception provided for in section 22. If he is correct, the effect of it would be in some respects to give a wife fuller rights over her interest in the *tediatetam,* since there is no provision requiring her husband's consent to its disposal by her as is in force in regard to her separate property, if immovable property. I cannot agree with his argument. If it had been the intention of the legislature, nothing would have been easier than to have said so. *Tediatetam* is expressly excluded from section 8, and the Ordinance is silent on the subject of the husband's admitted rights over *tediatetam* prior to 1911. The exclusion of *tediatetam* in section 9 does not affect this aspect of the case.

Coming now to the provisions of section 2 of the Ordinance, I can find nothing in the Ordinance inconsistent with the law in force prior to the Ordinance, so far as it gave the husband full management and control of the *tediatetam,* including power to sell and mortgage it. Ordinances which take away rights either as regards persons or property must be strictly construed. It is presumed that the legislature does not desire to encroach upon the rights of persons, and if such is its intention, it will be manifestly plain, if not in express words, at least by clear implication and beyond reasonable doubt (Maxwell on *Interpretation of Statutes, p. 427*). There is certainly, in my opinion, no such implication here. As I have stated, I can find nothing in the Ordinance inconsistent with an intention to retain in force the rights of the husband over the common property. I can find nothing in section 11 or section 22 inconsistent with this view. The first portion of section 22, to which I have already referred, and the reference to the provisions of the *Thesawalamai* relating to the liability of the common property (I supply the latter words I hope correctly, as they are apparently omitted from the section) to be applied to pay debts of either spouse on the death intestate of either clearly show that the whole law is to be found in this Ordinance, and not elsewhere, otherwise so long as both spouses remained alive or died intestate, no such liability would apparently arise, apart from the extent to which it is there mentioned. Counsel for the plaintiff does not suggest, however, that this liability exists only in the case of the death intestate of either spouse. This liability of the common property for the debts of both spouses is referred to in one of its aspects in section 22, and it is mentioned nowhere else in the Ordinance. It is, however, to be found in the law in force prior to the Ordinance, and not being inconsistent with the provisions of the Ordinance, it also remains in force to-day.

I would therefore hold that the husband of the plaintiff had full power and authority to execute the bond D 3 to Mrs. Silva over the whole of the property purchased on the deed P17.

The further question remains to be decided, whether, the husband having the right to mortgage the whole of the property as he did, the plaintiff was a necessary party to the mortgage action within the meaning of section 6 (1) of the Mortgage Ordinance, No. 21 of 1927. That section provides that every person is a necessary party to a hypothecary action who has any mortgage on, or interest in, the mortgaged property, to which the mortgage in suit has priority. The purport of this requirement, having regard to the other provisions of section 6 (3) and of section 10, is to make the decree in the mortgage action binding upon persons who have any interest in the mortgaged property to which the mortgage has priority.

What is the interest of either spouse in the common property during the subsistence of the marriage ? The community begins at the time of the marriage, or in the case of common property acquired during the marriage, at the time of acquisition, and continues until the dissolution of the marriage, either by death or otherwise. Community does not mean that each spouse has a separate interest in one-half of the common property. If it was so, it would not be common property. The whole of the property is common property between the two with powers of management and control in the husband, so long as the community continues. The cases which have been cited deal with claims arising on the death of a spouse at a time when the community had terminated. *Parasatty Ammah v. Setupulle* [1] was a claim by a widow on behalf of herself and her children in respect of *tediatetam* property donated by her husband during his lifetime. *Seelachchy v. Visuvanathan Chetty* (*supra*) was a similar claim by a widow, decided by a majority of the Court, Bertram C.J. and de Sampayo J. in favour of the defendant, but as I have pointed out in *Iya Mattayer v. Kanapathipillai* [2], not on the same grounds. In the last-mentioned case the plaintiffs were the heirs of the wife, who brought the action for declaration of title to certain land which had been the common property of the spouses.

Having regard to the powers of the husband in respect of the common property of the spouses to mortgage the whole of the property, the wife is not a necessary party to the action to make her interest in it bound by the decree of the Court in a suit on the mortgage bond. This seems to me a necessary inference or deduction from his power to mortgage the whole of the property. It is possible that other considerations might arise in cases where the community had come to an end before the action was brought or in the course of the action, but whether they would or not it is not necessary here to decide. In the circumstances of the case before us the plaintiff's interest in the common property was fully represented in the action by her husband as controller and manager of the common property of the two with power to mortgage, and she was not a necessary party to the action, if by that is meant she should be a party, separate and distinct from her husband, to make her bound by the decree. It might well be that, in respect of the common property, she

[1] *3 N. L. R. 271.* [2] *29 N. L. R. 301.*

could not be a party at all, having regard to her personal status and capacity, so far as the common property is concerned, since the provisions of the Married Women's Property Ordinance do not apply to Tamils of the Northern Province who are subject to the *Thesawalamai,* but for the purpose of this case it is not necessary to go so far as that. On this ground also, for the reasons I have given, this appeal must, in my opinion, fail.

I would therefore dismiss the appeal with costs.

POYSER J.—I agree.

KOCH J.—I agree.

Appeal dismissed.