1963 *Present :* **Basnayake, C.J., and Abeyesundere, J.**

MURUGESAPILLAI and another, Appellants, *and* MUTTIAH and others, Respondents

S. C. 134 of 1961 (Inty.)—D. C. Chavakachcheri, 2095/P

Thesavalamai—Thediatheddam—Immovable property acquired during subsistence of marriage—Subsequent death of wife—Marriage of daughter thereafter—Acceptance of dowry—Right of the daughter to inherit share of the acquired property of her deceased mother—Thesavalamai Regulation, s. 3, Part I, s. 3—Jaffna Matrimonial Rights and Inheritance Ordinance (prior to amendment by s. 6 of Ordinance No. 58 of 1947), s. 20 (2).

Under the Thesavalamai, a daughter who was given a dowry on her marriage that took place after the death of her mother did not, by accepting the dowry, lose her right to her share of her deceased mother's thediatheddam which vested in her by operation of section 20 (2) of the Jaffna Matrimonial Rights and Inheritance Ordinance in the form in which it stood prior to its amendment by section 6 of Ordinance No. 58 of 1947.

APPEAL from a judgment of the District Court, Chavakachcheri.

H. V. Perera, Q.C., with *M. Shanmugalingam*, for Plaintiff-Appellant.

C. Ranganathan, for the 1st Defendant-Respondent and for those substituted in place of the 2nd Defendant-Respondent.

April 5, 1963. BASNAYAKE, C.J.—

This is an action for partition of the land known as Innasimanalkadu situated at Thampakamam in Palai in the Pachchilaippali division in Jaffna District in extent twenty-five lachchams and twelve and one-fourth kulies of varaku culture with plantations thereon. The 1st plaintiff is the husband of the 2nd plaintiff. The 2nd plaintiff and the 2nd defendant are sister and brother. The 1st defendant is their father. Their mother, Mary Packiam, died on or about the 21st April, 1929. The subject matter of the suit is the acquired property of the wife of the 1st defendant and the mother of the 2nd plaintiff and the 2nd defendant. The question for decision is whether by accepting a dowry a child in whom property has, prior to the acceptance of the dowry, vested by operation of section 20 (2) of the Jaffna Matrimonial Rights and Inheritance Ordinance in the form in which it stood before its amendment by section 6 of Ordinance No. 58 of 1947, loses her right to the property so vested.

The plaintiffs prayed that this land be declared the common property of the 2nd plaintiff and the 1st and 2nd defendants and that it be partitioned and divided as follows :—

2nd plaintiff—an undivided 1/4 share
1st defendant—an undivided 1/2 share
2nd defendant—an undivided 1/4 share

The defendants averred in their answer that by accepting the deed of dowry P3 No. 606 dated 26th October 1945 attested by notary Charles Rajakone Thambiah the 2nd plaintiff must be taken to have renounced her rights to any share in her deceased mother's acquired property including the land in question, and that she is therefore estopped in law from claiming a one-fourth share in the land which is the subject-matter of the suit. The land was purchased on deed P1 in 1925 during the subsistence of the marriage of the 1st defendant with the deceased Mary Pakiam. Upon Pakiam's death in 1929 a half share of this property vested in the two children, the 2nd plaintiff and the 2nd defendant, by virtue of section 20 (2) of the Jaffna Matrimonial Rights and Inheritance Ordinance. That provision read—

> "Subject to the provisions of the *Tesawalamai* relating to liability to be applied for payment or liquidation of debts contracted by the spouses or either of them 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 defendants further took up the position that by reason of the 2nd plaintiff's acceptance of the dowry she forfeited the interests that vested in her on her mother's death by operation of section 3 of the *Thesawalamai*, and that they vested in the 1st defendant and the 2nd defendant or on the 2nd defendant as the sole heir of the deceased. Section 3 provides for a case in which the daughters are given a dowry in the life time of the parents and before they have inherited any property from them. In such a case the provision declares that they are not entitled to claim a share in the estate of the parents after their death. That was the customary law in 1806 and as the *Thesawalamai* Regulation ordained that all questions between the Malabar inhabitants of the Province of Jaffna should be decided according to the *Thesawalamai* or the Customs of the Malabar Inhabitants of the Province of Jaffna as collected by Order of Governor Simmons in 1706 that law was applied. But the enactment of the Jaffna Matrimonial Rights and Inheritance Ordinance in 1911 effected a change in that law. It declared that both spouses shall be equally entitled to the *thediatheddam* of each spouse regardless of whether it is acquired by either spouse and retained in his or her name and that on the death intestate of either spouse one half of that joint property shall remain the property of the survivor and the other half shall vest in the heirs of the deceased. The enactment was made subject only to the provisions of the *Thesawalamai* relating to liability of the *thediatheddam* of each spouse to be applied for payment or liquidation of debts contracted by the spouses or either of them. No other provision of the *Thesawalamai* is saved and the principle of *expressio unius exclusio alterius* would apply and exclude all other provisions than that expressly saved.

Quite apart from the effect of section 20 (2) of the Jaffna Matrimonial Rights and Inheritance Ordinance the instant case is not one which falls within the ambit of section 3 for the reason that the death of the parent took place before the dowry was given and is not a case contemplated by that section which has no application to this case where the dowry was given after the property had vested. The relevant portion of it reads as follows :—

> " The daughters must content themselves with the dowry given them by the act or doty ola and are not at liberty to make any further claim on the estate after the death of their parents, unless there be no more children, in which case the daughters succeed to the whole estate ".

The learned District Judge is wrong in holding that P3 operates as a renunciation of the 2nd plaintiff's rights to her mother's estate. The learned counsel for the respondent referred us to several decisions of this Court, but they have no application to the instant case and need not be discussed.

We therefore set aside the judgment and decree and direct that the case be sent back so that the partition action may proceed.

The appellants are entitled to the costs of the appeal.

ABEYESUNDERE, J.—I agree.

Appeal allowed.