Feb. 23, 1910 *Present:* Mr. Justice Middleton and Mr. Justice Wood Renton.

VELUPILLAI *v.* SIVAKAMIPILLAI.

D. C. (Testamentary), Batticaloa, 488.

Tesawalamai—*Jaffna Tamil resident in Batticaloa—Married in Jaffna—Matrimonial rights of spouses—Ordinance No. 21 of 1844, s. 6.*

A Jaffna Tamil went over to Batticaloa and resided there for about thirty-five years prior to his death (in 1907), and acquired lands and other properties. In 1891 he married in Jaffna a native of Jaffna, and allowed his wife and children to live in Jaffna and visited them periodically. In 1902 he removed his family to Batticaloa and lived there till his death.

Held, that the matrimonial rights of the parties were governed by the *Tesawalamai*.

The position of the widow would depend on her special legal rights under the customary law of Jaffna which was applicable to her husband at the date of her marriage; it would not be competent for the husband to deprive her of those rights, at least by acquiring without her consent a subsequent domicil of choice in the District of Batticaloa.

Both under the general law and in view of the special provisions of section 6 of Ordinance No. 21 of 1844 the rights of the parties have to be determined by the law of domicil of the husband at the time of the marriage.

According to section 6 of Ordinance No. 21 of 1844 the law of the matrimonial domicil (and not the *lex loci rei sitæ*) is the criterion by which the rights and powers of the spouses in regard to common property situated in any part of the Colony are to be determined.

ONE Alavapillai, who was a native of Jaffna, went over to Batticaloa about thirty-five years ago, and bought several lands in the Batticaloa District. In 1891 he married the respondent, also a native of Jaffna, and for the next ten or eleven years allowed his wife and family to live in Jaffna and visited them periodically. In 1902 he removed his wife and his family to Batticaloa and resided there till his death. During his last illness he executed on January 12, 1907, his testament, whereby he bequeathed to his five children four-sixths share of all his property, with certain reservation in favour of his wife, and the remaining two-sixths share to his brother Kanapathipillai and his nephew, the appellant, in equal shares, and further appointed the appellant as his executor.

The value of the testator's immovable property in Batticaloa amounted to about Rs. 28,000, and that in Jaffna to about Rs. 1,500.

On January 23, 1908, probate of the said will was issued to the applicant, who filed his final account on May 5, 1909. The respondent, alleging that one-half of the immovable property was, according to the *Tesawalamai*, her separate property, over which

the testator had no testamentary disposition, objected to the passing of the final account. At the inquiry the first issue tried was whether the matrimonial rights of the testator and his wife should be governed by the Roman-Dutch Law or the *Tesawalamai*. The learned District Judge held that the *Tesawalamai* governed the matrimonial rights of the testator and his wife.

The executor appealed.

The case was argued on February 21 and 23, 1910.

E. W. Jayewardene (with him *Tissaverasinghe*), for the appellant.—At the time of his marriage the testator was a resident of Batticaloa. The *Tesawalamai* applies only to the Malabar "inhabitants" of the Province of Jaffna. "Inhabitant" means a "dweller or householder in any place" (*Wharton's Law Lexicon*); "one who has a permanent home in a place" (*R. v. Mitchell*,[1] *Stroud 969*). A change of domicil does not depend so much upon the intention to remain in the new place for a definite or indefinite period, as upon an intention not to return; an intention to return at a remote period does not affect, if the other circumstances show that the new domicil is the permanent home. Domicil may be acquired by residence for a single day, if that intention be clearly proved (*1 Burge 41*). By a change of residence of a permanent character voluntarily assumed there is a change of domicil. The fact that the testator removed in 1902 his wife and children to Batticaloa shows the intention of the testator to make Batticaloa his permanent home or domicil.

Van Langenberg, for respondent.—The matrimonial domicil governs the matrimonial rights of the spouses (Ordinance No. 21 of 1844, section 6). The matrimonial domicil of the parties is Jaffna. They were inhabitants of Jaffna; they were married in Jaffna; the wife and children resided there from 1891 to 1902. One spouse cannot change the domicil after marriage against the wish of the other spouse.

Jayewardene, in reply.—The domicil of the husband at the time of marriage is Batticaloa. His wife, although the marriage took place in Jaffna, acquires the domicil of the husband (*4 Encyclopædia of the Laws of England 343*).

Cur. adv. vult.

[On February 23 Mr. Jayewardene obtained leave to submit further argument and authorities for the appellant.]

The *Tesawalamai* applies only to property situated in the "Province of Jaffna." Even non-Tamils owning lands in Jaffna are governed by the *Tesawalamai* (*Suppiah v. Tambiah*[2]). Similarly, the *lex loci rei sitæ* would apply to property situated in Batticaloa.

[1] *10 East 511.*

[2] *(1904) 7 N. L. R. 151.*

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Counsel cited *Robertson's case;*[1] *Wijesinghe v. Wijesinghe;*[2] *Wellapillai v. Sittambelam;*[3] *Bank of Africa, Ltd. v. Cohen;*[4] *Laws of England, vol. VI., 691.*

February 23, 1910. MIDDLETON J.—

In this case the appeal is against an order of the District Judge made in a testamentary action, holding on an issue which was decided, in the first instance, that the matrimonial rights of the testator and his wife were governed by the *Tesawalamai*. This question depends upon the wording of an Ordinance, and that Ordinance says that " all questions between Malabar inhabitants of the Province of Jaffna." are to be decided according to the customs which are laid down as applicable to the Malabar inhabitants in the *Tesawalamai*. The questions really here are: " Was the deceased a Malabar inhabitant of the Province of Jaffna? " And secondly, " Was he married to his wife in accordance with the law applicable to the Malabar inhabitants of the Province of Jaffna? " We have to depend for the decision of this question upon facts which have been deposed to by the widow of the deceased man and by the executor in this case, and in my opinion the widow has succeeded in establishing that the deceased man was a Malabar inhabitant of the Province of Jaffna, and that his wife was married to him in Jaffna as an inhabitant also of the Province of Jaffna. I think that we must construe the word " inhabitant " in a more extended meaning than is given to it in the dictionaries from which Mr. Jayewardene drew his definition. I would construe it as indicating a " permanent inhabitant "—one who has his permanent home in the Province of Jaffna. The question of domicil has been introduced here; and, of course, in a measure that question affects the inferences as to the meaning of the word " inhabitant." It is contended by Mr. Jayewardene that the will is inconsistent with the *Tesawalamai*, and also that the evidence shows that the deceased had an intention of abandoning his " inhabitancy "—if I may use the word—of Jaffna, and taking up his abode in Batticaloa; but I think, on the contrary, the terms of the will may be well open to a construction that they were drawn under the belief that the man was still an inhabitant of Jaffna.

The important part of our decision in this case is the application of what is said to be the law from the *Tesawalamai* to the circumstances of the widow in this case. That, I think, would be governed by section 6 of Ordinance No. 21 of 1844, which provides that " in all cases of marriages contracted either within any part of this Colony or abroad without a nuptial contract or settlement, the respective rights and powers of the parties during the subsistence of the marriage in and about the management, control, disposition,

[1] *(1886) 8 S. S. C. 36.*
[2] *(1891) 9 S. S. C. 199.*
[3] *(1875) Ram. 114.*
[4] *(1909) 2 Ch. 129.*

or alienation of any immovable property situated in any part of this Colony, which belonged to either party at the time of the marriage or has been acquired during the coverture, and also their respective rights in or to such property, or any portion thereof, or estate, or interest therein, either during the subsistence of the marriage or upon the dissolution thereof, shall in all cases be determined according to the law of the matrimonial domicil." That sub-section is repealed in so far as it is inconsistent with Ordinance No. 15 of 1876, but in my opinion in respect to Jaffna Tamils it would not be repealed, and the rights of the parties, where there has been no previous settlement, must be determined by the law of matrimonial domicil. That law, in my opinion, was the law of the *Teswalamai*, and it will be in consideration of the finding of this Court on that point that the District Judge will in the future determine the rights of the parties. I may add, however, as regards the law of domicil, *The Lauderdale Peerage Case*[1] lays it down that a change of domicil, which, I think, is very much equivalent to what I call " inhabitancy " here must be *sine animo revertendi*, and, I think, that the Judge was right in holding in accordance with the ruling in that case that every presumption is to be made in favour of original domicil, and that no new domicil can be taken to have been acquired without a clear intention of abandoning the old. I think the order of the District Judge, therefore, must be upheld, and the appeal dismissed with costs. I desire most emphatically, in giving my judgment, not to be associated with any theory as to what is the law of the *Tesawalamai* on the particular point which may arise on the construction of the will, and I propose only to decide that in this case the parties married subject to the law of the *Tesawalamai*, whatever it may be, and that the estate of the deceased must be administered according to that law.

After hearing further argument of counsel, I desire to say that I have nothing to add to what I have stated yesterday, and I agree with what has fallen from my brother as to the effect of section 6 of Ordinance No. 21 of 1844.

WOOD RENTON J.—

I entirely concur both in the reasoning of my brother Middleton and in the conclusion to which he has come. But in view of the importance of the question raised in this case, and of the very great care with which it has been argued on both sides, it is perhaps desirable that I should say a few words. We are at present concerned only with the following issue: " Whether the matrimonial rights of the testator and his wife, the first respondent, should be governed by the Roman-Dutch Law or by the *Tesawalamai*." For the purpose of deciding that issue, it is necessary to consider what is the critical point of time in the case. It appears to me that, both

[1] *10 A. C. 692 ; House of Lords, Scotch Appeals.*

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under the general law and in view of the special provisions of section 6 of Ordinance No. 21 of 1844, the rights of the parties have to be determined by the law of the matrimonial domicil, which I see no reason for interpreting in any other way than in its recognized legal sense, namely, the law of the domicil of the husband at the time of the marriage. I have no doubt that the learned Judge came to a right decision when he held that the evidence adduced on behalf of the appellant fell very far short of showing that there had been on the husband's part, at the date of his marriage in 1891, any change in his legal position as a Malabar inhabitant of the Province of Jaffna. I think that the term "inhabitant" must be interpreted in the sense of a person who, at the time in question, had acquired a permanent residence in the nature of domicil in that Province. I should be inclined to hold, if it were necessary, that, even if the rights of the parties depended upon the domicil of the testator at the date of the execution of the will, the appellant has failed to show that he had thrown off his admitted domicil of origin. But it is unnecessary to decide that point, inasmuch as I think that under the law the date of the marriage must be taken as the point on which the decision of the issue that is now before us must turn.

If I am right so far, there are obviously two different states of facts that may arise in the future. If it should be proved, and I desire to express no opinion as to what the state of the law on that point would be, that under the *Tesawalamai* as interpreted by the commentators and by any decisions of the Supreme Court a wife acquires at the date of her marriage a permanent proprietary interest in the matrimonial property, of which her husband has no power to deprive her by will, the principle that was laid down, in the first place as to movables, by the House of Lords in *De Nicols v. Curlier*,[1] and in the subsequent proceedings in the same case by the Chancery Division,[2] as to immovables, in regard to the property of French spouses who had been married without any marriage contract, but under the special law of community enacted by the Code Civil, would apply. The position of the widow in the present case would then depend on her special legal rights under the customary law of Jaffna which was applicable to her husband at the date of the marriage; and it would not be competent for the husband to deprive her of those rights, at least by acquiring without her consent a subsequent domicil of choice in the District of Batticaloa. The rule of law laid down in the case of *De Nicols v. Curlier, ubi supra*, would hold good in regard to the immovable property of the husband, even if it were not situated in the Province of Jaffna. On the other hand, if it ultimately be shown that there is no special customary law of this character applicable to Malabar inhabitants of the Province of Jaffna, we should still have to consider the express provisions of section 6 of Ordinance No. 21 of 1844, which has not, for the

[1] *(1900) A. C. 21.*

[2] *(1900) 2 Ch. 410.*

purpose of a case like the present, been repealed, in my opinion, by Ordinance No. 15 of 1876, and which provides that in all cases of marriages contracted without a nuptial contract or settlement, the respective rights and powers of the parties, not only during the subsistence of the marriage, but even upon its dissolution, in regard to immovable property situated in any part of this Colony, shall in all cases be determined according to the law of the matrimonial domicil.

In my opinion, the clear effect of that enactment is to make the law of the matrimonial domicil the criterion by which the rights and powers of spouses in regard to immovable property situated in any part of the Colony are to be determined, and there is therefore no room for the application of the rule (see *Bank of Africa, Ltd. v. Cohen*[1]) that the *lex loci rei sitæ* should be applied. If it had been necessary to decide the point, it might well, I think, have been held that the effect of section 15 of Regulation No. 18 of 1806 is to subject all questions between persons who, at the date that the point is in issue, are within the meaning of that section " Malabar inhabitants of the Province of Jaffna " to the provisions of the customary law. But, apart from that, section 6 of Ordinance No. 21 of 1844 is, I think, decisive. On the grounds I have endeavoured to state I agree with my brother Middleton.

Appeal dismissed.