1951 *Present :* **Nagalingam J., Basnayake J. and Swan J.**

SELLAPPAH, Appellant, *and* SINNADURAI *et al.*, Respondents

S. C. 554—D. C., Point Pedro, 2,873

Thesavalamai—*Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 48), ss. 6, 19 and 20*—Thediatheddam—*Retrospective operation of amending Ordinance, No. 58 of 1947—Interpretation Ordinance (Cap. 2), s. 6 (2) and (3) (a).*

Co-owners—Transfer, by a co-owner, of entirety of common property to stranger—Prescriptive possession by transferee—How computed.

Appeal—Case from District Court—Constitution of Appellate Court—Courts Ordinance (Cap. 6), ss. 38, 48 and 51.

Held (Basnayake J. dissenting): (i) The amendment of sections 6 and 19 of the Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 48) by Ordinance No. 58 of 1947 has retrospective operation. The amending Ordinance was enacted in order to declare what the law always was and to restore the law as it stood before the decision in *Avitchy Chettiar v. Rasamma* (1933) 35 N. L. R. 313. Where, therefore, a woman, who married in 1917, purchased certain lands in 1918 with her dowry money during the subsistence of the marriage, such lands must be regarded as her separate property and not as *thediatheddam.*

(ii) Where one of several co-owners sells the entirety of the common property to a person who is a stranger and not a co-heir and who purchases it without any knowledge or belief that any other party is entitled to any interest in the property, the possession of the purchaser is not the possession of the co-owners. In such a case, *Corea v. Iseris Appuhamy* (1911) 15 N. L. R. 65 or *Brito v. Muttunayagam* (1918) 20 N. L. R. 327 is inapplicable, and the purchaser acquires title to the entire property after adverse possession for ten years.

(iii) Under section 38 of the Courts Ordinance, an appeal from a judgment of a District Court may be directed by the Chief Justice to be listed before three Judges if two Judges, after a preliminary hearing of the appeal, request the Chief Justice to make such direction.

APPEAL from a judgment of the District Court, Point Pedro.

This appeal was reserved for adjudication by a Bench of three Judges on a reference made by Dias S. P. J. and Swan J.

H. V. Perera K.C., with *H. W. Tambiah, C. Renganathan, T. Somasunderam* and *S. Sharvananda* for the plaintiff-appellant.—The point that arises on this appeal is whether certain property claimed by the plaintiff is *thediatheddam* property. In September, 1917, plaintiff married third defendant, who, in March, 1918, during the subsistence of the marriage, acquired the property in dispute with her dowry money. The plaintiff thereafter went to Malaya, where he was employed, and remained there a considerable time. In December, 1923, the wife, who remained in Jaffna, made an application to the District Court of Jaffna for permission to sell her dowry property without the consent of her husband, on the ground that the husband had deserted her. The application was allowed and the third defendant purported to

convey by deed D 4 of 1924 the land in dispute to Rasamma. From Rasamma the lands devolved ultimately on the first and second defendants. The plaint in the present action was filed on February 14, 1947, and the answer of the first and second defendant was filed on June 27, 1947. On July 3, 1947, the Jaffna Matrimonial Rights and Inheritance (Amendment) Ordinance, No. 58 of 1947, was proclaimed. At the time of acquisition of the property in dispute Ordinance No. 1 of 1911 (Chap. 48) was in operation and under that Ordinance the property is " acquired " or *thediatheddam* property, notwithstanding the fact that the money was dowry money. Under the Ordinance of 1911 such property belonged equally to the two spouses. According to the phraseology of section 19 of the Ordinance of 1911, if property is acquired by the wife for valuable consideration during the subsistence of marriage the property is *thediatheddam* even though the source of the consideration is dowry money of the wife. Further, the property is *thediatheddum* " of " the wife. Section 20 provides the answer to the question " who are the owners of such property ? ". Inheritance is dealt with in sub-section 2. One of the incidents of Thesavalamai is that the husband can deal with the *thediatheddam* of the wife as he is regarded as the manager of the common property.

[NAGALINGAM J.—Only if the property is in his name ?]

Even if it is in the wife's name. The whole of the Thesavalamai is not abrogated by Ordinance No. 1 of 1911—*Sangarapillai v. Devaraja Mudaliyar* [1]. As husband, he is manager of the common property. The wife has no power to deal with her property. She has no power to dispose of her half share. Where property is acquired by a wife during marriage and deed is executed in her favour it vests by law in both the spouses—*Ponnachchy v. Vallipuram* [2]. Where property is acquired by a husband during subsistence of marriage the title, legal and beneficial, vests by operation of law in husband and wife—*Sellachchy v. Visuvanathan Chetty* [3]. Therefore, a husband can convey legal title to the whole of the property as he is the owner of the *communio*. He can sell in the course of management although he has no deed in his own name. But he cannot donate more than his half share—see the judgment of Garvin J. in *Sellachchy v. Visuvanathan Chetty* (*supra*). The majority view in that case was that the husband can dispose of the whole property as he is the absolute manager. See also *Sangarapillai v. Devaraja Mudaliyar* (*supra*). In the present case Ordinance No. 1 of 1911 is applicable. The parties were married in 1917 and the property was acquired for valuable consideration in 1918. The separate property can be alienated with the consent of the District Judge. The District Judge can dispense with the husband's consent only when the wife wants to deal with her separate property. In other cases no court can give consent. If the property in dispute in this case was not separate property, and was *thediatheddam* within the meaning of Ordinance No. 1 of 1911, then the Court cannot give consent. Was it *thediatheddam* property ? Section 19 makes it clear

[1] *(1936) 38 N. L. R. 1.*
[2] *(1923) 25 N.L. R. 151.*
[3] *(1922) 23 N. L. R. 97.*

that it was *thediatheddam* of the wife, and section 20 (1) indicates that it belongs to both husband and wife equally. See *Avitchy Chettiar v. Rasamma* [1]. After the answer was filed in the present case the Jaffna Matrimonial Rights and Inheritance (Amendment) Ordinance, No. 58 of 1947, came into operation. It is submitted that this Ordinance did not operate retrospectively. There is nothing in the Ordinance itself to say that it is retrospective. Section 7 declares that the amendment shall not affect the rights of the parties in the case of *Avitchy Chettiar v. Rasamma* (*supra*) and in other cases in which that case may have been followed. This section was inserted *ex abundanti cautela*. It does not say, by necessary or reasonable implication, that the amendment affected the mutual rights of parties in all cases other than those expressly indicated. The fact that the amending Ordinance refers to the earlier Ordinance as the " principal Ordinance " is no indication that the amending Ordinance is retrospective, as practically all amending Ordinances refer to the earlier Ordinances in the same way whenever the amendments are not of a simple nature. With regard to the meaning of the expression " principal Ordinance " see section 5 of the Interpretation Ordinance. Further, section 6 (3) (*b*) of the Interpretation Ordinance appears to be decisive on this question. No right can be taken away unless expressly taken away by written law. In England (52 and 53 Vict. Cap. 63) the problem is more difficult. There must be an intention to affect vested rights—*Barber v. Pigden* [2]; *The Guardians of the Poor of the West Derby Union v. The Metropolitan Life Assurance Society* [3].

It is submitted therefore that *Sachchithananthan v. Sivaguru* [4] was wrongly decided and that Ordinance No. 58 of 1947 has no retrospective effect.

C. Thiagalingam, *K.C.* with *V. A. Kandiah* and *E. R. S. R. Coomaraswamy* for the defendant-respondent.—Sections 19 and 20 of Ordinance No. 1 of 1911 have nothing to do with this case. The question is what is the meaning of the word *thediatheddam*. It does not mean a different thing before and after the amending Ordinance came into force. The amending Ordinance is a declaratory statute. The question whether it is of retrospective effect does not really arise. The statute is declaratory because it seeks to define the word *thediatheddam* in view of erroneous decisions. Assuming that sections 19 and 20 have some application, two questions arise—what is *thediatheddam*, and on whom does *thediatheddam* rest? With regard to the meaning of " acquired " in section 19 see the Thesavalamai (Chap. 51) Part I, section I, and the judgment of Withers J. in *Jivaratnam v. Murukesu* [5]. Section 19 (*a*) of Ordinance No. 1 of 1911 correctly defined *thediatheddam* and there is no necessity to consider the amending Ordinance. See also *Nalliah v. Ponnamah* [6]. It is perfectly clear that the property in dispute was the property of the wife as it was admittedly purchased with dowry money. With regard to the question whether the amending Ordinance was retrospective, see *Odgers' Construction of Statutes*, 1946 ed., p. 194;

[1] *(1933) 35 N. L. R. 313.*
[2] *(1937) 1 K. B. 664.*
[3] *L. R. (1897) A. C. 647 at p. 655.*
[4] *(1949) 50 N. L. R. 293.*
[5] *(1895) 1 N. L. R. 251.*
[6] *(1920) 22 N. L. R. 198.*

Halsbury's Laws of England, 1st ed., Vol. 27, pp. 116, 162. Even where no express words appear in a statute to indicate that the statute is retrospective, still, if the context so requires, a retrospective effect can be given to it—*A.G. v. Theobald* [1]; *Lane v. Lane* [2].

With regard to the use of the word " repeal ", see *Surtees v. Ellison* [3]. When an Act is said to be " repealed ", except as regards past transactions, the old Act is treated as if it had not existed. The effect of the use of the words " delete and substitute " in the amendment is to make one read the principal Ordinance as if the words in the amendment were in the principal Ordinance from 1911. Section 6 of the Interpretation Ordinance has no application, as that refers to total repeal.

[At this stage Counsel for the appellant submitted that the Bench was not properly constituted. The argument in regard to this submission is dealt with in the judgments of Basnayake J. and Swan J. *infra*.]

H. V. Perera, K.C., in reply.—Even if there is a canon of interpretation which comes into conflict with section 6 of the Interpretation Ordinance the statutory provision must prevail. The " dominant intention of the legislature " referred to in *Sachithananthani v. Sivaguru* (*supra*) is something subjective. The intention of a statute and the intention in enacting a statute are different. The proper test would be—is there express provision in the new Ordinance taking away rights acquired under the old Ordinance? Section 7 of the amendment is a " saving clause ". With regard to the effect of a saving clause, see *Punjab Province v. Daulat Singh* [4].

H. W. Tambiah continued.—The trial Judge did not consider the questions of adverse possession and ouster. The parties are co-owners and no prescription can arise. There is no evidence of adverse possession and no ouster was proved—*Corea v. Appuhamy* [5]; *Sideris v. Simon* [6]. Mere possession and the execution of deeds do not amount to ouster—*Ummu Ham v. Koch* [7]. See also *Cooray v. Perera* [8] and *I. L. M. Cadija Umma v. S. Don Manis Appu* [9].

Cur. adv. vult.

October 10, 1951. NAGALINGAM J.—

This appeal raises a point of some importance in regard to the matrimonial rights of a wife governed by the Matrimonial Rights and Inheritance (Jaffna) Ordinance (Cap. 48 of the Legislative Enactments). Though the argument has ranged over a very wide field, the decision of the case lies in a very narrow compass.

The facts briefly are: The plaintiff married his wife the third defendant in September, 1917. In March, 1918, by deed P2, the third defendant bought certain lands with her dowry-money and the lands in dispute

[1] *(1890) 24 Q. B. D. 557.*
[2] *(1896) 74 L. T. 557.*
[3] *(1829) 7 L. J. (O. S.) K. B. 335.*
[4] *(1942) A. I. R. Fed. Court 38 at p. 42.*
[5] *(1911) 15 N. L. R. 65.*
[6] *(1945) 46 N. L. R. 273.*
[7] *(1946) 47 N. L. R. 107.*
[8] *(1944) 45 N. L. R. 455 at p. 456.*
[9] *(1939) 40 N. L. R. 392 at p. 396.*

are two of those lands she purchased. The husband, the plaintiff, went to Malaya in June, 1918, while the wife continued to remain in Jaffna. In December, 1923, the wife applied to the District Court of Jaffna for permission to sell her dowry property without joining her husband as a party, as the husband, she alleged, had deserted her for a period of over two years and also as she had made attempts to find his whereabouts and had failed in her attempts. That application was allowed by the District Court and the third defendant sold and conveyed *inter alia* the lands in dispute to one Rasamma by deed D4 of March, 1924. From Rasamma the lands in dispute have devolved through simple mesne conveyances on the first and second defendants.

The plaintiff has instituted this action for a declaration of title that he is entitled to these lands, for ejectment of the first and second defendants and for damages against them. He also avers in the plaint that the third defendant his wife is made a party defendant as she is unwilling to join him in the action. The plaintiff's evidence, however, shows that he and his wife were living together at the date of the institution of this action.

The question that arises is whether the conveyance D4 of 1924 by the third defendant in favour of Rasamma is valid. The validity of the deed depends upon the further question as to what were the third defendant's rights in law in respect of the disputed properties.

Under the Thesawalamai, the law prior to the passing of the Ordinance, not only was the dowry property of a married woman her separate property but also any property into which such dowry property may have been converted; for example where a wife received a cash dowry from her parents and with that cash she purchased immovable property, that immovable property would continue to be her separate property, for it was regarded as merely having taken the place of the cash and to be impressed with the character of dowry money with which it had been purchased. Even after the enactment of the Ordinance this view continued to hold ground. See the cases of *Nalliah v. Ponnamah* [1] and *Sellachchy v. Visuvanathan Chetty* [2]. In both these cases the view was taken that *tediatetam* property within the meaning of the un-amended section 19 of the Ordinance did not include property purchased by a spouse with his or her separate funds and that where property was purchased with separate funds by a spouse such purchase continued to be the separate property of such spouse. The first of these two cases was decided by de Sampayo J. and Schneider A. J. while the latter which is headed " Full Bench " was decided by Bertram C. J. and de Sampayo J., Garvin A. J. dissenting.

It will be noticed that the application made by the third defendant to the Court was made after the decision of these two cases (the former in 1920 and the latter in 1922) and was based on the view expressed authoritatively in these two cases, one of them being regarded, in any event at that time, as a Full Bench decision of this Court: so that correctly and properly the lands purchased by the third defendant, admittedly with her dowry money, were her separate property which she was entitled to deal with under section 6 of the Ordinance, provided she obtained the consent of Court. The Court itself took the same view

[1] *(1920) 22 N. L. R. 198.*

[2] *(1922) 23 N. L. R. 97.*

of the law and granted the third defendant's application. It would be manifest that the third defendant, if she instituted the action now, would be met by a plea of estoppel and one can, therefore, quite understand why she has not joined the husband in bringing the action.

The law was accepted in the sense laid down in these two cases and continued to be acted upon until 1933, when in the case of *Avitchy Chettiar v. Rasamma* [1] a Divisional Bench departed from the principal expressed in these two cases and adopted the view that the naked fact of the purchase of property by either husband or wife during the subsistence of marriage resulted in the property purchased being freed from the character of separate property even though the consideration provided for such purchase is shown to be the separate fund of the spouse so purchasing. A Commission was appointed in 1929 to consider and report on amendments to Thesawalamai and it was to give effect to the recommendation of the Commission (see Sessional Papers 3 of 1930 and 1 of 1933), that the amending Ordinance was prepared but before the amending Ordinance could be presented to the State Council, *Avitchy Chettiar v. Rasamma* (*supra*) was decided and the Legislature took the opportunity as stated in the objects and reasons (which are reproduced hereunder for convenience of reference) [2] *inter alia* to make " some modifications rendered necessary " by the decision and with intent " to give a clear definition of the separate property of each of the partners of a marriage " " based on well established custom " and " *to remove the ambiguity* which led to the decision in the case of *Avitchy Chettiar v. Rasamma* " (*supra*) enacted the Jaffna Matrimonial Rights and Inheritance (Amendment) Ordinance, No. 58 of 1947, in the form in which it appears.

[1] *(1933) 35 N. L. R. 313.*

[2] *Ceylon Government Gazette No. 8,274; Part II, February 26, 1937 :*

" *Objects and Reasons.*

1. This Bill is intended to give effect to the recommendations contained in the Report of the Thesawalamai Commission dated December 12, 1929 (Sessional Paper III of 1930) and in their Supplementary Report of October 9, 1931 (Sessional Paper I of 1933) with some modifications rendered necessary by the decision of the Supreme Court in the case of Avitchy Chettiar v. Rasamma (35 N. L. R. page 313).

2. Clause 2 is designed to place beyond doubt the applicability of the Jaffna Matrimonial Rights and Inheritance Ordinance, 1911, to all the property of those governed by it regardless of the actual situation of such property, whether in the Northern Province or elsewhere.

3. In clauses 3 and 4 amendments are proposed to sections 8 and 9 of the principal Ordinance, in order to give a clear definition of the separate property of each of the partners of a marriage. The definition is based on well-established custom and is intended to remove ambiguity which led to the decision in the case of Avitchy Chettiar v. Rasamma. *A clearer definition of* thediatheddam *is also proposed in clause 5, and the new principle according to which* thediatheddam *is to devolve on the intestacy of a spouse is set out in Clause 6.*

4. Although the meaning of section 24 of the principal Ordinance is that sons and daughters all take equal shares, it seems to be necessary to add to it the provision that the surviving parent or other members of the family may no longer exercise the customary right of distributing all the property of the deceased parent as dowry to the daughters to the exclusion of the sons. This proposal is set out in Clause 7.

5. The object of Clause 8 is to save the rights of the parties in the case of Avitchy Chettiar v. Rasamma *and in other cases in which that case may have been followed as a precedent prior to the date on which this amendment becomes law.*

J. C. Howard,
Legal Secretary. "

Colombo, February 23, 1937.

The question that now arises is as to what is the effective date of operation of the provisions of the amending Ordinance. I think it is elementary to state that one should look at the enactments themselves in the first instance to see if any assistance can be derived therefrom in regard to the question and if the Legislature either expressly or by necessary implication has indicated the date of operation, then the answer is found. With this end in view I shall set out the relevant portion of section 6 of the Ordinance as amended by the Amending Ordinance:

" All movable or immovable property to which any *woman married after the commencement of this Ordinance* may be entitled at the time of her marriage, or which she may during the subsistence of the marriage acquire or become entitled to by way of gift or inheritance or *by conversion of any property to which she may have been so entitled* or which she may so acquire or become entitled to shall . . . . belong to the woman for her separate estate . . . . "

Nothing can be clearer than that the Legislature intended that the section as amended should apply to all women married after the commencement of this Ordinance for the section as amended expressly says so. If this section as amended applies to all women married after the commencement of this Ordinance, as it undoubtedly does, it is hardly necessary to inquire further from when does the amendment speak, for it is obvious it must necessarily speak from the date of the commencement of the Ordinance itself, for only then can it apply to all women married after the commencement of the Ordinance, that is to say, from the 17th of July, 1911, the date of commencement of the Ordinance. There are no words from which it is possible to come to any other conclusion much less that the section as amended only applies to women married after the passing of the amending Ordinance, No. 58 of 1947, on 4th July, 1947. To introduce the notion that the section as amended is to apply only to persons married after the 4th July, 1947, the date of passing of the amending Ordinance, one would have to recast the whole section and delete the words " any woman married after the commencement of this Ordinance " and substitute therefor the words " any woman married after the passing of the amending Ordinance." In other words one cannot accept the view that the amendment is to apply only to women married after 4th July, 1947, without doing violence of a totally unjustifiable character to the section itself. I cannot do better than quote an often cited passage from Craies on Statute Law [1] where the law is stated thus:

" If it is a necessary implication from the language employed that the Legislature intended a particular section to have a retrospective operation, the Courts will give it such an operation. ' Baron Parke ' said Lord Hatherley in *Pardo v. Bingham* [2] ' did not consider it an invariable rule that a statute could not be retrospective unless so expressed in the very terms of the section which had to be construed, and said that the question in each case was whether the Legislature had sufficiently expressed that intention. In fact, we must look to

[1] *4th ed. p. 334.*

[2] *(1870) 4 Ch. App. 735, 740.*

the general scope and purview of the statute, and at the remedy sought to be applied, and consider what was the former state of the law, and what it was that the Legislature contemplated'. "

If one bears therefore in mind that the separate property of a spouse was defined in the way in which it received judicial interpretation in the cases of *Nalliah v. Ponnamah* [1] and *Sellachchy v. Visuvanathan Chetty* [2] for over 22 years even after the passing of the Ordinance before that definition was assailed in the case of *Avitchy Chettiar v. Rasamma* [3] and when it is remembered that not merely as a result of the report of the Commission but in consequence of the last mentioned decision it was that the law was amended, it is not difficult to see that the Legislature intended that the amendment which was in the nature of a piece of enactment declaring what the law always was and restoring the law as it stood before the decision in *Avitchy Chettiar v. Rasamma* [3] should have operation from the commencement of the Ordinance itself. It is hardly necessary to observe that the amendment restores the law as stated in *Nalliah v. Ponnammah* [1] and *Sellachchy v. Visuvanathan Chetty* [2] and departs from that expressed in *Avitchy Chettiar v. Rasamma.* [3]

It would also be noticed that section 3 of the amending Ordinance which amends section 6 of the principal Ordinance does not use the term " repeal " and no question arises therefore of any attempt made on the part of the Legislature to conserve any vested rights. Indeed the conclusion would appear to be irresistible that the Legislature did not regard that by passing the amending section 3 it was interfering with any vested rights of a husband who was married after the commencement of the Ordinance and whose wife was yet living, for it is obvious that no argument based on section 6 (2) of the Interpretation Ordinance was available to such a husband, as contended for at the Bar.

In this view of the matter it is clear that the lands in question to which the third defendant became entitled by conversion of her dowry money to which she was entitled at the time of her marriage were her separate property and therefore the alienation by deed D4 with the permission of Court was valid and binding so as to give an indefeasible title to the purchaser. The first and second defendants have therefore a valid title to the lands and no question of prescription arises so far as the defendants are concerned for they have a legal title in themselves. It is for the plaintiff to show that he who has no paper title has a title by prescription but the evidence is conclusive that he never has had possession since 1924, when the sale to Rasamma took place.

I should, however, wish to make an observation in regard to the contention based on the assumption that the first and second defendants were co-owners with the plaintiff and that their possession was therefore the plaintiff's possession. This contention was advanced on the footing of *Corea v. Iseris Appuhamy* [4] and *Britto v. Muttunayagam* [5] and similar cases. It will be found that in all these cases the action was against a co-heir who continued to be in possession and not against a stranger

[1] *(1920) 22 N. L. R. 198.*
[2] *(1922) 23 N. L. R. 97.*
[3] *(1933) 35 N. L. R. 313.*
[4] *(1911) 15 N. L. R. 65.*
[5] *(1918) 20 N. L. R. 327.*

who had bought the entirety of the land from one of the co-owners and continued to be in exclusive possession thereof. The point is covered by authority. In the case of *Mohamed Marikar v. Kirilamaya* [1] two heirs purporting to be the sole heirs of the original owner transferred the land to the defendant. After the expiry of over ten years, a purchaser from another heir of the original owner instituted an action for declaration of title for a share and relied upon co-ownership to surmount the obstacle presented by adverse possession. Schneider J, with whom Garvin A.J. agreed, held that the judgment in the case of *Corea v. Iseris Appuhamy* [2] was inapplicable to the circumstances of that case. In the present case Rasamma and her successors in title had been in exclusive possession from 1924 till the date of the institution of action in 1947. Their possession was overt and was adverse to the plaintiff, and it is in these circumstances idle to contend that Rasamma or any of her successors in title ever regarded themselves as co-owners with anyone else. Rasamma and her successors in title purchased the entirety of the property *without any knowledge or belief of the existence of any other party entitled to any interest in the land.* The plea of prescription therefore is of no avail to the plaintiff.

Plaintiff's action therefore fails.

An argument was addressed to us with regard to the date of operation of the new sections 19 and 20. These come under Part III of the Ordinance dealing with inheritance and have no application to the problem presented by the present case. I need only observe that if one will read section 14 and the new sections 19 and 20 it would be noticed that even those sections have operation from the date of the passing of the Ordinance and catch up estates of all persons who may have died after the commencement of the Ordinance, subject to the limitation contained in section 14 itself. One can then quite appreciate the reason for enacting section 7 of the amending Ordinance and why it was necessary to enact that the amendments made by the amending Ordinance were not to be deemed to affect the mutual rights of the parties in *Avitchy Chettiar v. Rasamma* [3] or in other cases decided in accordance with the decision of that case; for in truth the amendments affect the estates of all persons who died after 1911.

For the foregoing reasons, the appeal is dismissed with costs.

BASNAYAKE J.—

This case came up for argument in the first instance on the 3rd of July, 1950, before my brothers Dias and Swan. Both the appellant and the respondent were represented by counsel. After a preliminary hearing my brother Dias made the following order with which my brother Swan concurred:

" My learned brother and I are agreed that this case should be referred to the learned Chief Justice as we are of opinion that this case merits consideration by a Bench of three or more judges of the Supreme Court.

[1] *(1923) 1 T. L. R. 158.* [2] *(1911) 15 N. L. R. 65.* [3] *(1933) 35 N. L. R. 313.*

" The question is whether the amendment of section 19 of the Jaffna Matrimonial Rights and Inheritance Ordinance (Chapter 48) by Ordinance No. 58 of 1947 has a retrospective effect, viz., whether rights which vested prior to the amendment are affected by the amending Ordinance ? The question will also arise whether the case of *Sachchithananthan v. Sivaguru* (1949) 50 N. L. R. page 293 has been rightly decided ? For these reasons we think this case merits consideration by a Divisional Bench or Fuller Bench. Mr. Kandiah wants us to note that even if the point is decided against him that he has other questions to argue in support of the judgment."

The appeal was, on the order of My Lord the Chief Justice, then listed before a Bench of three Judges consisting of my brothers Nagalingam and Swan and myself.

It was argued on the 19th and 21st of December, 1950, and its hearing was interrupted by the Christmas vacation. Owing to the absence of the Judges who composed the Bench on circuit, it was not possible to resume the hearing till 26th September, 1951. At the resumption of the hearing learned counsel for the appellant brought to our notice that the Bench hearing the appeal was not properly constituted in as much as the reference to a Bench of three Judges was not in accordance with section 51 of the Courts Ordinance. He argued that the Chief Justice had power to refer a case to a Bench of two or more Judges under section 48A of the Courts Ordinance, and that he had also power to constitute a Full Bench under section 51 of the Courts Ordinance. Learned counsel contended that the present reference was under neither section of the Courts Ordinance and that the Chief Justice had no other power to refer the matter to a decision of two or more Judges.

Learned counsel for the respondent submitted that the Bench was properly constituted. He relied on section 38 of the Courts Ordinance. The material portion of that section reads:

" All appeals in civil cases from the decision of a single Judge sitting as in the last preceding section provided, and from judgments and orders of the several District Courts of the Island, shall be heard before two at least of the Judges of the said Court."

He laid emphasis on the words " at least " and submitted that those words indicated that more than two judges may hear a civil appeal from a District Court. I am unable to agree with that view. The words " two at least " do not mean " two or more ". It is another way of saying effectively that two Judges and not less than two shall hear civil appeals. Those words are well known in enactments, especially where it is desired to fix a time or a period of time with certainty. In the case of *In re Railway Sleepers Supply Company* [1] Chitty J. expressed the view that " 14 days " and " at least 14 days " meant the same thing. My view receives confirmation from the practice of this Court extending over a quarter of a century in listing civil appeals from District Courts before two Judges and no more.

This being not an appeal before a single Judge the order by my brother Dias cannot be related to section 48 of the Courts Ordinance. It can only

[1] *(1885) 54 L. J. Ch. 722.*

be regarded as a request to My Lord the Chief Justice to exercise the functions vested in him by section 51 of the Courts Ordinance. The present Bench has not been constituted as therein provided, and I am in agreement with the submission of learned counsel for the appellant that the Bench as constituted at present for the purpose of this hearing is not in accordance with the statute, but as my brothers Nagalingam and Swan were of a different view the majority decided that the case should be heard and we gave counsel the opportunity of concluding their arguments.

This is an action by one Alfred Alagaratnam Chellappah for declaration of title, for ejectment, and for damages in respect of two allotments of land described in the schedule to the plaint.

The plaintiff's case is that his wife, the 3rd defendant, purchsed in 1918 four lands after his marriage with her in 1917, for a sum of Rs. 4,750, which was part of her dowry. After the purchase of these lands, the plaintiff went to Malaya and remained there till 1946. During his absence in Malaya his wife visited him once in 1941 and remained with him there till 1946, when they both returned. When he went to the lands which are the subject matter of this action in 1946 he found that the first defendant was in possession. On inquiry he learned that the lands had been sold by his wife, the third defendant, by deed D4 of 17th March, 1924. The sale had been effected under the authority of an order of court made on the application of the plaintiff's wife. In her application she had alleged that she was the lawful wife of the plaintiff, that her husband had deserted her for a period of over two years, that she was entirely dependent on her own earnings for the maintenance of herself and her child, that owing to her state of indebtedness she was desirous of selling some of the dowry property, that she had failed to trace the whereabouts of her husband though every endeavour was made in that behalf, and that she was not aware whether he was alive or dead. That application was lodged on the 21st of December, 1923, and the lands in question were sold to one Mary Rasammah, wife of one Albert Ponniah. The vendee on that deed P4 disposed of her rights in 1924, and the 1st, 2nd, 4th, and 5th defendants purchased the land in 1942.

The following issues were tried:

1. Were the lands in dispute acquired for valuable consideration during the subsistence of the plaintiff's marriage with the 3rd defendant ?
2. If so, did the plaintiff and the 3rd defendant become jointly entitled to the said lands by reason of such acquisition ?
3. If so, is the plaintiff entitled to a declaration that he is entitled to manage and deal with the said land ?
4. Is the plaintiff entitled to be placed in possession of the said lands ?
5. What damages ?
6. Are the 1st and 2nd defendants entitled to the said lands under and by virtue of deed No. 1226 of 5.5.1945 ?
7. Have the 1st and 2nd defendants acquired prescriptive title to the said lands ?
8. Were the lands in question separate property of the 3rd defendant ?

The issues were answered against the plaintiff, and he has appealed. The main question argued before us in appeal was that the Ordinance that applied to the plaintiff and the third defendant at the time of purchase and sale of the lands in question was the Jaffna Matrimonial Rights Ordinance of 1911, and that the relevant sections are 19 and 20 as they stood before the amendment of that Ordinance by Ordinance No. 58 of 1947 which came into operation on 3rd July, 1947.

For the respondent it was contended on the authority of the judgment of my brother Nagalingam in *Sachchitanathan v. Sivaguru* [33] that Ordinance No. 58 of 1947 had retrospective effect and that sections 19 and 20, as amended by Ordinance No. 58 of 1947, applied to the plaintiff and the third defendant in respect of the purchase and sale of the lands in question.

Learned counsel for the appellant contended that an Ordinance does not affect the past operation of anything done under a repealed Ordinance unless the repealing Ordinance expressly provides that past transactions shall be affected. There is no such provision in Ordinance No. 58 of 1947 and it cannot therefore be said to affect the purchase and sale by the third defendant of the lands in question. Section 7 of Ordinance No. 58 of 1947 declares that the amendment shall not affect certain decisions specified therein. I am unable to regard that section as anything more than a provision inserted *ex abundanti cautela* for the purpose of preventing any person from asserting that the amendments effected by the amending Ordinance affect the decision mentioned therein. It is a well-known rule of construction that legislation does not affect cases already decided, and a provision such as section 7 is strictly unnecessary [34] especially in view of section 6 (3) (*a*) of our Interpretation Ordinance. With great respect to my brother Nagalingam, I am unable to agree with the view taken by him.

If then the parties are governed by the 1911 Ordinance as it stood before the amendment, the purchase effected by the third defendant with her dowry money became her *thediatheddam* and she was not free to alienate more than her interest therein. The sale by her in the absence of her husband did not pass title to more than a half share of the property. The fact that the sale was authorised by the Court does not affect the matter. A Court has no power to authorise a person to sell more than his or her share of a land. It is not clear under what provision of law the Court was moved in the matter and under what authority it sanctioned the sale. There is no statutory power enabling a Court to sanction a sale such as the one it sanctioned.

If the defendants have title only to an undivided half share of the lands, are they entitled to claim by virtue of prescriptive possession the other half of which they and their predecessors were undoubtedly in possession from the date of sale ? It is contended for the appellant that prescription does not run against the plaintiff in this case as the defendants were nothing more than co-owners with him and that their possession was not

[33] *(1949) 50 N. L. R. 293.*

[34] *(1912) A. C. 400, Lemm v. Mitchell ; (1917) 1 K. B. 259 Rex v. Southampton Income Tax Commissioners, Singer, Ex. p.*

adverse. Learned cousel has cited several decisions of this Court in support of his contention that a co-owner's possession enures to the benefit of the other co-owners and in this case there being no ouster the defendants are not entitled to secceed in their claim on the ground of prescription against the plaintiff in respect of his half share of the lands.

The learned District Judge does not discuss the question of prescription beyond saying: " I accept the evidence of the 4th defendant as regards possession and also as regards the presence of the plaintiff in Ceylon in 1925 and in 1942."

In the result the plaintiff is entitled to succeed. The appeal is therefore allowed with costs both here and below.

SWAN J.—

I should like, first of all, to deal with the point taken by Mr. H. V. Perera that this Bench of three Judges has not been properly constituted and that we are acting without jurisdiction. The point was taken at a very late stage, in fact when learned Counsel for the respondent was about to conclude his argument. Mr. Perera said that he was not raising it by way of objection, but that he merely desired to bring it to our notice that we were not a properly constituted Bench. In this connection he cited to us sections 38, 48, and 51 of the Courts Ordinance as amended by Courts (Amendment) Act, No. 52 of 1949.

Section 51 provides that " it shall be lawful for the Chief Justice to make order in writing in respect of any case brought up before the Supreme Court by way of appeal, review or revision, that it shall be heard by and before all the Judges of such Court, or by and before any five or more of such Judges named in the order, but so that the Chief Justice shall always be one of such five or more Judges. "

I do not think that section 51 has any application, because the Chief Justice did not act, or purport to act, under that section.

Section 38 provides, *inter alia*, that " all appeals in civil cases from judgments and orders of the several District Courts of the Island shall be heard before two at least of the Judges of the said Court . . . . In the event of any difference of opinion between such two Judges the decision of the said Court shall be suspended until three Judges shall be present, and the decision of such two Judges when unanimous, or of the majority of such three Judges, in case of any difference of opinion, shall in all cases be deemed and taken to be the judgment of the Supreme Court. "

The concluding paragraph of section 38 as amended would read—

" Nothing in this section contained shall preclude any judge of the Supreme Court sitting alone in appeal from reserving any appeal for the decision of more than one Judge of that Court. "

Section 48 as amended provides that " where any question shall arise for adjudication in any case coming before a single Judge of the Supreme

Court which shall appear to such Judge to be a question of doubt or difficulty it shall be lawful for such Judge to reserve such question for the decision of more than one Judge of that Court. "

The Amending Act introduces a new section 48A which reads as follows :—

" Any appeal or question which is, under section 38 or under section 48, reserved for the decision of more than one Judge of the Supreme Court, shall be decided by a Bench, constituted in accordance with an order made by the Chief Justice in that behalf, of two or more Judges of that Court. "

Mr. Perera contends that when this case came up before two Judges of this Court they had no power or authority to reserve it for the decision of a fuller Bench. What happened was that this case was listed for hearing before my brother Dias S.P.J. and myself. After learned Counsel for the appellant had opened his case we thought that the matters involved in the appeal merited consideration by a Bench of three or more Judges of the Supreme Court, and we so reported to the Chief Justice. I should add that Mr. H. W. Thambiah, who appeared as Senior Counsel for the appellant at that stage, expressly invited us to have the appeal listed before a fuller Bench. The case now comes up before a Bench of three Judges. The question is whether we have the right and authority under the Courts Ordinance to hear and decide this appeal. I think the answer to that question can be found in section 38 which states that " all appeals in civil cases . . . . . . from judgments and orders of the several District Courts of the Island shall be heard *before two at least of the Judges of the said Court.* "

For these reasons I express the opinion that we are a properly constituted Bench to hear this appeal and with that view my brother Nagalingam agrees.

As regards the appeal itself I agree with my brother Nagalingam that it is impossible to come to any other rational conclusion than that the amendments contained in Ordinance 58 of 1947 operate as from the date of commencement of the Jaffna Matrimonial Rights and Inheritance Ordinance—Cap. 48 of the Legislative Enactments, that is from 17.7.1911. It seems to me that the amending Ordinance was enacted in order to declare what the law always was, as well as to remove any doubts that might have been created by the decision in *Avitchy Chettiar v. Rasamma.* [34]

Even if this view of the matter is erroneous I would hold that the 1st and 2nd defendants have acquired a title by prescription. The circumstances in which the 3rd defendant came to sell the lands in dispute, and Rasamma to purchase them, amount to an ouster, and would be the starting point of adverse possession upon which a title by prescription could lawfully be based.

In my opinion the appeal fails and I would dismiss it with costs.

Appeal dismissed.

[34] *(1933) 35 N. L. R. 313*