[FULL BENCH.]

Present: Bertram C.J., De Sampayo J., and Garvin A.J.

SEELACHCHY *v.* VISUVANATHAN CHETTY.

147—D. C. Colombo, 1,963.

Tesawalamai—*Acquired property—Gift by husband—Claim by wife that husband had no power to gift more than half share of acquired property—Property situate out of Jaffna—Applicability of* Tesawalamai.

S, a Tamil subject to *Tesawalamai*, acquired after his marriage with the plaintiff a property in Colombo and donated it to N, his son

N executed a mortgage of the property, and it was sold in execution, and purchased by the mortgagee (defendant).

Plaintiff brought this action to vindicate half of the property on the ground that it was part of the *thediathetam*, and that, therefore, it was not competent to S, without the consent of his wife, the plaintiff, to donate more than a half share.

Held (Bertram C.J. and De Sampayo J., Garvin A.J. *dissentiente*), that defendant's title was good.

BERTRAM C.J.—Under the *Tesawalamai* community of goods is restricted to acquisitions during marriage. The husband is the manager of the common property. He can freely sell and mortgage the common property without the consent of the wife. But he cannot donate more than one-half. But if the husband, who is the absolute manager of the community, ignores the limitation of his powers of donation, and purports to make a gift of the whole of one of the acquired properties, the donation is not *ipso facto* void so far as it relates to the wife's share; and the wife is not entitled to an immediate *rei vindicatio* action against the donee for her half share; she or her heirs must wait till the dissolution of the marriage by death or otherwise for some form of compensation.

Any property acquired in the course of trade by one of two spouses subject to the *Tesawalamai* in a part of the Colony outside its special local sphere becomes *ipso facto* partnership property, as part of the community. The legal title to that property in so far as it is immovable property does not pass to the community, inasmuch as we require special formalities for the passing of title to immovables, where under our law it does not pass by operation of law. There passes, however, by the tacit agreement of the spouses, manifested by their not having made an inconsistent marriage settlement, an equitable right to have that property declared part of the community.

When the plaintiff's husband purchased the property, he acquired it subject to a constructive trust in favour of his wife, and his wife was entitled to sue him for a formal conveyance of her interest. But the right so acquired by the wife could not prejudice any *bona fide* purchaser claiming from the donee of her husband.

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DE SAMPAYO J.—A husband may under the *Tesawalamai* make a donation of the entirety of the acquired property, just as much as he may sell or mortgage the same. Even if he may not, the wife, if she is prejudiced by any donation of acquired property by the husband, cannot seek to obtain as against a *bona fide* purchaser from the donee a half share of the specific property, but can only ask for half of the acquired property as a whole, or for compensation from the husband's representatives.

GARVIN A.J.—These premises at the time of the acquisition by S vested by operation of law equally in his wife. The husband had not the right to gift the entirety of the premises, and the appellant consequently was not legally divested of her title to a half share by her husband's deed of gift.

THE facts are set out in the judgment of the District Judge (W. Wadsworth, Esq.) :—

This is an action by the plaintiff for declaration of title to a half share of premises No. 80, Bankshall street, situated in Colombo. The plaintiff bases her claim by right of *thediathetam* or acquisition under the *Tesawalamai* law.

The facts material to the decision of this case are these :—

More than forty years ago one Sangarapillai, a man of Jaffna, came to Colombo and traded here in cigars. His parents were both Tamils of Jaffna. In October, 1881, he went to Jaffna and married the plaintiff. At the time of the marriage he was not possessed of any immovable property. He had some money, with which he traded. He had no *mudusom* or hereditary property. Plaintiff was a native of Jaffna, both her parents were Tamils, and she was given dowry at the time of marriage. After marriage, Sangarapillai came back to Colombo and traded as before. Plaintiff never came to Colombo, but remained in Jaffna all her life. Sangarapillai used to go and see her occasionally in Jaffna.

Sangarapillai made profits in his business, and acquired immovable properties both in Colombo and in Jaffna. One of the properties so acquired by him was premises No. 80, Bankshall street, the property in dispute in this case. The deed of transfer, No. 1,788 dated October 4, 1894, conveyed the whole of the premises to him. The deed was duly registered ; Sangarapillai possessed the property.

By the marriage Sangarapillai and plaintiff had six children. The eldest son was Nagalingam. The boy came to Colombo and lived with his father, and was educated here. He was prosecuting his studies to become an advocate, but having failed in the preliminary examination he joined the father in business.

On October 15, 1906, Sangarapillai donated the property in question to his son, Nagalingam, by deed, which was duly registered.

Sangarapillai and Nagalingam carried on the cigar business in these very premises.

Sangarapillai died in 1910, leaving a will, by which he left his properties to his wife, and appointed Nagalingam as executor. His estate was duly administered.

Nagalingam continued the business after his father's death, and practically attended to the family as his father did. He sent the usual monthly allowance to his mother in Jaffna. When his sisters married, he gave the necessary dowry.

Nagalingam possessed the property in question and traded there. By bond No. 1,699 dated June 8, 1914, attested by Mr. L. B. Fernando, Proctor and Notary, he mortgaged the premises to a Chetty and raised Rs. 6,000.

On September 25, 1916, he executed a secondary mortgage of these premises and raised a sum of Rs. 3,000.

By bond No. 1,979 dated May 27, 1918, attested by Mr. C. T. Kandyah, Proctor and Notary, he mortgaged the premises to another Chetty and raised Rs. 13,000, and discharged the prior mortgages.

By bond No. 3,666 dated October 21, 1919, attested by Mr. J. T. Bartlett, Proctor and Notary, he executed a secondary mortgage of the premises and raised a sum of Rs. 10,000 from another Chetty.

All the above mortgage bonds were duly registered.

In case No. 53,378 of this Court, bond No. 1,979 of May 27, 1918, was put in suit by the mortgagee, the present defendant, a Chetty, and decree was entered in his favour against Nagalingam.

In execution of the decree the property was duly advertised and was put up for sale with the sanction of Court by public auction, and at the sale the defendant became the purchaser, and obtained a transfer dated August 27, 1920. Defendant was put into possession of the premises.

On September 20, 1920, plaintiff, on the advice of her son-in-law, a proctor, files this action, disputing the right of the defendant to the half share of the premises, on the ground that as the property was bought by her husband, Sangarapillai, during the subsistence of the marriage, half of it became by operation of the *Tesawalamai* law her own at the time of the acquisition, and that Sangarapillai had no right to dispose of the whole of the property without her knowledge, and that Nagalingam became entitled only to half the property; and that, therefore, the defendant's right to a half of the property is invalid.

Several very important questions affecting persons governed by the *Tesawalamai* law have been raised, and I consider that a survey of the law is necessary for a proper appreciation of the points raised.

Tesawalamai, as its name denotes, is a description of the country custom. *Tesa* (country) and *walamai* (custom). In 1704 the Dutch Governor of Ceylon, Governor Simons, directed the Disawa of Jaffna, Claas Isaaksz, to inquire into the customs of the Tamil inhabitants of Jaffna as then existed and to compile them. In consequence, after inquiry, Isaaksz submitted a description of the customs, in the Dutch language, to the Commander van der Duyn in 1707. The Commander had the same translated into the Tamil language, and delivered the translation to twelve "sensible" modeliars to peruse and revise the same. The "sensible" modeliars reported that they perfectly agreed with the usual customs prevailing at this place, and fully confirmed the same. Isaaksz insisted on the modeliars giving their assent to his composition by signing it, as he said: "Because I know that the modeliars are deceitful and variable; and therefore when they have subscribed their names to the composition of their laws and customs, they will have no opportunity whatever to retract their assent given to the same."

The twelve modeliars accordingly signed the composition, making some observations as to certain customs relating to slaves.

In 1708 the customs were promulgated by the Dutch Governor of Ceylon and were given the force of law, and authenticated copies of

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the same were sent to the Courts of Justice and the Civil Landraad for their guidance.

This composition of the country customs is called the *Tesawalamai*.

In 1806, when the Dutch settlements in Ceylon were ceded to the British Crown, a Regulation, No. 18 of 1806, was issued declaring that this Code of customs, commonly known as the *Tesawalamai*, should be considered to be in full force, and that all questions between "the Malabar inhabitants of the Province of Jaffna," or "in which a Malabar inhabitant was defendant," should be decided according to this Code of customs.

In 1814 the then Chief Justice, Sir Alexander Johnston, caused the Code to be translated into English, and this translation is the law of *Tesawalamai* now applicable.

Disawa Isaaksz's insistence on the sensible modeliars putting their signatures to his composition of the customs to prevent any retraction appears to have had a tremendous effect, for, in spite of many changes in the customs and many repeals of Statute, the Code of *Tesawalamai*, like the laws of Medes and Persians, still remains unchanged, at least on paper. During the last two hundred years the world has changed, and Jaffna with it. Old customs which prevailed in these ancient days had fallen into disuse, and even abrogated. Customs regarding adoption, mortgage of slaves, and the like, though still having legal sanction on paper, as shown in this Code, have disappeared long ago. It is, indeed, surprising that a whole chapter of this immutable Code devoted to male and female slaves, their different classes, their marriages, the divisions of their properties, their duties, their sales, &c., still finds its place in the Statute Book, despite the abolition of slavery by Ordinance No. 20 of 1844. It may be that the slaves were designated as persons of certain low castes—Covias, Chandos, Pallas, and Nallavas—and that as questions relating to the customs of those persons may still be said to exist, and the Regulation No. 18 of 1806 having provided for such questions, though slavery was abolished, the provisions as to slaves still find their place in the Statute. But whatever reason might have prompted the compilers of the Ordinances, there cannot be much question that a good portion of the Code of *Tesawalamai*, as printed and kept, is obsolete and ineffective. How much of it is obsolete and how much of it is extant it is not necessary to examine, except as to the point relating to this case.

The *Tesawalamai* Code was compiled at an age when the people of Jaffna, who were more or less agriculturists, were residing, both in fact and in law, in Jaffna and were "inhabitants" of Jaffna. Times changed, means of communication with other parts of the world became possible, and these "inhabitants" went to several parts of Ceylon and also to distant countries, but still maintained their relationships with their home, and constructively continued to be "inhabitants" of Jaffna and governed by the Code of *Tesawalamai*.

Though the customs mentioned in the Code related to the usages and habits of people actually resident in Jaffna, some of the expressions used in the Code may be applicable, and have been made applicable, both by Statute as well as by judicial decisions, to a wider extent.

For instance, the term *thediathetam* originally was intended to convey the meaning profits acquired. A husband brought his inherited or *mudusom* property, and a wife brought her dowry property. They both cultivated the lands and fields. Any profits they gained became common, and was known as *thediathetam*. In olden times, and even at the present day in many places, both husband and wife, and often

the children too, joined in cultivating the fields and gardens and earned their living. It is possible that neither Isaaksz nor the sensible *modeliars* of old had in their minds any thought of the Jaffna inhabitant making money outside Jaffna by his own exertions, unaided by his wife, and getting profits and acquiring property. But the term *thediathetam* is wide enough to embrace this mode of acquisition, and the objection of Mr. Tisseverasinghe, for the defendant, that in this case the property bought by Sangarapillai in his own name cannot be said to come within the meaning of the term *thediathetam* under the *Tesawalamai* cannot, therefore, be sustained. In my opinion, all property acquired by either of the spouses during marriage must be held to be *thediathetam* or acquired property.

The next question raised was whether *Tesawalamai* applied to this case, inasmuch as the defendant is not governed by the *Tesawalamai*. In support it was submitted that the Regulation No. 18 of 1806 laid down that all questions between Malabar inhabitants of the Province of Jaffna, or where a Malabar inhabitant was a defendant, should be decided according to the *Tesawalamai* Code. It is true that the immediate parties here are not both governed by the *Tesawalamai*, but only the plaintiff. But the defendant cannot have any more rights than those of his predecessor in title, Nagalingam. If Nagalingam was entitled under the deed of gift only to a half, defendant will be entitled to that half only. The provision of the law in stating what the law applicable in a certain case is does not enact that the law is applicable only to that case and to no other. The point to be considered is the right of Nagalingam, who admittedly is governed by the *Tesawalamai* Code.

The main question is as to the right of Sangarapillai to donate the whole of the property to his son Nagalingam. This is a very important question, and although I do not find much difficulty in deciding this question, I have before me a judgment of the Supreme Court decided in 1872, which creates some difficulty.

The position of a husband under the *Tesawalamai* was more or less analogous to that of the husband under the Roman-Dutch law. It was truly said that under the Roman-Dutch law the husband and wife were one, and that one the husband. His marital power extended over all the property, both movable and immovable, brought into community. He had full power to dispose of the property. *Thediathetam* or acquired property under the *Tesawalamai* corresponds to the community property under the Roman-Dutch law. Such property was liable to the husband's debts. He had the absolute right to sell or mortgage the same. If the property was left undisposed and he died, then there is provision, both under the Roman-Dutch law and the *Tesawalamai*, as to devolution of title by inheritance. But during the lifetime of both the spouses the power of the husband to deal with the property is not limited.

Tesawalamai makes no difference between movable and immovable property. Whatever powers the husband had over movables extended to immovables. If he earned money, it was his. He could spend it as he liked. If he invested the money in immovable property, his powers or his rights over the property were not diminished or taken away, and he dealt with it as he liked. All this he could do by reason of his marital status. When he or his wife died, the community in the *thediathetam* is dissolved, and a half of what remains at the death of either spouse is considered the absolute property of the surviving spouse, and the other half passes by right of inheritance to the heirs of the deceased spouse. If, however, there is nothing remaining at

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the death of either spouse, there is naturally nothing for the surviving spouse or for the heirs of the deceased spouse.

Unlike the Roman-Dutch law, the *mudusom* property of the husband and the dowry property of the wife did not form part of any community, but remained their separate property. The husband's power over these properties appear to be restricted under the *Tesawalamai.* He had the power to sell the dowry property of the wife with her consent, not necessarily written consent. If he sold without such consent, the wife was only entitled to claim compensation from him (*Muthukistna 96*), but the sale was not bad.

As regards *thediathetam,* the husband's right to sell or mortgage is not disputed. Mr. Balasingham, for plaintiff, however, disputes the right of the husband to donate the whole of the *thediathetam,* and relies on the case of *Parasathy Ammal v. Setupulle.*[1] He cannot point to any passage in the *Tesawalamai* Code itself which limits the power of the husband. He submitted that this Court was bound to follow the judgment of the Supreme Court, and could not alter the law as laid down there. This case finds its place in the reports nearly thirty years after judgment was delivered, probably on account of the importance of the question as to the validity or otherwise of a contract *ex turpi causa.* As the report is not quite clear on the point raised in this case, I sent for the record in that case. The reporter has made some mistake in the statement of the case in the reports. The District Judge held the deed was illegal and not valid.

In that case the plaintiff alleged that her husband during the marriage lived in concubinage with another woman, and donated the whole of the acquired property to her, and brought the action against her to have the deed set aside on the ground that the deed was invalid. The main ground on which the District Judge decided the case was that the donation deed was invalid, as it was a contract *ex turpi causa,* and, therefore, invalid and illegal. The question of the right of the husband to deal with the whole of the property was also incidentally raised. In his judgment he stated, without giving any reasons, that "by the *Tesawalamai,* the property being acquired after marriage, the plaintiff's late husband, if he could donate for the purpose recited in the bond, viz., concubinage, he had control only over half the lands." I note from the record that Mr. Advocate Wyman (father of Mr. Balasingham), the greatest authority on *Tesawalamai,* on behalf of defendant, submitted to the Court that the lands donated were lands purchased by the donor in his own name only, and hence he could donate the same, and that there was nothing in the *Tesawalamai* to the contrary. The deed being set aside *in toto,* the question of the donor's right under the *Tesawalamai* does not appear to have been gone into fully by the Judge. Defendant appealed, and was represented by counsel. The respondent was not represented. The decision of the lower Court was reversed on the question of the consideration for the deed. The Supreme Court, however, did not give full relief to the defendant, but reiterated the dictum of the District Judge as to the donor's right under the *Tesawalamai;* in fact, the Supreme Court went further, and laid down the dictum that "by the Tamil customary law (referring, I take it, to the *Tesawalamai*) the donor could only dispose of half this property." How this wide dictum came to be made is not clear, but it is not disputed that this dictum is not applicable so far as dispositions by mortgages or sales are concerned. The defendant probably was satisfied when he got the half.

[1] *(1872) 3 N. L. R. 271.*

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I am bound to follow the judgment of the Supreme Court, whatever my views may be, if the decision applied to this case. I find that I am free to adjudicate on the question raised, as the facts of this case are materially different.

In that case the donation was in favour of third parties. Section 4 of the *Tesawalamai* deals with donations, and places certain restrictions on the power of a husband to gift away property. For instance, he cannot gift away more than one-tenth of his hereditary property, which is entirely his own, without the consent of his wife and children. This implies donations outside the family. Following the spirit of the restriction, it can, with justice, be said that the restriction may be extended to acquired property. The judgment of the Supreme Court should be taken only to effect donations outside the family, and which were executed without the consent of the wife and children. I am not sure if even this section is not obsolete at the present day.

In this case it was a donation to a member of the family. There is nothing in the *Tesawalamai* to prevent a donation to the wife or children. Nor can any such restriction be inferred from any provision in that Code. The husband's rights to dispose of property are not taken away, except as stated in section 4.

It may be noted that the donation in this case was to his son, who was doing business with him, and who later supported the mother and sisters and gave dowry to the sisters when they married. The donation was not in any way prejudicial to the rights of the wife and children.

In the next place, it is conceded that the husband under the *Tesawalamai* can donate the property with the knowledge of the wife, and plaintiff alleged in the plaint that the donation was without her knowledge. A definite issue was framed on this point. Under the *Tesawalamai* no consent is required in writing. Her verbal consent, or even acquiescence, should be held to be sufficient. She need not in law join the conveyance or transfer. As such, where the husband and wife are living peaceably, or, in the language of the *Tesawalamai*, when they are not living separately on account of some difference, it is reasonable to conclude that such consent was given, or that the wife had knowledge of the transaction. She says she did not know. I do not believe her evidence. I find that the property was not gifted to Nagalingam without her knowledge. She says she came to know about the donation only a year or two ago. She is put up to bring the action after the property was sold in execution against her son Nagalingam. She says she knew her husband acquired the property at the time he acquired it. The donation was made four years before her husband died. Her husband died nearly ten years ago, and she was made his sole legatee by his will. She did not claim the half under the will. It is not reasonable to think that she did not know anything about the property till recently. In my opinion she knew all about it, and now she is put up by her son-in-law, who happens to be a lawyer, and it may be that Nagalingam himself is also responsible for the action. If the mere statement of the wife, several years after the death of the husband, that she did not know of the disposal of the property by her husband should be acted upon, it will throw open the door to frauds and perjuries, and will unsettle well-established title to land.

There is still another point in which this case differs from the case in *3 N. L. R.* There the action was to have the deed of donation set aside, and was between immediate parties. If, in this matter,

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plaintiff brought the action against Nagalingam, there may be some reason to plead the judgment in the *3 N. L. R.* case as the law on the point. If the action was against Nagalingam to set aside the deed, on the ground that the donor had no right to dispose of more than half the acquired property, Nagalingam might have replied that the property in question was not the only acquired property, that there were several others, and that stock must be taken to find out if the other properties did not exceed the half share of all the acquired property. Half of the acquired property does not mean necessarily half share of each and every property. He might also have justly pleaded that, inasmuch as the widow had elected to take all the property of the deceased under the will, she could not now be allowed to claim this property apart from the will. As between immediate parties, the law and equities may be easily applicable.

Where the rights of third parties are concerned, both in law and in equity, such rights should not be prejudicially affected, unless some express provision of the law is contravened.

It is not necessary to decide the questions of prescription or of estoppel in view of my finding that Sangarapillai had the right to gift the whole of the property to his son Nagalingam.

I should like to add that several practical difficulties would arise if a particular system of law, comprising as it does only a collection of customs of a particular place at some remote time, and which collection is not a complete one and does not provide for all cases, should be construed or applied to include other matters not provided for. No one will question that the *Tesawalamai* Code is not a complete collection of the customs of the country at the time of the compilation. Nor can any one seriously contend that the customs which prevailed for the conditions of life two hundred years ago could be extended to apply to conditions unknown then. As regards the system of inheritance of property left by either spouse, there is reason to find out the principle in which property devolved on the heirs, but in cases where acts are done *inter vivos* and affect properties outside the place where the custom prevailed, and where third parties' rights are affected by such acts *inter vivos*, the rights of a person to deal with his own property should follow the law generally affecting such acts.

Ordinance No. 7 of 1840 provides how property—I confine myself to immovable property—is transferred from one person to another, and rights passed. The owner of a property in whom the right to it is vested executes a deed attested by a notary and two witnesses, and his rights are transferred by that deed. The transferee passes on his rights to another, and he to another, and so on. To ensure that any intending purchaser may exactly know the state of the title to a property, the law has laid down certain provisions in the Registration Ordinance, whereby notice is given to the public in the registers of the district as to the dispositions of the property made from time to time by the owners. The notary who examines the title for an intending purchaser will be able to say if the title is good or not on an examination of the registers. In this case the several notaries who attested the several deeds were rightly satisfied with the title of the persons appearing in the register. The defendant is an innocent purchaser. If, as was contended, though the title was in Sangarapillai, and presumably he had, *primâ facie*, the right to dispose of the property, he did not have the legal right to part with the whole of it under a particular system of law, no person can safely purchase property in this Island. The intending purchaser

must needs find out if the vendor or any of his predecessors were Tamils, if they were governed by the *Tesawalamai*, if they or their predecessors in title were married or not, if the properties were acquired by them before or after marriage, if married, had the wives of the different persons knowledge of the transfers, and so on. Counsel suggested that it would not be difficult to find out a man's nationality from his name. Not only the vendor's nationality, but the nationality of all his predecessors must be found. Name does not count. Names of several persons do not betray their nationality. Not a few in Ceylon, and many in Jaffna in times gone by, especially when they became Christians, adopted Hebrew, Portuguese, Dutch, English, and even American names, and their descendants, at least a large number, have considered it proper to retain the names of their ancestors. Several Tamils of Jaffna have such names still, and, therefore, name is no test to find out if a man is governed by the *Tesawalamai* or not. On the other hand, there are several Tamils in Ceylon owning properties who are not governed by the *Tesawalamai*. Nor, again, will it be possible or practicable to concern oneself with the domestic affairs of other persons, possibly strangers or persons dead years ago. It is unthinkable that any law should be found which should necessitate inquiries of the kind above stated.

The *Tesawalamai* Code does not place any restriction on the power of a person to dispose of his own property during the lifetime of his wife, nor is there any provision in the Code that in disposing of his property he must let his wife know what he is doing or what he has done to make such disposition valid.

I dismiss plaintiff's action, with costs.

A. St. V. Jayawardene, K.C. (with him *Arulanandan* and *J. Joseph*), for plaintiff, appellant.—In *Parasathy Ammal v. Setupulle* [1] the Full Court recognized the long-accepted principle of *Tesawalamai*, that the husband can only dispose of half the acquired property, and this has never since been questioned. Recently Schneider A.J. followed it in *Sampasivam v. Manikkam.* [2] According to the *Tesawalamai*, the *thediathetam* or acquired property vests in both the spouses at the moment of acquisition. Section 22 of Ordinance No. 1 of 1911 merely declares the old law. The husband is no doubt the manager of the dowry of the wife as well as the wife's half share of the *thediathetam*. Just as he cannot alienate any portion of her dowry property, so he cannot alienate the wife's half share of the *thediathetam*. A sale or mortgage of the wife's half of the *thediathetam* is permitted on the ground that the proceeds thereof is presumed to benefit the marriage community. The same cannot be said of a donation. Even under the Roman-Dutch law the husband, who has unlimited powers of disposition of the common property, can be restrained from alienating the same if he acts fraudulently. A husband under the *Tesawalamai* has less extensive rights than a husband under the Roman-Dutch law (section 4, sub-sections (1) and (2)). The learned District Judge himself does

[1] *(1872) 3 N. L. R. 271.*

[2] *S. C. Min., July 22, 1921, reported in this volume.*

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not question the soundness of the decision in *Parasathy Ammal v. Setupulle* (*supra*). The question of the defendant being a *bona fide* purchaser for value was never raised in the lower Court, and ought not to form the basis of any decision.

Bawa, K.C. (with him *Tisseverasinghe*), for defendant, respondent.—Under the *Tesawalamai* the husband has an unlimited right to dispose of the acquired property. He could mortgage it at his discretion (*Muthukistna 124*), sell it to satisfy the debts he had incurred (*Katharuvaloe v. Menatchipille*,[1] *Katiresu 15, Muthukistna 124*), or dowry the same to his daughters as he likes (*Thambapillai v. Sinnatamby*[2] and *Nagaratam v. Alagaratam*[3]). There is no authority to show that his power to donate is taken away from him. Sangarapillai had donated this property to his only son, who would even otherwise be ultimately entitled to it. The nature of the community created by marriage is nowhere defined in *Tesawalamai*. As *causus omissus* in *Tesawalamai* is supplied by the Roman-Dutch law (*Puthatamby v. Mailvakanam*,[4] *Teyvar v. Seevagamipillai*,[5] *Muthukistna 325*), the community created must be taken to be the same as in Roman-Dutch law. If the husband donates the property in fraud of the community, only two remedies are open to the wife. First, to sue the donee to have the deed of donation set aside; and, secondly, to sue the husband or his representative to make good the loss. It was the former of these remedies that was sought for in *Parasathy Ammal v. Setupulle* (*supra*). This action is available only against the donee or a transferee with notice of the fraud, but not against an innocent third party, who had got the property for valuable consideration. If such an action had been brought against the son, he might have had a good defence. The deed of donation is good as long as it is not set aside by a competent Court, and it cannot be attacked incidentally in this action. The second remedy, to make good the loss, is still open to her, but it is doubtful whether she could succeed, as all his other properties were bequeathed to her by his last will. If Roman-Dutch law does not apply, Trusts Ordinance, No. 9 of 1917, sections 65, 66, and 118, would apply. Under these sections property in the hands of a third party without notice cannot be reached.

The acquired property may be regarded as partnership property when it remains in the name of the person in whose name it is bought (*Madar Saibo v. Sirajudeen*[6]).

Story on Equity lays down the principle governing partnership property (section 1207).

[1] *(1892) 2 C. L. R. 132.*
[2] *(1915) 18 N. L. R. 348.*
[3] *(1911) 14 N. L. R. 60.*
[4] *(1897) 3 N. L. R. 42.*
[5] *(1905) 1 Bal. 201.*
[6] *(1913) 17 N. L. R. 97*

Jayawardene, in reply.—When *Tesawalamai* is silent, what should be applied is the Hindu law and not the Roman-Dutch law. Donation is not allowed in Hindu law (*Cornish on Hindu Law 116*). Cited also *1 Mad. H. C. Rep. 122, 2 Mad. H. C. Rep. 162, 3 Mad. H. C. Rep. 50, 13 I. L. R. Mad. 490.*

Cur. adv. vult.

January 16, 1922. BERTRAM C.J.—

This appeal raises an important question under the *Tesawalamai*. It relates to a valuable property in Colombo situated at No. 80, Bankshall street. This property was bought in 1894 by one Sangarapillai, a trader who had lived for many years in Colombo, but whose home was in Jaffna, and who was admitted to be subject to the *Tesawalamai*. In 1906 Sangarapillai donated the whole of this property to his son Nagalingam. His widow, the present plaintiff, avers that, while she was aware of the purchase, she knew nothing of the gift. On September 27, 1910, Sangarapillai died, leaving a will, by which he bequeathed all his properties to his widow, and appointing his son, Nagalingam, executor of his will. Nagalingam executed a series of mortgages of the property, and in 1918 it was sold in execution at the suit of one of the mortgagees, the defendant, and purchased by him at the sale. The action is now brought to vindicate half of this property on the ground that it was part of the *thediathetam*, and that, therefore, it was not competent to Sangarapillai, without the knowledge of his wife, to dispose of it by way of gift to Nagalingam to the extent of more than one-half.

The learned District Judge, the late Mr. Wadsworth, in a very carefully reasoned judgment, has disallowed the plaintiff's claim, and dismissed her action on several grounds. Accepting on the authority of the Full Court decision in *Parasathy Ammal v. Setupulle* [1] the proposition that the husband cannot dispose of by way of gift more than one-half of the *thediathetam*, he holds that this only applies to donations outside the family; he further holds (on no very definite material) that the gift took place with the knowledge of the plaintiff, and disbelieves her assertion to the contrary. He further expresses the view that the prohibition against donating more than one-half of the *thediathetam* applies to the *thediathetam* as a whole, and not to each individual property comprised in it. He points out the extreme inconvenience that would be caused if the title of a purchaser outside the Northern Province was liable to be invalidated by the allegation that under a local customary law, of an incomplete and uncertain character, one of his predecessors in title was precluded from disposing of the interest which he purported to convey.

The institution of a community of goods in marriage, unknown to the Roman law, was independently developed among races so distant and diverse as the Dravidian inhabitants of the Malabar

[1] *(1872) 3 N. L. R. 271.*

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Coast and the Germanic tribes, from whom, in all probability, the Roman-Dutch law derived it. (See *Voet 23, 2, 66 ; Planiol, Droit Civil, III., s. 891.*) I can find nothing to correspond to it in the law of the Hindu Joint Family, which was suggested as the source of the *Tesawalamai* in the course of the argument, nor does the passage cited from *Cornish's Joint Hindu Family*, by Mr. A. St. V. Jayawardene, seem to me to have any bearing on the subject. I am disposed to believe that in the *Tesawalamai* it was an independent development. The extent to which this partnership went has varied very greatly in the different systems of customary law which have recognized it. It reached its fullest development in the great commercial cities of Flanders and the Netherlands, where the community was universal, no doubt by reason of its convenience for commercial purposes. (*Planiol, III., s. 896.*) The *Tesawalamai* restricts it to acquisitions during marriage—a peculiarity which the *Tesawalamai* shares with the law of the ancient Visigoths (*Ibid., s. 1684*) and with that of the Frisians at the time of Voet (*23, 2, 85*).

In its original conception, both in the *Tesawalamai* and elsewhere, such a form of community was apparently confined to the fruits of the common exertions of the spouses (*cf.* "*de omni re quam simul collaboraverint*"—*Loi Ripuaire* cited *Planiol, III., s. 891 (II.)*), but it seems to be admitted that in the modern *Tesawalamai* it must be taken as extending to all acquisitions made by the husband in the course of his business. It is an essential feature of the community in almost all its forms that the husband should be the manager of the common property. There is no question that this is so in the *Tesawalamai*. He can freely sell (*Katharuvaloe v. Menatchipille* [1]) and mortgage (*Muthukistna 124*) the common property without the consent of his wife. But it is said that in the *Tesawalamai*, so far as an alienation by donation is concerned, there is a limitation of the powers of the husband, and that he is restricted from disposing of the common property by donation to the extent of more than one-half.

The questions which we have to consider are these :—

(1) Does such a limitation exist ?
(2) If it exists, what is its nature ? and, in particular,
(3) What is the extent of its local application, that is, does it apply to property outside the Northern Province ?

With regard to the first of these questions, I can have no doubt that such a limitation does exist. It is certainly singular that neither in the *Tesawalamai* as codified in 1706, nor in its re-codification in 1921, nor in its formulation as given in the appendix to *Muthukistna's Tesawalamai*, nor in any of the numerous cases collected in that volume, is there any mention of any such

[1] *(1892) 2 C. L. R. 132.*

limitation. This is all the more singular, as in both the Code of 1706 and in the appendix to *Muthukistna* the general question of donations of property and the limitation of the power of the spouses to make donations is dealt with in some particularity. On the other hand, there is the weighty, and, indeed, binding, authority of the Full Court decision in *Parasathy Ammal v. Setupulle* (*supra*), in which it is said " by the Tamil customary law the donor could only dispose of half this property." It is significant also that in that case the District Judge in the Court below, who had the best possible means of acquainting himself with the local customs, seems to have treated the proposition as not open to question. That decision has been recently followed by Schneider A.J. in *Sampasivam v. Manikkam*.[1] He there observed that the proposition was not challenged in the Court below in that case, and that he could find no case where the law as stated in *Parasathy Ammal v. Setupulle* (*supra*) had been disputed, though the decision had stood for more than fifty years. I think, therefore, that decision must be accepted as correctly stating the law.

The explanation of this distinction between donations and other forms of alienation must remain uncertain. Possibly that suggested by Mr. Arulanandan may be the true one, namely, that the proceeds of sales or mortgages are presumed to be expended in the interests of the community, whereas a donation means a permanent reduction in its assets without any corresponding compensation. Moreover, from a comparative observation of other systems of law, it would appear to be quite in accordance with the spirit of the principle of " community of goods " that donations should be treated on a special footing. Thus, in Roman-Dutch law, if the husband makes donations of such a character and of such an amount that an intention to defraud the wife may be presumed, these donations are liable to be impugned (*Voet 23, 2, 54*). See as an illustration of this principle the interesting case of *Weerasooriya v. Weerasooriya*.[2] Similarly, in French law, which in this matter derives its principles from the same source as the Roman-Dutch, the Code Civil deals specially with donations. Donations of immovables are forbidden. (Art. 1422.) Donations of movables are allowed subject to certain restrictions. The jurisprudence of the Courts has, moreover, established the old Common law principle that all excessive donations are liable to be annulled as fraudulent. (*Planiol, Droit Civil, III., s. 1024.*) An old French commentator on the French customary law has expressed the objection to the husband's freedom of donation with some force : " *Qu' on lui permette d'administrer en pleine liberté, soit ; mais de donner ! Donner, c'est perdre.*" (*Ferrière*—see *Ibid., s. 1019.*)

Accepting, therefore, the proposition that this limitation on the husband's powers of donation exists, the question we next have to

[1] *S. C. Min., July 22, 1921, reported in this volume.* [2] *(1910) 13 N. L. R. 376.*

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ask ourselves is: What is its nature? In the course of the argument it was discussed whether, under the *community of acquisitions*, the wife had a vested right to a share in each property as it was acquired, or only to a share in the totality of the acquisitions on the dissolution of the marriage. I can have little doubt that the former alternative is the true one. The idea of a community in all systems seems to me to import an *ipso facto* co-proprietorship in all properties which fall into the community. As Voet puts it in Roman-Dutch law (*23, 2, 68*), *omnia ipso jure sine traditio corporalium, et cessione incorporalium communicantur tum præsentia tum futura*, I think the same principle must be applied to the form of community recognized by *Tesawalamai*, more especially as it has been laid down that on all matters on which the *Tesawalamai* is silent, recourse may be had to the Roman-Dutch law. (See *Puthathamby v. Mailvakanam.*[1])

But this is not really the question. The question is not as to the wife's proprietary interest, but as to the extent of the husband's power of management. It is a feature of all systems of community that the husband is the absolute manager of the community. So extensive indeed are his rights, that it has been suggested that they have practically the effect of reducing the wife's right from that of co-proprietorship to a mere interest in expectancy. (See *Dumoulin* cited *Planiol, III., s. 898.*) "*Proprie non est socia sed speratur fore.*" In view of these extensive powers, the question arises whether, if the husband ignores the limitation of his powers of donation and purports to make a gift of the whole of one of the acquired properties, his action is *ipso facto* null so far as relates to the wife's share, or whether, on the contrary, it does not merely entitle the wife to some form of compensation. The question is whether this restriction does not so much make him incompetent to donate the whole, but rather simply imposes upon him a limitation which he ought to observe. The principle *quod fieri non debuit, factum valet* is elsewhere recognized in this connection. Thus, in Roman-Dutch law, according to the custom of Holland, even if it was provided in the dotal pact that the woman should retain her dowry intact, the husband did not lose his power of alienating it, and if he alienated it, his wife had no right of *vindicatio* of the alienated property, unless in the ante-nuptial settlement the power of alienation was expressly taken away from the husband. (*Voet 23, 5, 7.*)

The question arises, therefore, whether the act of the husband in the case contemplated is *ipso facto* void, entitling the wife to an immediate *rei vindicatio* action, or whether on the contrary she or her heirs must not wait till the dissolution of the marriage by death or otherwise for some form of compensation. In favour of the latter view is a passage in paragraph IV., section 5, of the *Tesawalamai*,

[1] *(1897) 3 N. L. R. 42.*

where it is expressly said that if a husband without the knowledge of his wife shall have given a part of the *thediathetam* to his heirs, the matter is ultimately to be adjusted on the death of husband and wife between their respective heirs. Nothing is said about the donation being *ipso facto* void. Indeed, the contrary is implied. Further, in more than one place in the *Tesawalamai*, and in the cases collected by Muthukistna, there are passages which seem to imply that unauthorized alienations by the husband, whether of dowry or hereditary property or of acquired property, are not *ipso facto* void, but are matters to be dealt with by way of compensation. (See paragraph IV., sections 3 and 4; paragraph I., section 10; *Muthukistna* 96, 117, 124, 125, 126, and 175.) Further, it should be noted that in Roman-Dutch law, in the case of a donation by the husband in fraud of the community, it is only on the dissolution of the marriage that the wife (or her heirs) can assert her remedy, and that it is only in the event of no funds being available to compensate her that she has an *actio quasi-Pauliana* (or, as Wesel suggests, a direct *rei vindicatio* action) to set aside the gift. (See *Voet 23, 2, 54*, and *Weerasooriya v. Weerasooriya* (*supra*).) Similarly, in French law the remedy for an unauthorized donation does not arise till a partition takes place at the dissolution of the community. (See *Planiol, III., s. 1029*.)

On the other side is the case of *Parasathy Ammal v. Setupulle* (*supra*), which was a *rei vindicatio* action, and was taken against the donee without any reference to an account with the heirs. It is to be observed, however, that the point was not taken in that case, and, moreover, the action was brought after the death of the husband, and it does not appear whether there were any other properties from which the aggrieved wife could have derived compensation.

I am inclined to believe that the balance of authority is in favour of the proposition that the wife's remedy arises only on the dissolution of the marriage by way of compensation, and that at any rate, in the absence of any express provision of the *Tesawalamai*, the principles of the Roman-Dutch law might well be adopted by analogy. The question, however, has not been very fully examined, and it appears to me that it might well be left to be further elucidated in some subsequent case by evidence of local custom such as appears to have been frequently tendered in old *Tesawalamai* cases. It is not necessary to decide the case upon this ground, for, as I will proceed to show, even if the alienation by the husband within the local realm of the *Tesawalamai* would have been *ipso facto* void, and even though within those limits a *rei vindicatio* action from the beginning would have lain for the recovery of the property, no such action lies in the present case on grounds quite independently of the question just discussed.

This brings us to the third of the questions above discussed, namely, the local extent of the application of the *Tesawalamai*.

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To what extent and in what manner does the *Tesawalamai* apply outside the Northern Province? This is an important question, which has been previously discussed both in the Courts and outside them. I observe that in the evidence and documents published in connection with the *Tesawalamai* Commission, it was assumed by more than one prominent witness that the *Tesawalamai* did not apply to property " outside Jaffna," and that the late Mr. William Wadsworth in an interesting memorandum expressed the opinion that " Looked at from every point of view there cannot be any doubt that the *Tesawalamai* Code is both a personal and a local law applicable to the Tamils of the Province of Jaffna and to property in Jaffna." When we are dealing with customary law, such extrajudicial utterances by a person well acquainted with local customs are entitled to consideration.

The question has also been discussed in two cases in this Court, namely, *Velupillai v. Sivakamipillai* [1] and *Spencer v. Rajaratnam.*[2] The arguments in these two cases covered a wide range, and observations were made in the judgments which seemed to have a bearing on this question, but if the facts be carefully examined, it will be found that those observations are wholly *obiter*, and that the actual decisions in both cases have no bearing on the present question. In the first of these cases, it was held on the facts that the deceased person, whose status was in question, was subject to the *Tesawalamai.* No decision was given to the applicability of the *Tesawalamai* to his lands in Batticaloa. In the second it was held on the facts that the deceased person, whose status was in question, was not subject to the *Tesawalamai,* and consequently there was no occasion to give any decision as to the applicability of the *Tesawalamai* to his properties in Colombo.

The danger of acting upon principles enunciated in *obiter dicta* is illustrated by the fact that in the former case the observations of both Judges proceeded upon the assumption that there could exist in Ceylon more than one matrimonial domicil, and they accordingly seem to suggest that consequently the provisions of section 6 of Ordinance No. 21 of 1844 had a decisive bearing on the subject now under discussion. In the second case, however, this assumption was expressly repudiated by both Judges (including Wood Renton C.J., who took part in both cases), and the contrary principle enunciated in *Wijesinghe v. Wijesinghe* [3] was accepted, namely, that only one matrimonial domicil can be acquired in Ceylon.

It may be well at this point to discuss and dispose of section 6 of Ordinance No. 21 of 1844. That Ordinance was passed at a time when British colonists were settling and acquiring property in various parts of the Colony, and finding themselves faced with

[1] *(1910) 13 N. L. R. 74.*
[2] *(1913) 16 N. L. R. 321.*
[3] *(1891) 9 S. C. C. 199.*

diverse systems of law, which if applied to themselves would affect the mutual proprietary rights of husband and wife in regard to the properties so acquired. Presumably, therefore, with a view to defining their position with regard to these systems of law, section 6 enacted a principle, which is in exact accordance with that which has since been confirmed by judicial decisions in England, and also with the principles of Roman-Dutch law expounded by Voet. It declares that the mutual proprietary rights of husband and wife with respect to any immovable property in any part of the Colony acquired during the subsistence of the marriage shall, in the absence of any marriage settlement, be determined in accordance with the law of the matrimonial domicil of the parties, or, if a marriage settlement exists, in accordance with the terms of that marriage settlement. In other words, it declared that in the absence of a marriage settlement the mutual rights of husband and wife whose matrimonial domicil was England should be determined by the law of England, and those of a husband and wife whose matrimonial domicil was Ceylon by the law of Ceylon. The section never intended to suggest that there might be several matrimonial domicils in Ceylon, and to regulate the rights of parties within one of such matrimonial domicils with reference to immovable property acquired in another. Such a view would have been inconsistent with the principle of *Wijesinghe v. Wijesinghe* (*supra*), which was apparently overlooked by this Court in the first of the cases above referred to, but recalled and re-emphasized in the other. The *Tesawalamai* is part of the law of Ceylon, and its personal or local limitations were entirely unaffected by the section. It is clear, therefore, that section 6 of Ordinance No. 21 of 1884 has no bearing upon the question of the local application of the *Tesawalamai*.

It has, however, one effect of an incidental character, and that an important one. There is no exception of the *Tesawalamai* in the Ordinance. It applies to persons subject to the *Tesawalamai* as much as to the other inhabitants of the Colony. On the one hand, it authorizes them freely to dispose of their property by will, notwithstanding any "law, usage, or custom now or at any time heretofore in force within the Colony." On the other hand, it authorizes them before marriage to conclude marriage settlements regulating their mutual proprietary rights, if they so desired, in a manner inconsistent with the *Tesawalamai*. This circumstance will be found to have an important bearing on the problem before us.

Now, *Spencer v. Rajaratnam* (*supra*) does lay down one principle—*obiter* it is true, but supported by weighty arguments—which is of great importance, namely, that the *Tesawalamai* is not a personal law in Ceylon as the Hindu or the Muhammadan law is in British India, but is an exceptional custom in force in the "Province of Jaffna," and applying primarily or mainly to a certain class of its inhabitants. I think that the considerations urged in the judgments

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amply substantiate that principle, and that it should be adopted. For certain purposes the *Tesawalamai* applies to all immovable property within the Province. Nothing is expressly said in the judgments with regard to its effect on immovable property situated outside that Province. This, in the present connection, is the problem that remains for us to determine. It was suggested in that case in the argument by Mr. Elliott (p. 324) that the true principle is this: "The *Tesawalamai* may be divided into two heads. One part deals with personal relations, &c., which Jaffna Tamils carry with them wherever they go. The other part deals with land tenure and other matters which are purely local." We are not called upon to give a decision on the whole of this interesting and broad proposition, which seems intended, among other things, to comprise the law of succession. We are simply concerned with the mutual proprietary relations of husband and wife subject to the *Tesawalamai* with respect to immovable property acquired during the continuance of the marriage but situated outside its special realm.

The problem then is simply this. In what manner does a special local customary law, to which a husband and wife are subject, affect their mutual proprietary rights with regard to immovable property acquired during the marriage but situated outside the locality within which that customary law is in force? This happens to be the precise question which is discussed at great length by Voet in the chapter "*De Ritu Nuptiarum*" (*23, 2*), and which was obviously the subject of much controversy in his day. The historical position with reference to which he speaks, namely (if I understand it aright), that of several federated states, all subject to the same Common law, but modified in its application to each by local customs and municipal statutes, is no doubt not exactly on the same lines as our own. But it furnishes a sufficiently close analogy to render his conclusions a useful guide to us in considering the application of a local customary law to immovable property outside its local sphere.

Voet's method of treating the subject is as follows: The conclusion to which he had finally come was "that as regards both immovables and movables, wherever situate, the only law to be regarded is the law of the matrimonial domicil, and that consequently under a marriage contracted between Hollanders, with a Holland matrimonial domicil, lands not only in Holland, but also in Frisia or any other place, are common property, wherever the local law does not require special solemn formalities before a local authority for the transmission of title, but is satisfied with the individual intention of the transferors according to the principles of Roman law; and that, where the local law does not allow title to be transferred otherwise than by solemn formality, they are at any rate liable to be declared common property upon the institution of a personal action for that purpose." (*Voet 23, 2, 85.*)

The way he reaches this conclusion is as follows: How is it, he asks, that when a Hollander in Holland contracts a marriage, both the Frisian and the Holland lands of the spouses become common property, or liable to be so declared? ("*communia fiant aut communicanda sint.*") He answers that the Holland lands become common by virtue of the law or custom of Holland, which is not in the case supposed affected by any ante-nuptial agreement, and is consequently tacitly ratified by the spouses, so that the force of the law and the tacit consent of the spouses here concur. But as to the Frisian lands, the Holland law can, of course, have no direct application to them. Why, then, do they form part of the community? This tacit ante-nuptial agreement generates in Frisia (where a solemn formality in writing is necessary to pass title to lands) an equitable right to have these lands declared common property (*communicandi necessitas*) just as in countries, where no such formality is necessary for the passing of title, it would affect an actual vesting of a common title (*communio*). The tacit agreement of the spouses consists in this circumstance, that knowing as they do, or must be taken to do, the effects of marriage according to the law of the matrimonial domicil, they must be taken to have contracted the marriage on the basis of this law and its conditions as being just, fair, good, and laudable, and as being one which if it had displeased them they could have repudiated by an express dotal agreement. The conclusion, therefore, is that "inasmuch as express nuptial settlements, by which it is provided that there shall be a universal community between the spouses, have the effect, if not of transferring title, at any rate of conferring personal rights (*effectum, si non realem, at saltem personalem*) as regards all properties wherever situated, even in those places in which a universal community has not been introduced, provided that the constitution of such a community by such an agreement is not expressly forbidden . . . . there is no reason why we should not attribute the same effect to this tacit agreement of the spouses with regard to all properties wherever situated."

It will be observed that Voet draws a distinction between places where title passes by simple consent and places where a special formality is required for the purpose. In the former, even though the agreement of the spouses, express or tacit, was made in a locality subject to a different system of law, a title in co-proprietorship (*communio*) actually vests; in the others all that passes is a right to have such a title made effective (*communicandi necessitas*), or, as would be said if we were using terms of English law, in the one case a legal title, in the other case an equitable one. Voet puts the matter more fully and precisely in another passage in the same context when referring to the analogy of a partnership agreement. He says: "The things which a person has hitherto possessed in his own name, he has henceforth agreed to possess in the name of

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another, and so from that moment everything belonging to the partners or in our case to the spouses is deemed to have been delivered on the basis of a title of partnership, even though in fact they have not been delivered."

Voet is, of course, speaking of places each subject to its own municipal law, and each capable of constituting a separate matrimonial domicil, but, if bearing this difference in mind, we apply these principles, as in my opinion we may justly do, to the case of a region subject to a special customary law differing from the ordinary law of the country in which it is situated, the result would appear to be as follows: Any property acquired in the course of trade by one of two spouses subject to the *Tesawalamai* in a part of the Colony outside its special local sphere becomes *ipso facto* partnership property as part of the community. The legal title to that property does not, however, pass to the community, inasmuch as we, like the Frisians, require special formalities for the passing of title, where under our law it does not pass by operation of law. There passes, however, by the tacit agreement of the spouses, manifested by their not having made an inconsistent marriage settlement (as under section 6 of Ordinance No. 21 of 1844 they might have done), an equitable right to have that property declared part of the community. It might be said that this tacit agreement itself is obnoxious to Ordinance No. 7 of 1840, and that the law, therefore, cannot give effect to it. But I think that this is too strict a view. I prefer, as Mr. Bawa suggests, to regard the solution as coming within a principle definitely made part of our legal system by section 96 of the Trusts Ordinance, No. 9 of 1917. "In any case not coming within the scope of any of the preceding sections where there is no trust, but the person having possession of the property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands." In other words, I hold that when the plaintiff's husband purchased the property now under consideration, he acquired it, in consequence of his marriage contract, subject to a constructive trust in favour of his wife, and that his wife was entitled to sue him for a formal conveyance of her interest, or, as Voet puts it, subject to a *necessitas communicandi*.

But the right so acquired by the wife could not prejudice any *bona fide* purchaser claiming from the donee of her husband, even though the gift to this donee was a breach of this constructive trust. (See sections 98, 65, 66, and 118 of the Trusts Ordinance.)

The property was, in fact, constructively and equitably partnership property. The view of the English principles of equity, now, if not previously, so far as they relate to this subject, formally adopted into our legal system by the Trusts Ordinance, is admirably expressed

in the passage cited by Mr. Bawa from *Story's Equity Jurisprudence* :—

"In cases, therefore, where real estate is purchased for partnership purposes, and on partnership account, it is wholly immaterial, in the view of a Court of Equity, in whose name or names the purchase is made and the conveyance is taken; whether in the name of one partner or of all the partners; whether in the name of a stranger alone or of a stranger jointly with one partner. In all these cases let the legal title be vested in whom it may, it is in equity deemed partnership property, not subject to survivorship; and the partners are deemed the *cestuis qui trust* thereof.

"A Court of law may, nay must in general, view it only according to the state of the legal title. And if the legal title is vested in one partner, or in a stranger, a *bona fide* purchaser of real estate from him, having no notice, either express or constructive, of its being partnership property, will be entitled to hold it free from any claim of the partnership. But if he has such notice, then in equity he is clearly bound by the trust, and he takes it *cum onere*, exactly like every other purchaser of a trust estate" . . . . *Story—Equity Jurisprudence, s. 1207.*

In the year 1900 the House of Lords, apparently oblivious of the fact that the whole question had been worked out by Voet, examined the question afresh, came to the same conclusions, and applied them to the case of French spouses, married in community of property, settling in England, and there acquiring both movable and immovable property. (See *De Nicole v. Curlier* [1]; *Re De Nicole*; [2] *and Dicey—Conflict of Laws, pp. 510 seqq. and 837–8.*) This case now settles the law with regard to the effect of a marriage in community upon the mutual proprietary rights of the spouses with reference to property acquired in another country subject to a wholly alien system of law. As I have said, these principles, *mutatis mutandis*, are capable of application to the conditions of this Colony and to the circumstances of the present case. In that case no question arose of the rights of any *bona fide* purchaser. It was recognized that the wife acquired a proprietary interest in the property purchased by her husband. There was no occasion there to inquire whether that interest so acquired was legal or equitable. If the question had arisen, it would no doubt be held to have been equitable. The distinguishing feature of the present case is that the defendant was a *bona fide* purchaser without notice, and consequently the equitable proprietary interest of the plaintiff avails her nothing.

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

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

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Applying these principles to the present case, I hold that the defendant having no notice either of the plaintiff's equitable interest, or of the limitation of her husband's power to alienate the partnership property by way of gift, was not in any way responsible to the plaintiff, and acquired the property free of her equitable claims, and that he is therefore entitled to judgment and to the dismissal of this appeal.

There are two supplemental matters which deserve remark. In holding that, so far as relates to the mutual proprietary rights of husband and wife, the *Tesawalamai*, though primarily of local application, may affect property outside the sphere of its special operation, I desire to say nothing of its possible application in matters of inheritance. That question must await a case in which it is specifically raised. I will only say that when that question comes up for consideration much light may be derived from a study of the paragraph in Voet's chapter "*De Ritu Nuptiarum*," to which I have referred above.

I should further like to say that I do not think that it should be too readily assumed that the questions discussed in this case will, so far as relates to all marriages celebrated since its enactment, be superseded by the operation of section 22 of Ordinance No. 1 of 1911. Only so much of the *Tesawalamai* as is inconsistent with that Ordinance is thereby repealed. Nothing is said in that Ordinance about the local application of the *Tesawalamai*, but it does not follow that its application is intended to be co-extensive with the Colony. Similarly, nothing is said about the husband's power of management of the property comprised in the community, nor of any limitation on his power of donation. It does not follow, however, that these principles have been repealed. It will be a matter for consideration whether the Ordinance generally, and section 22 in particular, should not be read subject to these principles as well as to many others not specifically referred to.

I would dismiss the appeal, with costs.

DE SAMPAYO J.—

I have had the advantage of reading the judgment prepared by my Lord the Chief Justice; but as under the special circumstances in which we are placed this case must be disposed of at least by Monday, I regret that I am unable to deal with all the matters discussed in that judgment. Nor is it necessary that I should do so, because on the point involved in the case I have formed a different opinion which is decisive of this appeal. The question is whether under the *Tesawalamai* a husband may not validly alienate by way of donation any property acquired by him without the concurrence of the wife. I may say at once that I agree with the finding of the learned District Judge that the plaintiff, widow of Sangarapillai, whose act of donation is called in question, at the

time knew of the donation to their son Nagalingam, and acquiesced therein. With regard to the law, as the free right of alienation is one of the essential elements of ownership of property, any special law which is alleged to take that right away or materially restrict it must distinctly appear either in some enactment or in authoritative judicial decisions. In my opinion there is no such support for the proposition maintained on behalf of the plaintiff. It is remarkable that there is absolutely nothing on the point in the *Tesawalamai* itself which is appealed to as the special law governing this matter. The only passage to be found in that collection is section 1, sub-section (1), which describes the different kinds of property brought into the marriage by the husband and wife, namely, *mudusom* or hereditary property brought in by the husband, *chidenam* or dowry property brought in by the wife, and *thediathetam* or acquisitions of the husband or wife during the marriage. The sub-section next describes the ultimate destination of the property, and states that on the death of the spouses the *mudusom* is inherited by the sons or male heirs and the *chidenam* by the daughters or female heirs, and then it proceeds to state that " the acquisition of *thediathetam* should be divided among the sons and daughters alike." The *Tesawalamai*, thus, does not deal with the question of the husband's right of alienation, but only states a rule of inheritance, and it seems to me obvious that the inheritance can only be of the property that remains at the death of the parent after any alienations made during life. As regards this, there is judicial authority, to which I need not particularly refer, and it is, indeed, conceded by plaintiff's counsel that the husband can validly alienate by way of sale or mortgage. Why, then, is any line drawn between such alienations and donations? It was suggested by Mr. Arulanandan on the first day of the argument that the reason was that in the case of sales and mortgages the money was brought back for the benefit of both spouses, whereas in the case of a donation there was no such equivalent brought into the community. This suggestion is ingenious, but I am afraid it is plausible only. There is no indication of such a ground of distinction in the decisions recognizing the validity of sales and mortgages, and I do not think the reasoning is sound. So far, then, the *Tesawalamai* Code itself does not help the plaintiff. As regards judicial authority, the sheet anchor of the plaintiff is *Parasathy Ammal v. Setupulle.*[1] But I do not think that this fifty-year old judgment is really an authority on the point. It was a case in which the husband had donated a piece of acquired land to his concubine, and the judgment of Creasy C.J. dealt learnedly with the Roman-Dutch law on the subject of donations *ex turpi causa*. I suspect that the judgment was reported so late as 1900 on account of the valuable discussion of that important point. On the question of the right of the husband to dispose of the entirety

[1] *(1872) 3 N. L. R. 271.*

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of the land, all that we have is this single sentence : "The decree of the Court below should be set aside and judgment entered for the plaintiff for half the land in question, inasmuch as by the Tamil customary law the donor could only dispose of half this property." There is no reason given for so interpreting the customary law, no reference made to the *Tesawalamai* or to any previous decision, and there is no discussion whatever of the subject. There was no appearance for the respondent, and we are left without any guidance as to what argument of counsel for the appellant might have prevailed with the Court. Nor can I read the pronouncement as a definite decision that the husband cannot donate, as distinguished from selling or mortgaging, more than half of any acquired property. We are asked to read the judgment in that sense, because it says that the "donor" could only dispose of half the property. If so, this is a very cryptic way of deciding an important point of law. In my opinion the word "donor" in the context is not descriptive of the act, but only of the person whose act was in question; it was as much as to say "the person who gave the impeached donation." The important expression in this connection is "dispose of." It is not "dispose of" by way of donation, but "dispose of" generally. The opinion expressed is as consistent with a holding that a husband cannot dispose of more than half in any way whatever, whether by sale, mortgage, or gift, and it may well be that after all the Chief Justice meant to go as far as that, though it is quite clear that he was really interested only in the other question to which the whole judgment was devoted, namely, as to a donation *ex turpi causa.* Assuming, however, that that case decides what is contended for, how far is it a good authority? It is said that it is a Full Court decision. We had the Supreme Court Minutes produced before us. It appears that the Chief Justice sat with two other Judges on that day. But it does not at all appear that the Court was specially constituted for the purpose of deciding that case or any other case. The list for the day was a long one, consisting of a large number of Police Court appeals and of District Court final and interlocutory appeals. The case in question appears in the middle of the District Court cases, and there is nothing to indicate that it was specially considered by the three Judges. It is more likely that the two Puisne Judges, not having sufficient work to occupy them separately, sat with the Chief Justice to assist him generally. Moreover, the Minutes do not show that they expressed any opinion. There is only the draft judgment of the Chief Justice, and there is nothing to indicate that the other Judges agreed with it, or even signed or initialled it. I do not think that the judgment in question has any greater authority than that of a single Judge, which, therefore, is open to review. In my opinion a husband may, under the *Tesawalamai*, make a donation of the entirety of any acquired property just as much as admittedly he may sell or mortgage the same, and I would dismiss this appeal on that short ground. Even

if he may not, I agree with the contention of Mr. Bawa for the respondent that the wife, if she is prejudiced by any donation of acquired property by the husband, cannot seek to obtain as against a *bona fide* purchaser from the donee a half share of the specific property, but can only ask for half of the acquired property as a whole, or for compensation from the husband's representatives. In this case the husband by will gave all his remaining property to his wife, the plaintiff, and I think she must be content with it.

Garvin A.J.—

This is an action to vindicate title to a half share of certain premises situated in Colombo. The plaintiff is the widow of one Sangarapillai. Admittedly they were both subject to the *Tesawalamai*, and the premises in question were acquired by the husband during the subsistence of the marriage. Sangarapillai gifted the premises by deed to his son Nagalingam, through whom the defendant makes title.

It is not disputed that under the *Tesawalamai* there is community between spouses in all property acquired by either during the subsistence of the marriage; nor is it disputed that the premises under litigation in this case were subject to that community.

Property so acquired, which as such becomes subject to community, is designated *thediathetam*. What is the nature of this community? Does title to property acquired by one of the spouses vest equally in the other, as in the case of spouses subject to the *communio bonorum* of the Roman-Dutch law, or does the title remain in the spouse who acquired it, subject to the equitable right of the other spouse to take his share? Under the latter system a formal conveyance of immovable property to the wife will immediately, upon the execution of the conveyance, vest the title in both spouses. It was suggested that under the community known to the *Tesawalamai* the spouses in relation to property subject to that community stood in exactly the same position as the members of a commercial partnership. That is to say, that the title to property standing in the name of one partner remained in that partner alone, though as regards the other members of the partnership his position was that of a trustee. For this proposition no authority was cited. Though I can find no local decision which explicitly declares the community subsisting between spouses subject to the *Tesawalamai* to be in this respect identical with that known to the Roman-Dutch law, there are indications that that position was never doubted.

It is significant that in Ordinance No. 1 of 1911, "which represents the conclusions formed by a Committee specially appointed to inquire into the body of customary law known as the *Tesawalamai*, the law is by section 22 declared as follows: 'The *thediathetam* of each spouse shall be property common to the two spouses, that

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is to say, although it is acquired by either spouse and retained in his or her name, both shall be equally entitled thereto.' "

This is an explicit declaration of the law in the sense in which it was, so far as I am able to judge, always understood.

If this view of the law be correct, these premises at the time of acquisition by Sanagarapillai vested by operation of law equally in his wife.

It remains, therefore, to consider whether in such a case as this the husband has the right to dispose of any property subject to the community by gift.

Under the Roman-Dutch law as part of the marital powers committed to the husband was the right to control and dispose of property belonging to the community. It has been held by this Court that the husband may under the *Tesawalamai* dispose of common property by way of sale. If he has not the power to do so by way of gift, the appellant is, I think, entitled to contend that she has not been legally divested of her title to a half share of these premises by her husband's deed of gift. Express authority in support of the appellant's contention is to be found in the case of *Parasathy Ammal v. Setupulle*,[1] where it was held in an action by the widow to vindicate her title to property donated by her husband that she was entitled to judgment for half the property, " inasmuch as by the Tamil customary law the donor could only dispose of half the property."

For these reasons I think the appellant, who has not been legally divested of her title to half these premises, is entitled to succeed.

I would accordingly allow the appeal, with costs.

Appeal dismissed.

[1] *(1872)* 3 *N. L. R. 271.*