1917.

Present : Shaw J.

MURUGUPILLAI *v.* POOTHATAMBY.

358—C. R. Point Pedro, 17,231.

Tesawalamai—*Father leaving children by two beds—One-half ancestral property inherited by children of first bed and one-half by children of second bed.*

Under the *Tesawalamai*, upon the death of a father who has married a second time, his ancestral property goes one-half to the issue of the first bed and one-half to the issue of the second bed, whatever may be the number of children of the different unions.

In two partition suits in the District Court, A was allotted one-sixth share. In the present case A claimed half share as the sole child by the first bed of his father.

Held, that as the question whether A was entitled to one-sixth or half of his father's property was never put in issue in the former partition suits, A was not estopped from claiming a half share in the present case.

THE facts are set out in the judgment.

Balasingham for the appellant.—The children of Valliar take *per capita*. All the children are the children of Valliar, and there is no reason for giving the only child of the first wife half and all the five children of the second wife the other half. Ordinance No. 1 of 1911 is in many respects a codification of the *Tesawalamai*, and section 24 enacts that the children should take *per capita*. Unless there is a clear provision of the *Tesawalamai* to the contrary, we must take it that section 24 re-enacts the old law on the subject. In cases of doubt the Roman-Dutch law should be followed. *See Puthatamby v. Mailvaganam.*[1] Under Ordinance No. 15 of 1876 and the Roman-Dutch law the children take *per capita*. It is clear that even before Ordinance No. 1 of 1911 it was understood that the children succeeded to equal shares of the father's inheritance, as the respondent took a one-sixth share when two other lands were partitioned in the District Court. The cases from *Mutukisna* cited by the Commissioner of Requests were not judgments of the Supreme Court.

In any case the respondent is barred from claiming more than one-sixth share, by reason of the decrees in the two partition cases in the District Court. He was allotted one-sixth in those cases. The shares of all co-owners are put in issue in the partition cases. The Court has to investigate into the title of all the co-owners. Even if

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

the respondent's share was not actually put in issue, he was a party, and he could have put it in issue. He did not do so. He is barred from raising the issue again between the same parties, not only as to the lands partitioned in those cases, but as to all lands claimed by him as his share of inheritance from Valliar. Counsel cited *Dingiri Menika v. Punchi Mahatmaya;*[1] *Samichi v. Pieris;*[2] Civil Procedure Code, section 207, explanation.

No appearance for the respondent.

Cur. adv. vult.

December 14, 1917. SHAW J.—

This is a dispute between certain parties to a partition suit regarding one-fourth share of the land to be partitioned, which formerly belonged to one Valliar. The parties are Jaffna Tamils, to whom the *Tesawalamai* applies, and Valliar having died before Ordinance No. 1 of 1911 came into operation, their rights of inheritance are governed by section 1 of the *Tesawalamai.*

Two questions arise: (1) Whether the respondent, who is the only son of Valliar by his first wife, is entitled to one-half of his father's interest in the land, the other half going between the five appellants, who are children of Valliar's second marriage, or whether the children of both beds take equally *per capita?* (2) Is the respondent estopped from claiming more than a one-sixth share of Valliar's interest by reason of two previous partition suits relating to other lands, in which he was allotted one-sixth only of Valliar's interest, having rendered the subject-matter of his present claim *res judicata ?*

The Commissioner of Requests has determined both questions in favour of the respondent, and has allotted him half of Valliar's interest, or one-eighth of the land, allotting the other half to the appellants, or one-fortieth each.

In my opinion the determination is right on both points. With regard to (1), paragraph 11 of section 1 of the *Tesawalamai* makes it perfectly clear that upon the death of a father who has married a second time, his ancestral property goes one-half to the issue of the first bed and one-half to the issue of the second bed, whatever may be the number of children of the different unions. This construction is borne out by the cases cited at pages 5-6, 17-18, and 33-34 of *Mutukisna.*

With regard to (2), the question whether the respondent was entitled to half or one-sixth of his father's property was never put in issue in the former partition suits. In those suits he was simply allotted one-sixth, and took it without demur. The decisions in *Dingiri Menika v. Punchi Mahatmaya* [1] and *Samichi v. Pieris* [2] are not authorities for holding that an estoppel by judgment has arisen

[1] *(1910) 13 N. L. R. 59.* [2] *(1913) 16 N. L. R. 257.*

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in the present case. The principle of those judgments will be found very clearly stated in the judgment of the present Chief Justice in the latter case at page 263: "All that the law of England or of India or of Ceylon requires for the purpose of constituting *res judicata* or estoppel by judgment is that the issue in question should have been distinctly raised between the same parties appearing respectively in the same capacity; and should have been directly and necessarily determined by the former proceedings."

The question in issue in this case was never raised or determined in the previous partition suits.

The decision of the Commissioner is, in my view, correct, and I dismiss the appeal.

Affirmed.