1934 *Present:* **Macdonell C.J. and Dalton S.P.J.**

KANDAR *v.* SINNACHIPILLAI.

339—D. C. Jaffna, 22,324.

Thesawalamai—*Property acquired by son during his bachelorship—Son not under parental roof or control—Property does not fall into common property of parents—Regulation No. 18 of 1806, s. 1, cl. 7.*

Under the *Thesawalamai* property acquired by a son out of his own money at a time when he was unmarried but was no longer under the parental roof or parental control does not become part of the common property of his parents.

Per MACDONELL C.J.—Under the Roman-Dutch law the Courts have power to declare a statute obsolete if they are satisfied of its tacit repeal by disuse or contrary usage.

APPEAL from a judgment of the District Judge of Jaffna.

K. Balasingham, for second plaintiff, appellant.

A. Gnanapragasam, for defendant, respondent.

Cur. adv. vult.

October 17, 1934. MACDONELL C.J.—

I have read and agree with the judgment of Dalton J. in this case.

It is certainly a pity that the counsel for defendant-respondent did not lead evidence in the Court below to show that the provision in section 1, clause 7, of the *Thesawalamai,* that sons "are bound to bring into the common estate (and there to let remain) all that they have gained or earned during the whole time of their bachelorship" had become obsolete. Since this rule is one peculiar to the Jaffna Tamils and not one affecting other "bachelors" anywhere else in the Island, the probability is that the law elsewhere in Ceylon, namely that an unmarried son takes for his own whatever he earns by his own efforts even though his parents are

living, has been tacitly adopted as the law in the Jaffna peninsula also. It is at least striking that the learned counsel for appellant was unable to discover any reported case in favour of his argument for allowing this appeal. The case in Mutukisna at page 576 decided in 1828 shows that even then "bachelor" was held to have the restricted meaning of a son living in his father's house and under his control. There is a decision then of this Court, over a hundred years old, that the term "bachelor" in section 1, clause 7, of the *Thesawalamai,* cannot have the extended meaning that must be given to it if this appeal is to succeed.

If sufficient evidence had been led below, it might have been possible to hold formally that section 1, clause 7, of the *Thesawalamai,* is obsolete and no longer law even in cases where the marriage occurred before July 17, 1911, when the amending Ordinance No. 1 of 1911 came into force; with regard to marriages of Jaffna Tamils solemnized since that date, the point now contended for does not seem to arise. The decision in Mutukisna at page 301 seems to me a clear instance of the Courts declaring part of the *Thesawalamai* to be no longer law. That was a case tried in 1839 in which plaintiff tried to make a son responsible for the debts of his parents "although the parents do not leave anything", in accordance with this same section 1, clause 7, of the *Thesawalamai,* and the Court read into that enactment the qualification that the son would not be responsible for these debts, if he repudiated the inheritance, and did not intromit or do any acts showing that he intended to appropriate the inheritance to himself. In effect the Court substituted the more responsible "rule of the Civil or rather the Roman-Dutch law" for that of the *Thesawalamai* and thereby declared the rule of the latter to be no longer law.

By Roman-Dutch law it would certainly seem that the Courts have power to declare a statute obsolete if they are satisfied of its tacit repeal by disuse or contrary usage. In *Green v. Fitzgerald* [1], Innes J.A. after mentioning the principle of English law that there is no such thing as a tacit repeal of a statute, goes on to say—"The civil law on the other hand recognized the principal that a statute might not only be expressly repealed by the legislative authority, but tacitly repealed through disuse by silent consent of the whole community. In Holland the same doctrine was laid down . . . . In *Seaville v. Colley* [2], it was held that a right of retraction, founded upon the *lex Anastasiana,* and recognized by the law of Holland, had been abrogated by contrary usage and was no longer in force in the Cape Colony. I do not think, however, that the doctrine of the Roman-Dutch law can be confined to cases where contrary usage has been established; both in principle and on authority mere desuetude must in certain circumstances be sufficient", and in *Rex v. Detedy* [3], Kotze J.A. says practically the same, though he thinks that in South Africa the English rule as to statutes, namely, that they can only be abrogated by the legislative authority, had become established. This however, was an opinion *obiter,* and I do not think that here we are bound by any such restriction, but that our law with regard to obsolete statutes is as laid down by Innes J.A. in *Green v. Fitzgerald* (*supra*) quoted from above. It would follow then that under Roman-Dutch law the Courts

[1] *(1914) A. D., South Africa, 88.* [2] *9 J. 39.*
[3] *(1916) A. D. at p. 224.*

have, what they do not have under English law, power to declare a statute obsolete on sufficient proof that it has been disused and that contrary usage has been established or even by proof of the former only of these things. But in the absence of evidence below on the matter, I would concur in the reasons given by my brother Dalton for the dismissal of this appeal with costs.

DALTON S.P.J.—

This appeal raises an important question as to whether Jaffna Tamils, whether sons or daughters, who are unmarried, suffer from the disability of being unable to acquire any property for themselves whilst they remain unmarried and during the lifetime of their parents.

The facts in this case are as follows : One Sinnakuddy in the year 1912 when he was 29 years of age, but still unmarried, purchased and obtained a conveyance of a piece of land, 21 acres in extent. The conveyance (document P 1) is stated to be to Sinnakuddy, his heirs, executors, administrators, and assigns, who are to possess and enjoy for ever the said property. He purchased this property out of his own separate earnings, and his parents after the purchase lived with him in his house on the property. There is evidence also to the effect that his brothers lived there also with him, and both parents and brothers helped him to plant the land. The trial Judge finds they did so merely as close relatives. Sinnakuddy also purchased another block of land, 3½ acres adjoining the 21-acre property, after his father's death, but while he was still unmarried. There is no claim by plaintiffs in respect of this latter property.

Sinnakuddy's father died in the year 1914 and he married in the year 1921. He died in the year 1926.

This action was then commenced by Sinnakuddy's mother (Pattiny) and his brother (Kandar) as plaintiffs against Sinnakuddy's widow as administratrix of his estate for a declaration that the 21-acre property belonged as to one half to her (the mother of Sinnakuddy) and as to the other half to the children of her deceased husband. This claim is based upon the provision of the *Thesawalamai,* stated to be contained in clause 7 of section 1, the material parts of which are in the following terms :—

> " So long as the parents live, the sons may not claim anything whatsoever ; on the contrary, they are bound to bring into the common estate, and there to let remain, all that they have gained or earned during the whole time of their bachelorship . . . . . and that until the parents die, even if the sons have married and quitted the parental roof.
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> So that when the parents die, the sons first inherit the property left by their parents, which is called modesium or inherited property . . . . . ".

The plaintiffs' case is that the 21-acre block was property acquired by Sinnakuddy during bachelorship and therefore became part of the common property of his father and mother. It would in that event, I take it, fall under the category of property known as *tediatetam, i.e.,* acquired property. There is no other class mentioned in the *Thesawalamai* under which it can come. Even admitting all the facts found to have been

proved, Mr. Balasingham urges that, on the plain meaning of the words of clause 7, the plaintiffs must succeed. The first plaintiff, Pattiny, died after the commencement of this action, which was continued by the second plaintiff for himself and as executor of his mother.

One argument advanced on behalf of the defendant in the lower Court was to the effect that the provision of the *Thesawalamai* relied upon by the plaintiffs is obsolete. In support of that argument we have the opinion of de Sampayo J. in *Nalliah v. Ponnammah* [1], which is *obiter.* The date of that case is 1920. He states there that this disability of unmarried sons and daughters to acquire anything for themselves during the lifetime of their parents had long since become obsolete. The argument against that view has been elaborated before us, it being urged for plaintiffs that a provision of the statute law cannot be abrogated by disuse. Even if, however, the Roman-Dutch law is not so stringent as English law on this question, I do not think we have material before us to decide it, however much one might for other reasons incline to the same view as de Sampayo J. One would, I take it, first of all, require evidence for example, of the application of the law or existence of the custom, or of the fact that the law or custom had fallen into disuse or of a contrary practice existing and the length of time during which it had existed or the law had not been applied or made use of. This aspect of the case does not seem to have been gone into at all, so far as the evidence is concerned.

Whilst feeling unable for these reasons to decide this question of the abrogation by disuse of the provision of the law relied upon by plaintiffs, I am satisfied, however, there are other grounds upon which the judgment appealed from must be affirmed, having regard to the facts proved in this case.

There are some few decisions of the Courts covering a long period of time showing how the clause of the section 1 I have set out above has been construed. The *Thesawalamai* is described in section 14 of Regulation No. 18 of 1806 (Vol. I., Revised Laws, 1923, p. 25) as the customs of the Malabar inhabitants of the Province of Jaffna. It appears to have been recognized that these customs and usages might in course of time become modified, and it seems to have been the practice at any rate in the first half of the nineteenth century, when questions arose for decision under the *Thesawalamai,* for the Courts, when called upon to apply the provisions of the law in the Code, to obtain the help and assistance of Commissioners or special assessors well acquainted with Tamil usages and also of the more experienced inhabitants to speak as to the customs of the people for the purpose of ascertaining what exactly the customs in practice were and also whether there had been any modification to soften what has been called "the rigour of the general principle". (See Mutukisna's *The Thesawalamai,* p. 298-301, judgment No. 1,531, April 24, 1839.)

As early as 1828 there is a reported decision (Mutukisna p. 576) from Point Pedro which according to the sidenote deals with "property acquired during bachelorship". The report is very short but it seems fairly clear that in order to constitute the property common property, under the clause of section 1 set out above, at that date it was held that

[1] *22 N. L. R. at p. 204.*

the property must be property acquired by a son during the time he was under the roof of his parents. It is probable that as a general rule at the time the *Thesawalamai* was compiled, and for long after, a son who was a bachelor necessarily remained under his parental roof. It may almost be inferred from some of the words used in the clause that the son does not quit the parental roof until his marriage. It is quite possible therefore that the term "bachelorship" is used in the Code having that custom in view. It has been pointed out (*Seelachy v. Visuvanathan Chetty*[1], judgment of W. Wadsworth D.J. at p. 100) that this Code was compiled at an age when the people of Jaffna were mainly agriculturalists, when parents and children joined together in working their fields and gardens. They would have a common home under the parental roof, the sons and daughters remaining there as a rule until married.

This idea of residence under the parental roof playing an important part in the application of this provision of the *Thesawalamai* is also brought out in a case referred to by Mutukisna at p. 589, under date April 17, 1837. The sidenote there is "property purchased in favour of children while under parental roof". The father purchased property for his son when the latter was unmarried and under the protection of his father. It was held that the land belonged to the father's estate.

Another instance in which the provisions of clause 7 of section 1 of the *Thesawalamai* on another point have come to be more leniently construed than perhaps the literal meaning of the words themselves might at first sight allow is in respect of the liability of sons for the debts of their parents. The sons are stated to be at all times accountable for the same, whether they have the means to pay or not. It had been held in 1839 that this provision of the law as set out in the section is nothing more or less than a rule of the Roman-Dutch law and that an heir may avoid liability by repudiating the inheritance (Mutukisna p. 301). If that decision is correct, it affords support for a view I have previously expressed that the Roman-Dutch law has had some influence in the compilation of the Code contained in the *Thesawalamai*. This decision of 1839 as to the qualification upon the general proposition set out in section 1, clause 7, was followed in a decision in 1856 reported in *Lorenz's Reports, Part I., at p. 224,* although apparently on different grounds.

I now come to the more recent decision (*Umatavipillai v. Murugaser*[2]), decided in 1899 by Lawrie A.C.J. and Brown J. The facts are not set out, but the Court held that if section 1, clause 7, is still in force, it did not affect the case before them, because the clause referred only to a case where the son who acquires property is living unmarried in his father's house and under his father's control. No authorities are referred to in the judgment, but Sir Ponnambalam Ramanathan was one of the counsel engaged in the case. It will be seen that the decision appears to be in accordance with the earlier cases I have cited, the father's control and the parental roof, I take it, being for the purpose synonymous terms.

No decisions of the Courts expressing a view contrary to those I have mentioned have been brought to our notice, and in these circumstances, especially having regard to the view that appears to have been taken as to the meaning of clause 7 over a period of nearly a century, I have no

[1] *23 N. L. R. 97.* [2] *3 Balasingham's Reports 119.*

difficulty on the facts herein upholding the decision appealed from. Sinnakuddy purchased the property in question when he was unmarried but out of his own money, at a time when he was no longer under parental control or under the parental roof, and hence the property was his own property and did not become part of the common property of his parents.

In cases where the marriage of parents has taken place after Ordinance No. 1 of 1911 came into force, although of course it is not a matter to be decided in this action, it is doubtful whether any such question as has arisen here could arise, since the term *tediatetam* or acquired property is now defined in that Ordinance (see decision in *Avitchy Chettiar v. Rasamma*[1]). The term as there defined does not include any property acquired by the earnings of any son or daughter, such as are mentioned in clause 7 of section 1. It is to be noted that by section 2 of the Ordinance that "so much of the provisions of the collection of customary law known as the *Thesawalamai* . . . . as are inconsistent with the provisions of this Ordinance are hereby repealed".

The appeal must be dismissed with costs.

Appeal dismissed.