1952 *Present:* **Rose C.J., Nagalingam S.P.J., Gratiaen J., Pulle J. and Choksy A.J.**

AKILANDANAYAKI, Appellant, *and* SOTHINAGARATNAM *et al.*, Respondents

S. C. 307—D. C. Jaffna, 3,033

Thesavalamai—Thediatheddam—*Jaffna Matrimonial Rights and Inheritance Ordinance, No. 1 of 1911 (Cap. 48), ss. 6, 14, 19, 20—Amending Ordinance No. 58 of 1947—Retrospective effect—Interpretation Ordinance (Cap. 2), s. 6 (3).*

Held, (i) that the provisions of the Jaffna Matrimonial Rights and Inheritance (Amendment) Ordinance, No. 58 of 1947, which came into force on 3rd July, 1947, do not operate retrospectively so as to affect the rights of persons previously acquired under the provisions of the Jaffna Matrimonial Rights and Inheritance Ordinance, No. 1 of 1911 (Cap. 48).

(ii) that the earlier rulings to the contrary effect in *Sachchithananthan v. Sivaguru* [1], *Kathirithamby v. Subramaniam* [2], and *Sellappah v. Sinnadurai* [3] were wrongly decided.

APPEAL from a judgment of the District Court, Jaffna. This case was referred under section 51 of the Courts Ordinance for the decision of a Bench of five Judges.

H. V. Perera, Q.C., with *C. Shanmuganayagam*, for the plaintiff appellant.

C. Vanniasingham, with *A. Nagendra*, for the 1st defendant respondent.

S. J. V. Chelvanayakam, Q.C., with *A. Vythialingam*, for the 2nd defendant respondent.

H. W. R. Weerasooriya, Acting Solicitor-General, with *G. L. L. de Silva*, Crown Counsel, as *amicus curiae*.

Cur. adv. vult.

March 5, 1952. ROSE C.J.—

The principal point that arises for determination in this case is whether all or any of the provisions of the Jaffna Matrimonial Rights and Inheritance (Amendment) Ordinance, No. 58 of 1947, are retrospective in their effect. I have had the advantage of reading the judgments of my brothers Nagalingam and Gratiaen and find myself in agreement with the reasons and conclusions contained in the judgment of the latter.

[1] *(1949) 50 N. L. R. 293.* [2] *(1950) 52 N. L. R. 62.*
[3] *(1951) 53 N. L. R. 121.*

In my view the matter is concluded by the imperative provisions of section 6 (3) of the Interpretation Ordinance (Cap. 2) which read: "Whenever any written law repeals either in whole or part a former written law, such repeal shall not, *in the absence of any express provision to that effect*, affect or be deemed to have affected—

(*b*) any . . . . right . . . . acquired . . . . under the repealed written law;

(*c*) any action, proceeding, or thing pending or incompleted when the repealing written law comes into operation, but every such action, proceeding, or thing may be carried on and completed as if there had been no such repeal."

It will be noted that the words "in the absence of any express provision to that effect" used in our Ordinance are more restrictive in their scope than the words "unless the contrary intention appears" used in the corresponding English statute.

I find myself unable to agree with the view that one can read into section 14 of the Jaffna Matrimonial Rights and Inheritance Ordinance, No. 1 of 1911 (Cap. 48), an express provision which would have the effect of rendering the repealing law contained in the amending Ordinance of 1947 retrospective in its application so as to interfere with rights that had become vested or been acquired prior to that date. Such a view would seem to ignore the fact that between 1911 and 1947 there was a law (contained in the repealed sections 19 and 20) which determined the rights of parties till the amending law was passed. In my opinion, one would have to look to an express provision in the repealing law itself and it is clear that the amending Ordinance of 1947 contains no such provision.

Having regard to my view of the amending Ordinance, I am of opinion that it is unnecessary and indeed irrelevant to consider whether the effect of the amending Ordinance is more in accord with the spirit of the customary law of Thesawalamai than was the decision in the case of *Avitchy Chettiar v. Rasamma* [1].

It is unnecessary for me to examine the other aspects of this question as they have been fully dealt with in the judgment of my brother Gratiaen with whose views my brothers Pulle and Choksy and I are in agreement.

The decision of this Court upon the appeal referred by me under section 51 of the Courts Ordinance is therefore as follows:—

(*a*) that the provisions of the Jaffna Matrimonial Rights and Inheritance (Amendment) Ordinance, No. 58 of 1947, which came into force on 3rd July. 1947, do not operate retrospectively so as to affect the rights of persons previously acquired under the provisions of the Jaffna Matrimonial Rights and Inheritance Ordinance, No. 1 of 1911 (Cap. 48);

(*b*) that the earlier rulings to the contrary effect in *Sachchithananthan v. Sivaguru* [2], *Kathirithamby v. Subramaniam* [3] and *Sellappah v. Sinnadurai* [4] were wrongly decided;

(*c*) that this appeal should be allowed with costs and the case remitted for trial as indicated in the judgment of my brother Gratiaen.

[1] *(1933) 35 N. L. R. 313.*
[2] *(1949) 50 N. L. R. 293.*
[3] *(1950) 52 N. L. R. 62.*
[4] *(1951) 53 N. L. R. 121.*

NAGALINGAM S.P.J.—

This case is also one that relates to rights of persons governed by the Jaffna Matrimonial Rights and Inheritance Ordinance but is different from the case of *Kandavanam v. Nagammah et al.*[1] and other cases in which this Court had to consider the effect of the amending Ordinance No. 58 of 1947. The facts here are that the plaintiff-appellant, who was married to the 1st respondent in 1925, obtained a judicial separation from him in 1943. She instituted this action in 1946, claiming a half-share of the lands described in the schedule to the plaint on the basis that the said properties formed the *thediatheddam* of her husband. She also made the 2nd respondent a party to the proceedings as she alleged that the 2nd respondent, the father of her husband, had purchased the lands in his name but in trust for her husband. The defendants denied the allegations that the properties were purchased by the 2nd respondent in trust for the 1st respondent or that the said properties constituted the *thediatheddam* of the 1st respondent. There were also other pleas raised by the defendants which it is unnecessary to notice for the purpose of the present appeal.

By the time the case came up for trial, the amending Ordinance No. 58 of 1947 had been enacted and the effect of the amending provisions had been the subject of a decision by this Court in the case of *Satchithanandan v. Sivaguru* [2]. In that case, in delivering judgment I expressed the opinion that the amending Ordinance was retrospective in its operation. Counsel for the respondent in the lower Court taking his stand on the decision in the above case successfully contended before the learned District Judge that the rights of the plaintiff were affected by the new section 20 introduced by the amending Ordinance and that the plaintiff could not therefore succeed. The learned District Judge upheld the contention and has dismissed the plaintiff's action.

The question that arises for decision is whether the amending Ordinance has application to the rights of the plaintiff. The new sections 19 and 20 introduced by the amending Ordinance can have no application to the present case, because the scope of their operation, as I have set out fully in my judgment in the case of *Kandavanam v. Nagammah et al.* (supra), extends only to the *estates* of persons *who may die after the commencement of the principal Ordinance*. There is no estate here in regard to which the new provisions can apply, for both spouses are alive. The amending sections, therefore, in no way refer to the rights of the plaintiff. They are applicable to the estates of deceased persons only and not to the rights of spouses whose marriage tie may have been dissolved by a decree *a vinculo matrimonii* or who may have been judicially separated *a mensa et thoro*. Nor can it be said that any inference can be drawn from section 7 of the amending Ordinance, for the amendments made do not relate, as already stated, to the dissolution of marriage by Court or to judicial separation. If, however, one attempted to draw an inference from the language of this section, such for instance as that the rights of a spouse—to take the case pertinent for our purpose—who has been judicially separated before the amending Ordinance came into operation have been taken

[1] *S. C. 166, D. C. Jaffna No. 3,737 [S. C. Minutes of March 5, 1952].*
[2] *(1949) 50 N. L. R. 293.*

away, one would fall into an error of the magnitude and character referred to by Lord Davey in the case of *Guardians of the Poor of West Derby Union v. The Metropolitan Life Assurance Society and others* [1] and adverted to in the course of my judgment in the case of *Kandavanam v. Nagammah et al.* (supra).

It will be seen that the amendments say nothing one way or the other with regard to the rights of spouses who are judicially separated, and it will be wholly indefensible to base any deduction upon the absence of a provision. The inference, if any, in reality is sought to be drawn from the circumstance of the subsequent repeal of the provision in the earlier section 20. Such an inference, again, will be one which cannot be sustained or supported upon any logical basis; so that from a consideration neither of the new section 20 nor of section 7 of the amending Ordinance can it be said that the amendments regulate the rights of the plaintiff. Besides, those rights had accrued to and vested in her at the date of the Court entering a decree for judicial separation in 1943, and by virtue of section 6 (3) (*b*) of the Interpretation Ordinance those rights cannot be said to have been taken away by the repeal of the old section *in the absence of an express provision* to that effect. There is no such provision on which one can lean. Furthermore, the plaintiff's action was pending when the repealing written law came into operation, and by virtue of section 6 (3) (*c*) of the same Ordinance, the action must be carried on and completed as if there had been no such repeal.

In this view of the matter, it must follow that the plaintiff's rights remain unaffected by the amendments created by Ordinance 58 of 1947 and that her rights must be adjudicated upon on the footing of the provisions of law contained in the old sections 19 and 20.

I would therefore set aside the judgment of the learned District Judge and allow the appeal with costs both here and in the Court below, and remit the case for adjudication on the other issues.

GRATIAEN J.—

I have been authorised by my brothers Pulle and Choksy to state that, after full consideration, they share the views expressed by me in this judgment.

This appeal was referred by my Lord the Chief Justice under section 51 of the Courts Ordinance for the decision of a Bench of five Judges. The main questions which call for an authoritative ruling of the Supreme Court may be summarised as follows:—

(1) Whether all or any of the provisions of the Jaffna Matrimonial Rights and Inheritance (Amendment) Ordinance, No. 58 of 1947, have retrospective effect so as to take away vested rights previously acquired under the provisions of the Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 48) of 1911, some of the provisions of which were either amended or repealed 36 years later by the later Ordinance;

[1] *(1897) L. R. A. C. 647.*

(2) whether the judgments of Nagalingam J. (Windham J. concurring) in *Sachchithanathan v. Sivaguru* [1]; of Nagalingam J., sitting alone, in *Kithirithamby et al. v. Subramaniam* [2]; and of Nagalingam J. and Swan J. (Basnayake J. dissenting) in *Sellappah v. Sinnadurai et al.* [3] were correctly decided.

The conclusion at which I have arrived is that vested rights acquired prior to 3rd July, 1947, under the earlier enactment (to which I shall hereafter refer as "the principal Ordinance") were, *in view of the imperative provisions of section 6 (3) (b) of the Interpretation Ordinance*, entirely unaffected by the passing of the later Ordinance (to which I shall hereafter refer as "the amending Ordinance"). It follows that, in my opinion, the three earlier pronouncements to which I have referred should be over-ruled.

It will be convenient at the outset to examine the basis of the plaintiff-appellant's claims against the defendants-respondents in the three connected actions to which the present appeal relates.

The plaintiff and the 1st defendant are Tamils to whom the Tesawalamai applies. They were married on 7th February, 1925, and in consequence their respective rights over *tediatetam* property acquired by either of them during the subsistence of the marriage were regulated by the provisions of the principal Ordinance. On 6th September, 1943, a decree for separation a *mensa et thoro* in respect of their marriage was entered by the District Court of Jaffna, an appeal by the 1st defendant against this decree having been dismissed by this Court on 21st May, 1945.

The effect of this decree for separation was that (according to the law applicable at that time) one half of the *tediatetam* property to which the spouses had been "equally entitled" in terms of section 20 (1) of the principal Ordinance, became immediately released to the plaintiff, by virtue of section 20 (2), *for her separate use*. In other words, her share was automatically set free from the bond of community and from the powers of management which her husband had previously enjoyed under the Tesawalamai.

On 20th September, 1946, the plaintiff instituted action No. 3,033 in the District Court of Jaffna claiming from the 1st defendant and from his father the 2nd defendant her half share of certain lands which, she alleged, had been *tediatetam* property acquired by the 1st defendant during the subsistence of the marriage (but the conveyances for which had been procured by him in favour of the 2nd defendant *as nominee*). The plaintiff's cause of action was based on the legal right vested in her by operation of law under section 20 (2) of the principal Ordinance *either* on 6th September, 1943, when the decree for judicial separation was entered *or*, at the very latest, on 21st May, 1945, when that decree was affirmed in appeal. If these facts be established as true, the circumstance that the husband had by a device obtained a conveyance of the property in his father's name could clearly not affect the validity of the plaintiff's claim.

[1] *(1949) 50 N. L. R. 293.* [2] *(1951) 52 N. L. R. 62.*
[3] *(1951) 53 N. L. R. 121.*

On 18th October, 1946, the plaintiff instituted two further actions (numbered 3090 and 3091 respectively) against the defendants in the same court claiming similar relief, and on identical grounds, in respect of her half share in certain other allegedly *tediatetam* properties acquired by the 1st defendant in his father's name during the subsistence of the marriage.

These claims were contested by the defendants, the main defence of the 2nd defendant on the merits being that each of the properties had been purchased by him out of his own money and did not therefore constitute *tediatetam* property of either the plaintiff or the 1st defendant.

When the case came up for hearing on 6th June, 1947, the parties agreed, on grounds of obvious convenience, that " all three actions should be consolidated and tried together; that the issues should be framed together, and all the documents produced in one proceeding, and, finally, that one judgment be written and three decrees entered in conformity therewith ". The trial of the consolidated action on this agreed basis was then postponed for a later date.

In the meantime the amending Ordinance came into force. Some of its provisions have been drafted in language so obscure that the problem of their interpretation presents enormous difficulties. For instance, we have heard irreconcilable but plausible conflicting submissions from Mr. H. V. Perera, Mr. Chelvanayagam and the learned Acting Solicitor-General as to the meaning and effect of that part of the Ordinance which amends section 6 of the principal Ordinance ; we have also heard arguments as to the effect of the repeal of sections 20 (1) and 20 (2) and of the introduction of a new provision with regard to the *devolution* of *tediatetam* property—without any express mention, however, being made of its *incidence* during the subsistence of the marriage.

In the view which I have taken, the real controversy in the present appeal is confined within very narrow limits—namely, whether or not these obscure amendments, whatever they may mean, have been introduced with *retrospective* effect. As this issue must, for the reasons which will follow, be answered in favour of the plaintiff, the solution of the other problems which came up for incidental discussion need not now be attempted because the rights of the parties in this consolidated action must be answered solely *by reference to the law as it stood before the principal Ordinance was amended in some respects and repealed in others.* But I do desire to make a general observation. If, as Mr. Chelvanayagam suggests, the intention of the legislature was, *even prospectively*, to sweep away entirely the old ideas of community of property subsisting among persons married since 17th July, 1911, under the Tesawalamai, such a revolutionary change could quite easily have been introduced in clearer language—as indeed was done when section 7 of the Matrimonial Rights and Inheritance Ordinance (Cap. 47) was enacted in regard to certain other inhabitants of this Island. Unless these defects in draftsmanship are speedily remedied, it is safe to prophesy that the difficulty of ascertaining the legal incidence and the subsequent devolution of *tediatetam* property under the provisions of the amending Ordinance will involve many persons subject to the Tesawalamai in unprofitable litigation.

I now pass on to the comparatively simple point of controversy arising on the present appeal.

Shortly after the amending Ordinance passed into law, and before the trial of the consolidated action was concluded, the 1st defendant filed an amended answer pleading that " by reason of the provisions of Ordinance No. 58 of 1947 the plaintiff has no cause of action against this defendant to claim a half share of the *tediatetam* consequent on a decree for judicial separation ". His position was that the amending Ordinance had, with effect from 3rd July, 1947, retrospectively amended section 6 and repealed sections 20 (1) and 20 (2) of the principal Ordinance, so that the vested rights which the plaintiff had already acquired under section 20 (2) upon the passing of the decree for separation, had all been swept away—indeed, forfeited in his favour—by an Act of Parliament which came into operation 4 years later. It follows as a corollary to this contention that the plaintiff's rights *in the pending actions* fell to be determined not by reference to the law applicable at the time of their institution but in accordance with new laws enacted after the proceedings had commenced. Stated thus, the proposition, *if correct*, is so startling as to offend one's sense of justice and to disturb one's confidence in the wisdom of the legislature which is alleged to have intentionally produced this result.

The learned District Judge, at the conclusion of the consolidated trial, upheld this contention and delivered a single judgment dismissing all three actions instituted by the plaintiff against the defendants. Indeed, the learned Judge had no alternative but to so decide, for he rightly regarded himself as bound by the decision in *Satchithananthan v. Sivaguru* [1] in which appears the earliest pronouncement to the effect that the amending Ordinance has retrospective operation.

Before one considers the provisions of the amending Ordinance which are claimed to be retrospective, it is necessary to examine section 6 (3) of the Interpretation Ordinance (Cap. 2) which was enacted in 1901—i.e., on a date long prior to the passing of either the principal or the amending Ordinance with which we are now concerned. The section reads as follows:—

" (3) Whenever any written law repeals either in whole or part a former written law, such repeal shall not, in the absence of any express provision to that effect, affect or be deemed to have affected—

(*a*) the past operation of or anything duly done or suffered under the repealed written law ;

(*b*) any offence committed, any right, liberty, or penalty acquired or incurred under the repealed written law ;

(*c*) any action, proceeding or thing pending or incompleted when the repealing law comes into operation, but every such action, proceeding or thing may be carried on and completed as if there had been no such repeal ".

[1] *(1949) 50 N. L. R. 293.*

The relevant parts of the section which I have underlined have been substantially adapted from section 38 of the Interpretation Act, 1889, of England except that our legislature had designedly introduced (by substituting the words " in the absence of any express provision to the contrary " for the words " unless the contrary intention appears " of the English model) *an even stronger presumption against ex post facto legislation in this country.*

Section 6 (3) gives statutory recognition to the rule of judicial interpretation adopted in all civilised countries that the Courts should not lightly assume an intention on the part of Parliament to introduce legislation prejudicially affecting vested rights which have already been acquired. " Retrospective laws ", says Willes J. *in Phillips v. Eyre* [1] " are *prima facie* of questionable policy and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought (when introduced for the first time) to deal with future acts . . . . and ought not to change the character of past transactions carried on upon the faith of the then existing law. Accordingly, the Courts will not ascribe retrospective force to new laws affecting rights unless by express words (or unless by necessary implication) it appears that such was the intention of the legislature ". He proceeds to state that " *every law which takes away or impairs rights vested agreeably to existing laws is retrospective and is generally unjust and may be offensive, and it is a good general rule that a law should have no retrospect* ". Nevertheless, as he points out, " there may be occasions and circumstances involving the safety of the State, or even the conduct of individual subjects, the justice of which *prospective* laws, made for ordinary occasions and the usual exigencies of society, may for want of prevision fail to meet ; and in which the execution of the law, as it stood at the time, may involve practical public inconvenience and wrong . . . . Whether the circumstances of the particular case are such as to call for special and exceptional remedy is *a question which must in each case involve matters of policy and discretion fit for debate and decision in the Parliament* which would have had jurisdiction to deal with the subject-matter by preliminary legislation, and as to which a Court of ordinary municipal law is not commissioned to inquire or adjudicate ".

As Erle J. pointed out in *The Midland Railway Co. v. Pye* [2] "those whose duty it is to administer the law very properly guard against giving to an Act of Parliament a retrospective operation, unless the intention of the legislature that it should be so construed *is expressed in unambiguous language;* because it manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment ". Similarly, and for identical reasons, one should not lightly impute to the legislature a disregard for the sanctity of rights lawfully acquired under the provisions of some earlier Act of Parliament.

What then if, *even in England,* the words of a statute which is claimed to impair retrospectively a person's vested rights, should be found to be equally consistent with the rival theories of *retrospective* and merely *prospective* operation ? The answer is to be found in the observation

[1] *(1870) L. R. 6 Q. B. 1.*
[2] *10 C. B. (N. S.) 179 (—142 Eng. Reports 419).*

of Bacon L. J. in *Quilter v. Mapleson* [1] that " the rule against retrospective legislation applies as a guide where the intention of the legislature is obscure ". In Ceylon the rule is even stricter.

These elementary principles, now invested with statutory force, are " deeply found on good sense and justice " and " must always be adhered to unless in cases where there is something *on the face of the enactment putting* it beyond doubt that the legislature meant it to operate retrospectively ". *Moon v. Durden* [2]. My only excuse for emphasising them on this occasion is that, if I may say so with great respect, the earlier decisions of this Court referred to at the commencement of my judgment have paid insufficient regard to their importance.

As I have pointed out, section 6 (3) of the Interpretation Ordinance has laid down a less flexible test than that adopted in the corresponding English enactment. This is implicit in the phrase " *in the absence of any express provision to that effect* " as contrasted with the words " *unless the contrary intention appears* " employed in section 38 of the English Act. One cannot but assume that this different formula was deliberately chosen by our Legislature, for it is significant that in sections 4, 9 and 10 of the same Ordinance the phrase " unless a contrary intention appears " have been taken over without alteration from the words of the corresponding sections of the English Act. Again, section 3 declares that " no enactment shall in any manner affect the right of the Crown *unless it is therein expressly stated* or *unless it appears by necessary implication* that the Crown is bound thereby ", indicating very clearly to my mind that an " express provision " must in the context be construed as excluding even a " necessary implication " or what Evershed M.R. describes as a " necessary intendment " in *Hutchinson v. Jauncey* [3]. This latter authority illustrates the distinction between an " express provision " contemplated by section 6 (3) of our Interpretation Ordinance and the less exacting test which satisfies section 38 of the English Act.

The term " express stipulation " in section 7 of the Apportionment Act, 1870, has been held to *exclude* a stipulation that was " *merely left to be collected by inference* ". *In re Meredith; Stone v. Meredith* [4]. This does not necessarily mean, of course, that for the purposes of section 6 (3) (*b*) of our Interpretation Ordinance, there need be a specific and *direct* reference to the particular vested right which is under consideration. In *Paker Jarvis and Salt v. Locker* [5], for instance, it was decided that a bequest in a will " without any deduction whatsoever " could fairly be regarded as *including* an " express provision " exempting the property from direct liability to estate duty. That case was concerned with the interpretation of section 14 of the Finance Act, 1914, of England.

Section 6 (3) of the Interpretation Ordinance in a sense *controls* the operation of all repealing enactments. It protects vested rights acquired under a repealed Act from the impact of subsequent legislation unless there be unequivocal language *within the four corners of the repealing Act*

[1] *(1882) 9 Q. B. D. 672.*
[2] *(1843) 2 Ex. 22 (—154 E. R. 389).*
[3] *(1950) 1 K. B. 574.*
[4] *(1893) 67 L. J. Ch. 409.*
[5] *(1889) 2 Ch. 643.*

pointing to a deliberate decision on the part of Parliament to impair those rights. The section therefore demands *a clear and unambiguous expression (either directly or at least " in so many words ") of a legislative intention to affect vested rights prejudicially.* For there is a strong and compelling presumption that no Parliament would think fit, except after due discussion and debate, to forfeit or impair vested rights by *ex post facto* legislation. The process of judicial inquiry in cases of this kind affords no scope for speculation or conjecture. " The intention of Parliament is not to be judged of by what is in its mind but by its expression of that mind in the Statute itself " (*per* Lord Thankerton in *Wicks v. Director of Public Prosecutions* [1]).

Had the particular question submitted for our decision in this case been *res integra*, I must confess that I should have thought that only one answer would have been possible, for I have signally failed to discover a single provision in the amending Ordinance which gives clear expression, *either directly or " in so many words "*, to a legislative intention to produce a result so violent and unjust as the forfeiture of rights lawfully acquired under the provisions of either section 19 or section 20 of the principal Ordinance over a period of 36 years since 1911—affecting thereby the validity of innumerable *bona fide* transactions entered into on the faith of the existing law. Indeed, even if the test laid down in section 38 of the English Act had applied, I would say that there are no words in the amending Ordinance sufficient to justify the *inference* (far less the " necessary implication ") of an intention that the provisions of the principal Ordinance should be repealed retrospectively. But as learned Judges of this Court have on three separate occasions since 1949 taken the view that the amending Ordinance must be construed as having retrospective operation *in all respects*, it is necessary to examine the grounds on which each of those decisions have been based.

In *Sachchithananthan v. Sivaguru* [2] my brother Nagalingam acknowledged the force of the argument that " *though some implied provision may be inferred from the terms of section 7 of the amending Ordinance, no express provision is to be found therein whereby it could be said that any rights that had accrued were intended to be affected*". I should have thought that this concludes the argument which was based on section 7, but the judgment proceeds, by purporting to apply the ruling in *Barber v. Pigden* [3], to declare that the provisions of section 6 of the Interpretation Ordinance must give way to what is assumed to have been the " dominant intention " of the legislature which passed the amending Ordinance in 1947. With great respect, the only " dominant intention " relevant to the present problem would be an intention, if clearly expressed, to affect rights already acquired under the Ordinance of 1911. If there was any such intention, " dominant " or otherwise, it has certainly not been expressed in the amending Ordinance, and the uncompromising test imposed by section 6 (3) of the Interpretation Ordinance forbids a judicial search for *unexpressed intentions outside the four corners of the amending Ordinance itself.*

[1] *(1947) A. C. 367.*

[2] *(1949) 50 N. L. R. 293.*

[3] *(1937) 1 K. B. 664.*

Barber v. Pigden (supra) is indeed a very special case. It decides that an Act disclosing " an intention to make a clean sweep of the old legal fiction of (the English) common law that a woman on marrying became merged in the personality of her husband " could legitimately be construed, by reference to its language, as having retrospective operation—because, in the opinion of Scott L. J., " a statute abolishing old legal fictions is so nearly akin to a procedural statute that the presumption against a restrospective interpretation had little, if any, application ". *How very different is the present case!* Section 20 of the principal Ordinance gives statutory recognition to the long-established customary laws of an important section of the inhabitants in this Island, and those customary laws cannot in the slightest degree be equated to " legal fictions ". The Courts must surely insist upon very clear language in an amending enactment which is claimed to have swept away *retrospectively* the incidence of community of property attaching to *tediatetam* belonging to persons governed by the Tesawalamai. It is no doubt true that in *Barber v. Pigden* (supra) Greer L.J. was influenced, among other considerations, by the existence of a provision in the Law Reform (Married Women and Tort Feasors) Act, 1935, which is similar in certain respects to section 7 of the amending Ordinance, but this was by no means the only circumstance which influenced his decision. Be that as it may, I regret that I am unable to subscribe to the theory that the maxim *expressio unius, exclusio alterius* has any bearing on questions concerned with the application of section 6 (3) of our Interpretation Ordinance. The true answer to the argument based on section 7 is to be found in the following passage in *Maxwell's Interpretation of Statutes (9th edition) at page 318*:—

> " Provisions sometimes found in statutes enacting imperfectly or for particular cases only that which was already and more widely the law have occasionally furnished ground for the contention that the intention to alter the general law was to be inferred from the partial or limited enactment, resting in the maxim *expressio unius est exclusio alterius*. But that maxim is in applicable in such cases. The only inference which a Court can draw from such superfluous provisions (which generally find a place in Acts to meet unfounded objections and idle doubts), is that the Legislature is either ignorant or unmindful of the real state of the Law, or that it acted under the influence of excessive caution ".

I am content to say, with regard to the argument based on section 7 of the amending Ordinance, that any idle speculation as to why precisely its provisions were enacted would be profitless. For the section admittedly contains no words expressing an intention retrospectively to sweep away any rights of the kind which the plaintiff now seeks to vindicate. It only purports, presumably out of an abundance of caution, and in any event quite unnecessarily, to save the rights of parties in a limited group of decided cases dealing with only one particular category of *tediatetam* property which was caught up (perhaps unintentionally but nevertheless unambiguously) by the words of definition in section 19 of the principal Ordinance. Section 7 makes no express reference to

any other species of vested rights or to any other class of litigation, *concluded or pending*, and the impact of the amending Ordinance on these latter rights continues therefore to be controlled by section 6 (3) of the Interpretation Ordinance. As it happens, the *tediatetam* rights claimed by the plaintiff in the present action fall within the defintion of section 19 both in its amended *and* its unamended form.

I now pass on to the judgment of Nagalingam J., sitting alone, in *Kathirithamby et al. v. Subramaniam* [1] where he again decided that the Ordinance of 1947 has retrospective operation. It was common ground in that case that the plaintiffs had, under the provisions of sections 19 and 20 of the principal Ordinance, already acquired vested rights in their deceased sister's share in certain *tediatetam* property, but the defendant (i.e., the surviving spouse) contended that those rights had subsequently been forfeited in his favour upon the passing of the amending Ordinance of 1947. Nagalingam J. upheld this contention. He decided that, in addition to the grounds set out in his earlier judgment, the Ordinance was retrospective (*a*) because, by reason of section 5 of the Interpretation Ordinance, the amending Ordinance of 1947 must necessarily be " read as one with the principal Ordinance ", and (*b*) because the amending Ordinance was of a declaratory nature, having the effect of laying down " what was always the law ".

Mr. Chelvanayagam did not seek to support the first of these grounds, and, if I may say so without disrespect, it is untenable. No one can doubt that, *once the amending Ordinance did come into effect*, its provisions had to be read as part and parcel of the principal Ordinance. But it does not logically follow that both enactments should by some statutory fiction (whose origin cannot justifiably be traced to section 5 of the Interpretation Ordinance) be regarded *as having come into force contemporaneously in 1911.*

With regard to the second ground of the decision in *Kathirithamby's case*, it is certainly correct to say that a repealing Act which unambiguously manifests an intention to remove doubts as to the true meaning of an earlier statute, is generally held to operate retrospectively to that particular extent—for in such an event the repealing Act would not be seeking to introduce new law but merely to declare what the law (though previously misunderstood) had always been before the date of the repeal. " The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error whether in the statement of the common law or in the interpretation of statutes ". *Craies on Statute Law, (4th edition) at page 61.* Indeed, the requirements of section 6 (3) of the Interpretation Ordinance would for that very reason be satisfied. *Vide* also *Attorney-General v. Theobald* [2].

It seems to be implicitly assumed in this part of Mr. Chelvanayagam's contention as it was in the judgment in *Kathirithamby's case*, that a Divisional Bench of this Court, in deciding *Avitchi Chettiar v. Rasama* [3]

[1] *(1950) 52 N. L. R. 62.* [2] *(1890) 24 Q. B. D. 557.*

[3] *(1933) 35 N. L. R. 313.*

had in regard to one particular category of " acquired property " wrongly interpreted the definition of *tediatetam* contained in section 19 of the principal Ordinance; and that the purpose of the amending Ordinance was, by substituting a new definition more in keeping with the earlier customary law of Tesawalamai, to correct this so-called " *error of interpretation* " with retrospective effect. It would be strange indeed, if it were true, that any legislature should have paid such scant regard to the sanctity of *bona fide* transactions (not expressly protected by section 7 of the amending Ordinance) which had been entered into over a *period of 14 years* upon the faith of the ruling of a Divisional Bench assembled for the special purpose of settling authoritatively the meaning of section 19 of the principal Ordinance—a ruling which has consistently since 1933 been acted upon by Judges, litigants and professional advisers. But the truth is that there is no reason for imputing to the Legislature any desire to be so unjust.

I am satisfied that *Avitchi Chettiar's case* did in fact correctly interpret the language of section 19 of the principal Ordinance—as Nagalingam J. himself seems to have conceded in his earlier judgment (*50 N. L. R. at page 296*). Indeed, it was *in unqualified recognition of the correctness of this decision* that Parliament decided in 1947 to substitute a new definition which would restore *for the future* the more traditional conception of *tediatetam* which had been unmistakably, even though carelessly, altered by legislative intervention in 1911. In that view of the matter, the Ordinance of 1947 " does not contain any words to *correct* the earlier Ordinance; it does purport to *amend* it ". In the absence, therefore, of any " express provisions to the contrary ", section 6 (3) of the Interpretation Ordinance operates to prevent the amending Ordinance from receiving a construction which would prejudicially affect rights previously acquired—vide *Harding v. Commissioner of Stamps for Queensland* [1] and *Young v. Adams* [2] which distinguished *Attorney-General v. Theobald* (*supra*). As the learned Solicitor-General points out, *Midland Railway Co. v. Pye* [3] deals with an amending Act which contained words far more indicative of a merely " declaratory " intention than those contained in the amending Ordinance with which we are now concerned. Those words were nevertheless held to be *prospective* only in operation. I venture to suggest that the English authorities which were cited to us during the argument are of greater assistance as guides to the general principles which they enunciate rather than as precedents for deciding that certain particular words appearing in a particular context do or do not indicate an intention to give a statute retrospective operation.

Mr. Chelvanayagam's submissions in support of the judgment under appeal were based chiefly on the argument that the amendment of section 19 of the principal Ordinance was a declaratory amendment intended to correct what was assumed to be a judicial error on the part of the learned Judges who decided *Avitchi Chettiar's case*. I have already expressed my opinion rejecting this proposition, but, without discourtesy

[1] *(1898) A. C. 769.* [2] *(1898) A. C. 469.*

[3] *10 C. B. (N. S.) 179 (—142 E. R. 419).*

to Mr. Chelvanayagam, I feel constrained to point out that the conclusion which he invited us to draw as a corollary to this untenable hypothesis are even less acceptable. For he has argued in effect that if the amendment to section 19 be retrospective, the amendment to section 20 is so inextricably bound up with it as inevitably to be also retrospective.

Section 19 of the principal Ordinance was interpreted in *Avitchi Chettiar's case* as having added to the earlier categories of *tediatetam* a new species of property—namely, that which had been acquired during marriage by a Tesawalamai spouse by the conversion of his or her "separate property". But that decision was concerned only to define *the categories of tediatetam property*. An entirely separate subject, *relating to the incidence and the devolution of every category of tediatetam property*, was regulated by section 20 of the principal Ordinance—and it has not been suggested, as far as I am aware, that the provisions of section 20 have been wrongly construed or considered by Parliament to have been misinterpreted in earlier rulings of this Court. Whatever view might therefore have been taken by Parliament as to the advisability of retrospective amending section 19, there was no intelligible corresponding need for *ex post facto* legislation introducing in 1947 a completely new principle disturbing the sanctity of past transactions based upon the earlier incidence of even the admitted categories of *tediatetam* property unaffected by the ruling in *Avitchi Chettiar's case*—particularly as it has always been recognised that section 20 was in no way inconsistent with the customary law as it existed before 1911.

A statute should never be construed to have a greater retrospective operation than its language renders strictly necessary. *Gloucester Union v. Woolwich Union* [1]. Even, therefore, if the amendment to section 19 could properly have been regarded as declaratory and retrospective, it would not have followed that the amendment to section 20 *must* have been intended to have the same result. There are no words in the amending Ordinance which expressly (or even by inference) disclose an intention on the part of Parliament to give retrospective effect to the repeal of section 20 of the principal Ordinance. I refuse to believe that Parliament, actuated by a desire to introduce an allegedly declaratory amendment in one particular respect, should think fit at the same time to initiate an *ante dated* statutory "revolution" producing hardships in other respects.

There remains for consideration *Sellappah v. Sinnadurai* [2] where my brothers Nagalingam and Swan (Basnayake J. dissenting) once again took the view that the amending Ordinance of 1947 had retrospective operation. Swan J. declared that it was "impossible to come to any other rational conclusion", but as he appears to have implicitly identified himself with the reasoning of Nagalingam J., I pass on to examine Nagalingam J's judgment which introduces certain fresh arguments in support of his earlier rulings. He pointed out, for instance, that section 6 of the principal Ordinance, in its amended form, necessarily

[1] *(1917) 2 K. B. 374.* [2] *(1951) 53 N. L. R. 121.*

applied to all women subject to the Tesawalamai who were married *after the commencement of the earlier Ordinance of 1911*. This is so self-evident that Mr. H. V. Perera who appeared for the appellant in *Sellappah's case* somewhat apologetically assured us that he had not intended to be understood on that occasion to make any submission to the contrary. Be that as it may, I fail with very great respect to appreciate why such a proposition, which is obviously correct, should be regarded as sufficient to satisfy the strict requirements of section 6 (3) of the Interpretation Ordinance. Mr. Chelvanayagam made no submissions to us on this point.

A further ground of the majority decision in *Sellappah v. Sinnadurai* (*supra*) was that the amending Ordinance does not purport to "*repeal*" but only to "*amend*" section 6 of the principal Ordinance. Mr. Chelvanayagam did not attempt to justify this unconvincing argument, which in any event has no application to the express "repeal" of sections 19 and 20. Mr. Chelvanayagam submitted instead that the substitution of the word "all" in the amending section for the word "any" in sections 6 and 7 of the principal Ordinance lent some "slender" support to the retrospective theory. Really, I do not think it proper to decide questions affecting the presumption against Parliament's intention to destroy vested rights—based as it is on broad and fundamental principles of justice and good sense—by encouraging such pedantic etymological distinctions.

I prefer, with all deference, to adopt the reasoning of the dissenting Judge, Basnayake J., whose judgment is free of error because it does not lose sight of the unequivocal requirements of section 6 (3) of the Interpretation Ordinance. There is no "express provision" in any section of the amending Ordinance which affects or purports to affect rights acquired under the earlier Ordinance, and this is really the end of the argument upon this appeal. I therefore take the view that *Sachchithanathan v. Sivaguru* (*supra*), *Kathirithamby v. Subramaniam* (*supra*) and *Sellappah v. Sinnadurai* (*supra*) must for this simple but most compelling reason be over-ruled.

I have so far confined my judgment to the protection which section 6 (3) (*b*) of the Interpretation Ordinance affords to rights "acquired under the repealed written law". In the present actions, however, the plaintiff is equally entitled to rely on section 6 (3) (*a*) which unequivocally declares that, "in the absence of any express provision to that effect", no repeal shall affect "any action or proceeding pending or incompleted when the repealing written law comes into operation". In the result, actions Nos. 3,033, 3,090 and 3,091 of the District Court of Jaffna, which were all pending at the time when the amending Ordinance came into operation, were required by law to be "*carried on and completed as if there had been no such repeal*". "It is a general rule", said Jessel M. R., in *re Joseph Suche and Co., Ltd.*,[1] that "when the legislature alters the rights of parties by taking away or conferring any right of action its enactments, *unless in express terms they apply to pending actions*, do not

[1] (*1875*) *1 Ch. D. 48.*

affect them ". This principle is now enshrined in section 6 (3) (c) of our Interpretation Ordinance, and even though Evershed M. R. considered in *Hutchinson v. Jauncey* (*supra*) that, for the purposes of section 38 (2) (*c*) of the Interpretation Act of England, a necessary " implication " or " intendment " would suffice as a substitute for an " express " provision, the formula suggested by Jessel M. R. perfectly fits the stricter test imposed by the local Ordinance.

The combined effect of sections 6 (3) (*b*) and 6 (3) (*c*) of the Interpretation Ordinance is that if a party had already instituted proceedings to vindicate a vested right, the subsequent repeal of the enactment under which that right was acquired cannot be regarded as operating retrospectively unless there are express words satisfying both sub-sections.

I have now dealt with the arguments addressed to me at the Bar, and, for the reasons which I have set out, I take the view that the averments in the plaints in actions Nos. 3,033, 3,090 and 3,091, *if they be satisfactorily established by evidence*, do disclose in each case a cause of action against the defendants. The judgment under appeal must in my opinion be set aside, and it follows that the order contained therein directing decrees in favour of the defendants to be entered in all three actions on the basis of this erroneous judgment must also be quashed. I would order that the record should be returned to the lower Court with a direction that there should be a retrial *of each action* on the merits. The rights of the parties must in each case be determined in accordance with the law as is stood before the Jaffna Matrimonial Rights and Inheritance (Amendment) Ordinance, No. 58 of 1947, came into operation. The parties are of course free, should they so desire, to adhere to their earlier arrangement that these actions should on grounds of convenience be consolidated.

The defendants should be ordered to pay to the plaintiff the costs of this appeal and the costs of the abortive proceedings in the Court below.

PULLE J.—I agree.

CHOKSY A.J.—

The judgment prepared by my brother Gratiaen expresses my own views so adequately that it is not necessary for me to prepare a separate judgment. I entirely agree with the order he has made and for the reasons which he has given.

Judgment set aside.