1968 *Present:* H. N. G. Fernando, C.J., Alles, J., and Wijayatilake, J.

M. H. N. RAJARATNAM and others, Appellants, *and* F. D. CHINNAKONE, Respondent

S. C. 150/65 (Inty.)—D. C. Jaffna, 669/P

Divorce—Action for dissolution of marriage—Effect of decree nisi *being made absolute—Precise date on which the marriage is legally dissolved—Thesavalamai—Thediatheddam—Husband's power to alienate his wife's share of it—Date when such power terminates—Civil Procedure Code, ss. 188, 605.*

In an action for dissolution of marriage, the decree *nisi* is not effective to dissolve the marriage, and it is only the decree absolute which has that effect.

Decree *nisi* was signed by the District Judge on 23rd January 1948, and on 23rd September 1948 the Judge made an order "I therefore order that decree *nisi* be made absolute". An endorsement in pursuance of that order was not made at that stage in the decree *nisi* itself. The endorsement was in fact made and signed by the Judge on 20th February 1950.

Held, that the decree became absolute on 23rd September 1948. The endorsement of 20th February 1950 was only a ministerial act which gave formal effect to the judicial order making the decree absolute.

Held further, that, as the husband and wife in the present case were subject to the Thesavalamai, the husband ceased, on the date when the decree *nisi* was made absolute, to be the "irremovable attorney" of his wife in respect of her share of thediatheddam property.

APPEAL from a judgment of the District Court, Jaffna.

H. W. Jayewardene, Q.C., with *J. V. C. Nathaniel* and *M. Shanmuganathan*, for the Defendants-Appellants.

C. Ranganathan, Q.C., with *K. Kanag-Iswaran* and *C. Sandrasagara*, for the Plaintiff-Respondent.

Cur. adv. vult.

September 24, 1968. H. N. G. FERNANDO, C.J.—

The learned District Judge has held in this case that upon the entry of decree absolute on 22nd September (*sic* 23rd) 1948 for the dissolution of the marriage of the parents of the plaintiff, the thediatheddam share of the plaintiff's mother vested in her. It has been argued in appeal that the date of the decree absolute must be held to be 20th February 1950, and not September 23, 1948.

The decree nisi was signed by the District Judge on 23rd January 1948, and on 23rd September 1948 the Judge made an order " I therefore order that decree nisi be made absolute ". The record shows, that an endorsement in pursuance of the order was not made at that stage in the decree nisi itself. The endorsement was in fact made and signed by the Judge on 20th February 1950. It is necessary to determine on these facts the precise date on which the marriage of the plaintiff's parents was legally dissolved.

It is clear law that the entry of decree nisi for dissolution of a marriage does not terminate the status of the parties as husband and wife. In the *Aserappa* case [1], this Court disapproved of a practice sometimes adopted of a Court entering a decree absolute without being moved to do so by one of the parties ; and in the *de Silva* case [2] the Privy Council referred to the need for an application to be made by a party before the Court makes absolute the decree of dissolution. In view therefore of the possibility that neither party may seek to have the decree nisi made absolute, the decree nisi is not effective to dissolve the marriage, and it is only the decree absolute which has that effect. Mr. Jayewardene rightly pointed out during the argument of the present appeal that the English procedure for a decree nisi in the first instance (which was incorporated in our Code) was designed to give the parties an opportunity for reconciliation.

Having regard to the law as just stated, s. 188 of the Civil Procedure Code cannot apply in the case of a decree absolute for dissolution of a marriage, which must not therefore be dated as of the date of the judgment. There is no doubt therefore that the dissolution of the marriage in this case could not have been legally effective at any time prior to the time when the Court made the decree absolute in terms of s. 605 of the Code. The section reads thus :—

> " Whenever a decree nisi has been made and no sufficient cause has been shown why the same should not be made absolute as in the last preceding section provided within the time therein limited, such decree nisi shall on the expiration of such time be made absolute ."

The section contemplated that the existing decree nisi " shall be made absolute ", and, when the Court (as it did in this case) has signed an order " that the decree nisi be made absolute ", the Court has done all that the section requires to make the decree absolute. I hold therefore that the decree under consideration became absolute when the Judge signed this order on 23rd September 1948. The circumstance that the formal endorsement in pursuance of that order was signed only on a later date does not in my opinion alter the position. The signature of the formal endorsement is only a ministerial act which gives formal effect to the judicial order making the decree absolute ; and at this stage in the action there is no reason why the principle recognised in s. 188 (that a decree dates back to the date of adjudication) should not apply.

[1] *(1935) 37 N. L. R. 372.*

[2] *(1936) 38 N. L. R. 63.*

I turn now to the other question which arises in this appeal. It is now common ground that the land which is the subject of this action was thediatheddam property of the plaintiff's parents. The plaintiff's father Chinnakone sold a half share of the land to one Rajaratnam by the deed D1 of October 1948. Thereafter by D2 of 12th January 1949 he again disposed of a half share of the land, stating on this occasion that he had himself acquired the and with his *mudusom*. The deed D2 was not effective to convey the half-share of Chinakone's wife, because (as I have held already, Chinnakone's marriage was dissolved when the decree for dissolution became absolute on 23rd September 1948; and it was conceded at the argument that the wife did have a half-share, even if the land had been acquired with Chinakone's *mudusom*.

The plaintiff acquired title to his mother's half-share by the gift P6 of 1962, and he brought this action against Rajaratnam's heirs in August 1962 for a partition of the land on the basis that he is entitled to that half-share. Having regard to the findings recorded earlier in this judgment, the only question which remains is whether Rajaratnam and his heirs have acquired prescriptive title to the half-share of Chinnakone's former wife.

There is no doubt that Rajaratnam was aware that this land was thediatheddam property: he bought one half-share from Chinnakone in October 1948, and only 3 months later he bought the other half-share on a deed in which Chinnakone made a weak and futile attempt to claim this share as his own by describing the land as an acquisition made with his *mudusom*. Moreover, I see no reason upon the evidence to doubt the correctness of the Judge's opinion that Rajaratnam knew of the dissolution of Chinnakone's marriage. He thus knew also that the deed D2 of January 1949 was ineffective to pass title to the share it purported to convey, because Chinnakone had by then ceased to be the "irremovable attorney" of his former wife. He became a co-owner with that lady in October 1948, and he and his heirs could acquire title by prescription against her only in accordance with the rules governing prescription by one co-owner against another. I am not impressed in this connection by the argument that this case must be considered as one against the estate of a deceased person. The defendants claim a title by prescription by virtue of possession by Rajaratnam *and by themselves* for a period of about 13 years, and they have not proved even that Rajaratnam died only after possessing the land for over 10 years.

There is no doubt that Rajaratnam demolished the fences which had formerly separated this land from an adjoining land owned by himself and his wife, that he erected fences round a corpus consisting of both the lands, and that he planted this land and took its produce for himself exclusively. But the learned Judge's finding that there was no evidence of ouster is supported by evidence which has not been disbelieved. The plaintiff's mother stated that she noticed the new fences when she visited the land in 1949, and that she then had a discussion with Rajaratnam; he then asked her to sell her share to him, and added "if you are not

selling your land, we will have the land partitioned. Till I purchase your share let there be no fence". In this state of he evidence, I must agree with the finding of the learned trial Judge that the defendants failed to discharge the burden of proving an ouster or something equivalent to ouster.

The judgment of the District Judge is affirmed. and the appeal is dismissed with costs.

ALLES, J.—I agree.

WIJAYATILAKE, J.—I agree.

Appeal dismissed.