1920.

Present: De Sampayo J. and Schneider A.J.

NALLIAH *v.* PONNAMAH.

95—D. C. Jaffna, 3,622.

Tesawalamai—*Ordinance No. 1 of 1911*—Thediathetam—Mudusom—*Property acquired before marriage—Investment during marriage in bonds and notes.*

Under Ordinance No. 1 of 1911 (*Tesawalamai*), money which a husband has saved out of his earnings before his marriage belongs to him for his separate estate, whether it is strictly called *mudusom* or not. The circumstance that it was invested during marriage does not change its character. Even if he invested it in the purchase of property during marriage and not on mere loans, the property would receive the character of the money invested, and would not be regarded as *thediathetam*. This is much more the case when the investments take the shape of loans of money on bonds or other instruments. A husband lent a sum of money before marriage on a mortgage of a house, and after marriage he purchased the house in consideration of the amount of the debt, and a further sum of money paid out of his earnings during marriage.

Held, that a share of the house was *thediathetam*, and the husband was entitled to a share as his separate property according to the proportion of the respective sums of money.

THE facts are stated in the judgment of the District Judge (Sir Ambalavanar Kanagasabai) :—

The administrator married the intestate on October 27, 1913, and had only one child. The intestate died on July 4, 1917, and the child on April 16, 1918. He administered the estate of the intestate in this case, and has filed what is called the final account. The respondent, who is the mother of the intestate and the only heir to the child, objects to the account being accepted on various grounds.

The following issues were framed on the suggestion of counsel on both sides :—

(1) Had the administrator Rs. 9,000 before his marriage, and did he bring the money into the common estate ?

(2) If so, is the administrator entitled to establish or claim the right to deduct the same from the aggregate amount of certain investments referred to in the final account ?

(3) Whether the whole of the land described in item 1 of the final account should be regarded as acquired property, or only 299/570 shares ?

(4) Was the sum of Rs. 1,000 advanced on bond referred to as the 17th item paid by the administrator after the death of the intestate ?

(5) If so, was the said sum the separate property of the administrator ?

(6) Was Rs. 600 paid to the cheetu club after the intestate's death, and if so, is he entitled to deduct this amount from Rs. 1,000 admittedly lent on the bond during her lifetime ?

(7) For what amount is the administrator liable to account in respect of the bond in the 17th item ?

(8) Was an *addial* (a neck ornament) being made for the intestate about the time of her death ?

(9) Had the administrator 80 or 60 brilliants to set on the *addial* ?

(10) Is the sum of Rs. 300 paid by Sathasivam to be regarded as the intestate's property ?

(11) Are the brilliants to be regarded as acquired property or separate property of the intestate ?

(12) Was the sum of Rs. 1,500 sent to Dr. Nalliah a loan or a present made to him by the administrator with the consent of the intestate ?

(13) Did the administrator contribute to two shares in the cheetu club or only one share of Rs. 100 ?

(14) Were items 34 and 35 in the respondent's objection the separate property of the administrator ?

(15) With regard to what items in schedule (*b*) of paragraph 10 of the respondent's affidavit, is the administrator liable to account, and what is their value ?

(16) Do professional earnings of the administrator form part of the *thediathetam* within the meaning of Ordinance No. 1 of 1911 ?

(17) Do items 2 to 19 in the inventory represent such earnings of the administrator before and during the subsistence of the marriage, and if so, should they not be deleted ?

(18) Is it permissible for the administrator at this stage to withdraw from the position taken up by him at the final account ?

(19) Is the administrator entitled to claim whatever money he had at the time of the marriage from what may be regarded as the property acquired during the marriage ?

On the 1st issue I find that the administrator had over Rs. 8,000 at the time of his marriage, and that he brought this sum into the common estate. Not that he had intended to settle half of this amount on his wife, but he retained it treating it as *mudusom* property, though he did not state its special character in dealing with it. It does not appear that he specially distinguished this money from the acquisition when he invested or otherwise dealt with this money . . . .

In investing or re-investing this sum of Rs. 8,000 during married life, he did not earmark it, as a wary villager would have done, by describing it as *mudusom* money in deeds or bonds by which the various sums were invested. He should not suffer because of want of this precaution. It is clear from the evidence of the administrator and Sinnetamby that the sum of Rs. 3,000 lent on bond dated March 17, 1917 (3rd item in the account), was part of the Rs. 8,000, though it is not referred to as *mudusom* money in the document. This bond was one of the three items admittedly claimed by the administrator before he applied for letters of administration, the other two being the 1st and 2nd in the list marked R 1 produced by the respondent.

The next question is whether he is entitled to deduct this sum from the aggregate amount of investments referred to in the final account. The law seems to be clearly in favour of the administrator, and it is

1920.

Nalliah v. Ponnamah

just that he should be allowed to do so. One of the three classes of properties known to the *Tesawalamai* is called *mudusom* or hereditary property when brought by the husband. *Vide* section 1, clause 1 Now, a sum of Rs. 8,000 was brought by the administrator, and it must be regarded as *mudusom* though not inherited by him from his parents. It is not and cannot be disputed that the house purchased on P 1 falls within the category of *mudusom*. Section 1, clause 15, says "should any of the man's hereditary property be diminished, when one of them dies, the same must be made good from the acquired property if it be sufficient." This rule remains in force, and is not affected by Ordinance No. 1 of 1911. Strictly speaking, the administrator's claim is not to have his *mudusom* made good out of the acquired property, but to have it excluded from the *thediathetam*. It is not suggested that the money in question was spent or lost. I think he is entitled to deduct Rs. 8,000 out of the estate as he has done. I answer the 2nd issue in favour of the administrator to the extent of Rs. 8,000.

On the 3rd issue, I find that 299/570ths share of the 1st land in inventory should be treated as *thediathetam*, and the balance 271/570 share as the administrator's *mudusom*. It is admitted by the respondent's counsel that the whole amount secured by bond No. 5,021 of 1913 was included in the consideration for the transfer No. 27 of 1915, P 2, for the land in question. It is common ground that on the said bond No. 5,021 a sum of Rs. 1,355, including the principal sum of Rs. 1,350, was due to the administrator on the date of his marriage, and that the consideration for the transfer P 2 was Rs. 2,850. The amount of Rs. 1,355 was the administrator's separate money, and it is only the balance sum of Rs. 1,495 that should be regarded as *thediathetam*, so that only one half of this sum of Rs. 1,495 should be treated as the intestate's share of the acquisition. On this basis it has been calculated and found that 229/570 share should be regarded as the *thediathetam* share of the land, if, in point of law, the administrator's contention that the land partook of the character of the money paid for it and that he should retain a share of it equivalent in value to the amount of his separate money Rs. 1,355, besides his half of the *thediathetam* Rs. 1,495. The administrator's contention is supported by a series of decisions, amongst which I may mention *1 N. L. R. 251* and 987, D. C. Jaffna (Testy.), decided on September 29, 1902. A certified copy of this latter decision is filed of record. Though the deed by which the land in dispute in the latter case was acquired during married state by the father of the intestate did not say that the money was his *mudusom* money, yet it was held that, the money having been established by other proof to have been his *mudusom*, the land took the character of the money and should be regarded as his *mudusom* property, heritable by his heirs only. The principle is fair and equitable that the conversion of one property into another does not alter the character of the property converted, but transmits it to the object which takes its place. Here the money is clearly earmarked, and it is unreasonable to say that simply because a land was purchased during the subsistence of marriage though with *mudusom* money, it should be regarded as *thediathetam*. The Ordinance No. 1 of 1911 only declared the law that existed in respect of acquired property and did not alter it. Section 21 of this Ordinance says what shall be known as *thediathetam*. But in my opinion it does not go to the length of saying that the mere accident of a purchase during married state gives the property the character of *thediathetam*. The valuable consideration referred to in that section must have been itself *thediathetam* to make the property *thediathetam* as it was the case before the Ordinance. A land purchased by a person

during married life with money acquired by him before his marriage cannot be regarded as property acquired for valuable consideration within the meaning of section 21. In other words, the share in question is like a property purchased by a husband with money donated by his father. Sections 20, 21, and 22 should be read together. The only alteration that was made in respect of *thediathetam* was by section 8, which was taken over from the Ordinance No. 15 of 1876 to improve the position of a wife with regard to some of her own earnings. If it be said that money acquired before marriage does not fall within one or other of the properties classified in these sections, my answer would be that the man who acquired it would be the sole owner of the property, whether it remained as money or turned into a land, and the question of inheritance will not arise till after his death . . . .

I have answered the 8th issue in favour of the respondent by holding that the value of the *addial* should be regarded as the intestate's separate property. The 9th, 10th, and 11th issues are connected with the 8th and may be disposed of together. The administrator wanted to make an *addial* set with rubies and brilliants for his wife and purchased 60 brilliants, which is the subject of the 6th issue, and gave a certain number of sovereigns to one Thalis asking him to make an *addial*. One Sathasivam, another jeweller, under whom Thalis was working, agreed to finish the work, supplying the required rubies, and received some money. The framework was made and shown to the administrator in 1916; but the rubies set on it by Sathasivam having been considered unsatisfactory, the *addial* was not accepted; nor were the brilliants set on it. The question is whether the unfinished *addial* with the brilliants should be regarded as the wife's property. If it had been completed, it would have been considered as a part of her paraphernalia. But the fact that it remained unfinished at the time of her death does not, on principle, seem to alter the case. The brilliants had been kept by her, and the *addial* was intended as a present to her. The administrator has proved that he had purchased only 60 and not 80 brilliants and that the cost was Rs. 500. In one of the lists produced marked R 2 the number of brilliants is stated to be 80. But after the administrator gave his evidence, it was not disputed that the number was only 60. The administrator may be technically right in saying that he did not make a present of the brilliants to his wife. But the brilliants were to be set on the *addial* which was intended as a present to her. I therefore hold, though with some diffidence, that the brilliants should be treated as her separate property and not as *thediathetam*.

With regard to the 12th issue, it is clear that the administrator's object in remitting the sum of Rs. 1,500 to one of his brothers who was then a medical student in England was to enable him to prosecute his studies there. The administrator says he had the consent of his wife to the remittance being made as a present. The money, as was all the other moneys involved in this case, was a part of his professional earnings. He was very kind to his wife, and was evidently desirous of decking her with costly jewellery and making her quite comfortable and pleasant. They loved each other, and were a happy pair with bright hopes, least expecting the estate of one of the partners to be involved in a litigation of the present nature.

In these circumstances it is fair to conclude that the administrator and his wife intended this sum of Rs. 1,500 as a present. It has also to be remembered that with reference to a previous transaction between the brothers, the administrator obtained a pro. note from his brother for a sum of Rs. 2,000 then advanced to him. It may be that the note was obtained either for the purpose of recovering the money, when the

1920.

Nalliah v. Ponnamnh

brother rose to a position of affluence, or with the object of having a hold on him in the general interests of the family. Whatever the object was, I think the absence of a pro. note for the sum in dispute indicates the truthfulness of the administrator's contention that the amount was presented with the consent of his wife.

H. J. C. Pereira (with him *Balasingham* and *Rajaratnam*), for the appellant.—The District Judge holds that the administrator had the sum of Rs. 8,000 when he married, and that he brought it into the common estate. This sum, it is admitted, was not inherited, and it clearly is not *mudusom* as defined by Ordinance No. 1 of 1911. The investments during marriage were for valuable consideration, and they are therefore acquired property within the meaning of section 21. The doctrine of earmarking does not appear to have been recognized by Ordinance No. 1 of 1911. Just as land belonging to a wife when converted into money under Ordinance No. 15 of 1876 becomes the absolute property of the husband, so all property acquired for valuable consideration during marriage is acquired property. In any event, the sum of Rs. 8,000 was not earmarked, and the administrator cannot, therefore, claim it as his exclusive property. He has dealt with this sum of Rs. 8,000 and his earnings during marriage as one common fund. He cannot now seek to deduct the Rs. 8,000 out of the balance left and say that all his presents and gifts and other expenses came out of money acquired after marriage and not from this sum.

The land referred to in item 1 in the inventory was during the subsistence of marriage. A part of the consideration for this was a sum of Rs. 1,350 lent some fifteen days before marriage on a mortgage of this land. The District Judge is wrong in saying that only a portion of the land is acquired property. The whole land is acquired property, and the administrator is only entitled to claim back Rs. 1,350 plus interest up to date of marriage. Counsel referred to *Ponnamah v. Kanagasuriyam*.[1]

A. St. V. Jayawardene (with him *Arulanandan* and *Joseph*), for the respondent, argued on the facts (not called upon to reply on the law).

Cur. adv. vult.

October 11, 1920. DE SAMPAYO J.—

This is an appeal from an order judicially settling the account of an administrator in a testamentary suit. The deceased was the wife of the administrator, and she died leaving an infant child as her heir. But within a few months the child also died. It is agreed that the appellant, who is the mother of the deceased, is the sole heir to the child, and has been regarded in these proceedings as entitled to the property of the deceased which would have come

[1] *(1916) 19 N. L. R. 257.*

to the child if living. The appellant raised objections to a number of items in the account, but we have to consider only two points.

The administrator, husband of the deceased, is a successful member of the legal profession, and before his marriage he had considerable sums of money saved out of his professional earnings, and after his marriage he invested these moneys and other moneys subsequently acquired in bonds and promissory notes. The appellant's case is that all these investments must be regarded as *thediathetam* or acquired property of both the spouses, and that half of them should be included in the deceased's estate. The husband, on the other hand, contends that so much of the money invested as belonged to him before the marriage is his separate property, and need not, therefore, be brought into the testamentary account. It is well settled, I think, that if the money by which acquisitions are made during marriage can be earmarked or traced back to the *mudusom* of the husband or the wife, the acquisitions should not be considered part of the common property, but would partake of the nature of the source from which they sprang. The Acting District Judge, who is a gentleman of great experience, and well versed in Jaffna customs, has, in a well-considered judgment, found that the investments in question to the extent of Rs. 8,000 was traceable to the moneys which had belonged to the husband before the marriage, and that the investments less that sum should alone be considered common property and be liable to be accounted for in the testamentary accounts. This finding of fact and the ruling of the learned District Judge are, in my opinion, quite right and just. Mr. H. J. C. Pereira, for the appellant, however, has raised a new point. He contends that, whatever might be the correct interpretation of the original *Tesawalamai*, the meaning of *mudusom* and *thediathetam* has been altered by the Ordinance No. 1 of 1911. Section 17 of the Ordinance declares that "property devolving on a person by descent at the death of his or her parents or of any other ancestor in the ascending line is called *mudusom* (patrimonial inheritance)," and section 21 declares that "the following property shall be known as *thediathetam* of any husband or wife: (*a*) property acquired for valuable consideration by either husband or wife during the subsistence of marriage, (*b*) profits arising during the subsistence of marriage from the property of any husband or wife." The argument founded on these provisions is that the husband's professional earnings before marriage, not being property devolving on him by descent, were not part of his *mudusom*, and that the investments on bonds and promissory notes, wherever the money came from, were property acquired for valuable consideration during marriage, and, therefore, were *thediathetam* or acquired property. There are one or two difficulties arising from this view

1920.

DE SAMPAYO J.

Nalliah v. Ponnamah

of the matter. *Mudusom* does, in general, mean property devolving by descent, and this, perhaps, was its sole meaning in the ancient days when unmarried sons and daughters could not acquire any thing for themselves, but what they acquired belonged to the parents, and would come back to them on the death of the parents. But this custom as to disability has long since become obsolete, and sons and daughters can now acquire for themselves before marriage, and such property has been considered their *mudusom*. Else under what other class would such property fall? It cannot be *thediathetam* since the acquisition is not made during the subsistence of the marriage. Then, again, the expression "property acquired for valuable consideration" in section 21 well applies to acquisitions by purchase and the like, but is wholly inappropriate to investments of money on loans. The truth appears to be that sections 17 and 21 of the Ordinance are not, and do not purport to be, exhaustive definitions of *mudusom* and *thediathetam*. They, I think, are intended to be only general explanations of the Tamil words. The provisions of the Ordinance which are most relevant to the present question and determine the rights of husband and wife to property acquired before marriage are those contained in sections 8 and 9, which declare such property to belong to the man or woman, as the case may be, for his or her separate estate. I think, therefore, that the money which the husband had saved out of his earnings before his marriage belonged to him for his separate estate, whether it is strictly called *mudusom* or not. The circumstance that it was invested during marriage does not change its character. Even if he invested it in the purchase of property during marriage and not on mere loans, I think that in view of the principle of the decisions on this point, the property would receive the character of the money invested, and would not be regarded as *thediathetam*. This is much more the case when the investments take, as in this instance, the shape of loans of money on bonds or other instruments. I am unable to agree with the argument of counsel on behalf of the appellant.

The only other point which need be considered on this appeal relates to a certain house which the husband purchased during the marriage. He had lent a certain sum out of the money which belonged to him before marriage on a mortgage of the house, and subsequently he purchased the house in consideration of the amount of the debt and a further sum of money paid out of his earnings during marriage. The District Judge has struck a proportion according to these respective sums of money, and declared the husband to be entitiled to a corresponding share of the house for himself, and the rest of the house to be *thediathetam* to be divided between the husband and the heir of the deceased wife. This, I think, is a correct and reasonable adjustment of the matter.

On the questions discussed in appeal, and on all other points involved in the case, the judgment under appeal is, I think, right, and I would dismiss the appeal, with costs.

SCHNEIDER A.J.—I agree.

Appeal dismissed.

The following is the judgment referred to in the judgment of the District Judge :—

No. 987—D. C. Jaffna.

September 29, 1902. LAYARD C.J.—

Two questions have been raised in the appeal, first, whether the 5th land in the inventory was acquired by the intestate's father with his *mudusom* money, and, if so acquired, should that land devolve on the heirs on the father's side only or not. The appellant's counsel has very properly not pressed the question as to whether this land was acquired with the father's *mudusom* money, but he argues, that even if it was so acquired, it should go to the heirs on both sides. It may be that the law is as urged by appellant's counsel; I do not say it is not so, for it is not necessary for me to decide it here, because I find that the parties in the Court below limited the question to one of fact, viz., whether the land was acquired with the father's *mudusom* money, and the parties agreed that if it was so acquired it should go to the heirs on the father's side only. The question now raised by the appellant's counsel was not argued in the Court below, nor was it decided by the District Judge, nor was it mentioned or referred to in the petition of appeal. We cannot therefore in this case, even though we recognize the ingenuity of appellant's counsel, decide a question which the parties in the Court below did not raise, but rather agreed should be decided on a certain eventuality, in a particular way. So, in my opinion the appellant's appeal with reference to the first question fails.

The second question raised by appellant's counsel was whether the administrator did actually perform the *anthiaddi* and *veeddukkiruddvan* ceremonies for which he has charged Rs. 137·27. The Judge in the Court below has found on the evidence adduced by both sides that the administrator was the proper person to perform these ceremonies and that he actually did perform them. I am not prepared to interfere with the finding. He has, therefore, allowed the item charged by the administrator, Rs. 137·27, as expenses incurred by him in carrying out these ceremonies. The appellant's counsel further argues that if these ceremonies were performed by the administrator, he cannot charge these amounts to the estate of the intestate which he is administering. The respondent's counsel, the Solicitor-General, tells us that it has been usual and is the practice of our Courts to allow the persons who perform these ceremonies to recoup themselves out of the estate of the deceased for the expenses incurred by them in respect of such ceremony. We are not in a position to say whether such has been the practice, and whether it has been usual for the District Court of Jaffna to allow sums expended in carrying out these ceremonies to be paid for out of the estate of the person whose property is being administered by an administrator. We, therefore, in dismissing this appeal make no order as to whether this item of Rs. 137·27 should be passed, but we leave it to the District Judge, if he finds that it is the practice in the Jaffna Courts to charge such expenditure to intestate estates to allow these items to be charged by the administrator to the estate he is administering in this case.

If he finds that such expenditure is not by custom usually charged to the estate of the deceased person, the District Judge must not allow the administrator charge this item of Rs. 137·37 in his account. The respondent is entitled to the costs of this appeal.

WENDT J. agreed.