1932 *Present :* **Macdonell C.J. and Dalton J.**

KANDAPPA *v.* ARUPALAVANAM *et al.*

272—D. C. Jaffna, 26,459.

Thesawalamai—*Voluntary separation of spouses*—Tediatetam—*Property acquired by husband after separation—Claim by wife—Ordinance No. 1 of 1911, ss. 21 and 22.*

Where spouses, whose matrimonial rights are governed by the *Thesawalamai*, entered into a deed of separation which contained the following provision, among others:—"We further declare that of the lands belonging to either of us on this date, prior to this date, or after this date, the lands that are in the name of either of us shall remain the property of the person in whose name the property is and that in the lands in the name of any one of us or in the lands that any one of us may become entitled to, the other shall have no claim whatever on any grounds whatsoever",—

Held, that the wife had no claim on the property acquired by the husband after the execution of the deed of separation.

APPEAL from a judgment of the District Judge of Jaffna.

H. V. Perera (with him *Tillanathan*), for plaintiff, appellant.

N. E. Weerasooria (with him *Gnanapragasam*), for second defendant, respondent.

November 10, 1932. MACDONELL C.J.—

I have had the advantage of reading my brother Dalton's judgment and I concur in it. But I would wish to state my own view of sections 21 and 22 of Ordinance No. 1 of 1911.

This land Ollaipulam may be taken to have become *tediatetam* when acquired by the husband in 1919. He conveyed it on 2 D 4 to the plaintiff on May 15, 1920, a conveyance, doubtless, which he had no right to make but this wronful act was condoned, if the expression can be used, by his wife the second defendant in the present action, by the settlement of August 16, 1922 (P 12) under which the plaintiff in the present action was to convey Ollaipulam to her for Rs. 1,400; she was a party to this settlement and after executing it could hardly be heard to say that her husband had no right to make the conveyance 2 D 4 or that the land Ollaipulam after the settlement P 12 was still *tediatetam*. How could it be if she had agreed to buy it from the present plaintiff? In actual fact she did not buy it but allowed her father to do so, a variation of the settlement P 12 to which clearly she consented. Then her father, since 1922 owner of Ollaipulam, conveyed it to her husband on P 4 on January 5, 1925. Once back in her husband's ownership, her case must be that it thereby again became *tediatetam*.

Section 21 of Ordinance No. 1 of 1911 says: "The following property shall be known as the *tediatetam* of any husband or wife; (*a*) property acquired for valuable consideration by either husband or wife during the subsistence of marriage". Now this land was property acquired by the husband for valuable consideration on P 4 of January 5, 1925, and the marriage subsisted then and does still in the sense that it has not legally been dissolved, and if this provision in section 21 stood alone, it would be difficult to say that this land did not again become *tediatetam* immediately on its transfer to the husband on P 4. But section 21 must be read with section 22 which says this:—

> "The *tediatetam* of each spouse shall be property common to the two spouses, that is to say, although it is acquired by either spouse and retained in his or her name, both shall be equally entitled thereto. Subject to the provisions of the *Tesawalamai* relating to liability to be applied for payment or liquidation of debts contracted by the spouses or either of them on the death intestate of either spouse, one-half of this joint property shall remain the property of the survivor and the other half shall vest in the heirs of the deceased; and on the dissolution of a marriage or a separation *a mensa et thoro*, each spouse shall take for his or her own separate use one-half of the joint property aforesaid".

This section treats dissolution of the marriage and separation of the spouses *a mensa et thoro*—I think the separation deed P 1 is a separation *a mensa et thoro*—equally as putting an end to the community of property between the spouses. Verbally it may be held to contradict section 21, but then one must remember that it is provided for something further than section 21 provides for. The former section says what property becomes *tediatetam* and when, *sc* during the subsistence of the marriage; the latter section goes on to enact what shall happen to the *tediatetam* property when the marriage no longer subsists, and it seems to say that the marriage will no longer "subsist", for the purpose of that community of property known as *tediatetam*, in either of two events, dissolution of marriage or separation. If one wishes, one can say that the draftsman of sections 21 and 22 has created his own terminology—he is at liberty to do so provided he makes himself intelligible—and has said that on the marriage ceasing to subsist either because of dissolution or because of separation, each spouse will take one-half of the joint property for his or her separate use. With this section 22 to guide us, we can now go back to section 21 and read it with section 22, and, so read, it seems to say that *tediatetam* property is property acquired for valuable consideration by either husband or wife as long as the marriage has not ceased to subsist either by reason of its dissolution or by reason of the separation of the spouses. It will follow then that if a marriage has ceased to "subsist" because of the happening of either of these events, then the characteristic *tediatetam* will not attach to after-acquired property. This is a case of such after-acquired property—confessedly, since it came to the husband in 1925, while the separation took place in 1922—and if so the claim of the wife to it fails. Construed together, the two sections 21 and 22, seem to me to lead to this interpretation. I agree in the order proposed.

DALTON J.—

The plaintiff brought this action against the two defendants, husband and wife, for declaration of title to a piece of land named Ollaipulam, 8 lachams in extent. He has been successful in respect of one-half share of the land only, his action as against the second defendant and what is called her half share being dismissed with costs. From the latter part of that judgment he appeals.

The defendants, husband and wife, were married in 1914, and are governed by the *thesawalamai*. The property in question formed part of what was acquired by the husband during the marriage, in the year 1919. It is not questioned that it was then *tediatetam*. In February, 1920, the husband is said to have deserted his wife, and on May 15, 1920, he conveyed the property in question by the deed marked 2 D 4 to his half brother, the present plaintiff. The consideration is said to have been Rs. 1,000, and the property was subject to a mortgage, the sum of Rs. 415 for principal and interest being deducted from the sum of Rs. 1,000. In July, 1920, the wife filed an action (No. 14,871) against her husband for judicial separation, and also for a division of the property acquired by him after the marriage, in which connection the land Ollaipulam was specially mentioned. In his answer the husband denied the allegations upon which the wife based her claim for a judicial separation, and pleaded

that the property in question had already been disposed of by him. He further set out that his wife had obtained an order for maintenance which was still in force.

In October, 1921, the wife had commenced another action, D. C. Jaffna, No. 16,213, against three defendants, one Aiyathurai, her husband, and the present plaintiff, for the purpose of setting aside a decree and judgment obtained by Aiyathurai against her husband in a claim on a promissory note. Aiyathurai had obtained a writ and seized the land Ollaipulam, and the sale had been fixed. She set out in her plaint that the three defendants were acting in collusion to deprive her of the share she claimed in the land.

After some time a settlement, including both actions Nos. 14,871 and 16,213, was arrived at between the parties. This is the document P 12 dated August 16, 1922. By the terms of that agreement the plaintiff, the wife, was to pay the sum of Rs. 1,400 to the third defendant (the present plaintiff), and on that sum being paid, the third defendant (the present plaintiff) was to convey the land Ollaipulam to her. She was also to have the conveyance of the life interest of her husband in another land called Vellipulam, which life interest had been purchased by the third defendant (the present plaintiff). It was further agreed that she was to withdraw case No. 14,871 without costs. With regard to the maintenance due to the wife under order in P. C. Kayts, No. 6,572, she agreed to give her husband a receipt in consideration of the transfer of the aforementioned properties. Aiyathurai also agreed to take no steps to recover the balance due to him on his judgment, if the settlement was carried out. It was to be carried out within one month.

On September 18 the case No. 16,213 was withdrawn, an order being made that it be dismissed with costs. Case No. 14,871 was withdrawn without costs. On August 26 the present plaintiff was paid the sum of Rs. 1,400 by the wife's father, Veerappa Velauther, and he conveyed the land Ollaipulam (P 3) on that date to him. The wife was apparently unable to raise the money herself. On the same day the present plaintiff conveyed (deed 2 D 7) to the wife the life interest he had purchased in the second land Vellipulam. The third document signed that day was the deed P 1, a deed of separation between husband and wife. All these three last mentioned documents were signed before the same notary, the two witnesses to 2 D 7 being also the same as those on P 3. One of these witnesses was also a witness to the deed of separation P 1.

It is clear from these facts that within a month of the settlement the terms of the settlement had all been carried out, with one variation. The Rs. 1,400 was not paid by the wife, but by the father, and in return for that payment the land Ollaipulam was conveyed not to her, but to him. Under the circumstances there cannot, however, be the least doubt that this variation was made with her full knowledge and consent. She cannot be heard then to say that it was not carried into effect.

The principal provisions of the deed of separation between husband and wife, which must of course be construed in light of the other conditions of the settlement between the parties, were as follows:—They

refer to the reasons whereby they are unable to live together as husband and wife, and they agree in future to live apart. The conveyance of the life interest of the husband in the land Vellipulam is mentioned, and the withdrawal of the claim for maintenance in case No. 6,572. They go on to declare that—

> " of the lands belonging to either of us on this date, prior to this date, or after this date, the lands that are in the name of either of us shall remain the property of the person in whose name the property is, and that in the lands in the name of anyone of us or in the lands that anyone of us may become entitled to, the other shall have no claim whatever on any grounds whatever."

The wife is given full right to deal with her own property as she wishes, without the interference of her husband, and without his consent being obtained. If consent is necessary, he purports to give it in the deed. Finally, they agree that all rights arising from matrimonial relationship are at an end. The land Ollaipulam was not referred to in the deed, for it had already been conveyed the same day by the plaintiff to the wife's father. Neither the transferor nor transferee was a party to the deed of separation, but the deed was part of the larger scheme of settlement of the disputes between all the parties.

After the conveyance to her father the wife, according to her evidence, continued to live on the land, her father living two compounds away. There is nothing to suggest that they, the wife and father, have not been living on the friendliest terms right up to the hearing of this present action, and it seems that they are still doing so. The inference is that they are on the best of terms.

The next step in the history of this land Ollaipulam is in January, 1925. On January 5 the wife's father Veerappa Velauther conveyed the land (deed P 4) to the husband for the sum of Rs. 1,500, Rs. 1,326 of which is stated to have been paid in the notary's presence. I refer to this deed later. The last step is in 1929, when the husband by deed P 2 conveyed the land to the present plaintiff on October 12, 1929, for the sum of Rs. 1,000, Rs. 140 of which is said to have been paid in the notary's presence. That deed is the basis of plaintiff's claim in the present action.

The first defendant, the husband, filed no answer to the claim, but the second defendant, the wife, laid claim to half the property on the footing that it was *tediatetam* as from its purchase in 1919. Her claim is based upon the fact that the marriage is still subsisting between the parties. How she could, in any event, therefore, in face of that fact obtain a declaration that she was separately entitled to one-half of the land, it is difficult to see.

Issues were framed, of which the most important is the first, in the following terms:—Is the second defendant estopped from claiming any share in the land in dispute in view of the deed of August 26, 1922? (Deed of separation P 1.) The trial Judge has found that the deed was a most unjust bargain, and by it the wife is supposed to give up all her rights in property acquired during marriage. He is mistaken, however, on more than one question of fact. He states it is the plaintiff's life

interest in the land Vellipulam which is conveyed to the wife by deed 2 D 7, that the plaintiff is an old man and his life interest worth next to nothing. It is the husband's life interest, however, which is conveyed, which the plaintiff had purchased. Then, as regards the settlement of the actions throughout which the wife had legal advisers, and as is evident, the assistance of her father, the learned trial Judge says the settlement was an unconscionable and unfair settlement, and apparently was never carried out. On the facts I have recited, I can see nothing unconscionable and unfair in it. The learned trial Judge, however, seems to have come to this conclusion on the assumption that a worthless life interest in the land Vellipulam was conveyed to her, which conclusion, as I have pointed out, is incorrect.

The statement that the settlement was not carried out is not supported by the facts. They all point to show it was carried out, with the one variation to which I have referred. That variation, one is driven to conclude, was made with the consent of the wife, doubtless for her convenience. Plaintiff states he sold the land to her father at her request, and his evidence on this point is consistent with all the facts that are not questioned. The unsatisfactory nature of his evidence in general is referred to, and it is not questioned that the learned Judge's view of the part plaintiff played may be quite correct, but he has not referred to some very unsatisfactory answers given by the wife in her evidence. She clearly wanted to deny responsibility for signing the deed of separation, but she eventually had to admit it was signed by her. Then she wished to make out that by it she never intended to give up her rights to Ollaipulam, although she had entered into a settlement whereby she was to pay Rs. 1,400 for this land and have it conveyed to her, and although on the day of the signing of the deed of separation it was at her request conveyed to her father, who paid the sum of Rs. 1,400 for it. She seeks to make out that she personally knew nothing about the settlement of the two actions she had brought, or what she had agreed to do, but that her proctor had settled the cases. Her father was not called as a witness to support her in this present action, presumably because his evidence could not help her. Although charges of collusion have been made against others, she has not suggested her father in 1925, or at any other time, acted in collusion with the husband or plaintiff. On the facts, in my opinion, the trial Judge was wrong in holding that the terms of the settlement were in any way unconscionable and unfair, and that they were not acted upon. When the land Ollaipulam was sold to the wife's father in 1922 with her consent, she retained no rights in it by virtue of her marriage.

It was urged, however, on appeal that in view of the fact that her husband purchased the land again in 1925 by deep P 4, as a legal marriage still subsisted at that date between her and her husband, although they were living apart under the deed of separation, the property was *tediatetam,* being property acquired for valuable consideration during the subsistence of the marriage, within the provisions of section 21 of Ordinance No. 1 of 1911. It was further argued that the wife could not by any deed or agreement entered into by her do away with the effect of the law that property acquired for valuable consideration during marriage was *tediatetam.* To deal with these arguments one has to consider the

effect of a deed of separation entered into by husband and wife in the terms of P 1, which I have already set out. In considering this question I am assuming that the property in 1925 became *tediatetam* again, although it was held in *Chellappa v. Valliamma* [1] that property acquired by one spouse after the separation is not property held in common. Mr. Weerasooria has asked us to reconsider that decision in view of what he states are the explicit terms of section 21, but it is not necessary for the purposes of this case to do so. In any event I might point out that the effect of section 21 has been fully considered in *Nalliah v. Ponniah* [2] which decision is binding on this court.

Counsel has been able to refer us to no cases dealing with the effect of a voluntary deed of separation on the joint property of spouses governed by the *thesawalamai*. I see no reason to think, however, they can be in any more favourable position than spouses married in community of property under the common law, who have entered into a deed of separation seeking to put an end to the community. One may therefore obtain assistance in answering this question from that source by way of analogy. It was held in *Zeideman v. Zeideman* [3] that in Roman-Dutch law all contracts which spouses might lawfully and effectually enter into with each other before marriage may lawfully and effectually be entered into by them during the subsistence of the marriage, in so far as regards and concerns themselves, provided always that such contracts be not of such a nature as to constitute either directly or indirectly a deed of donation from one spouse to another. (See *Voet 23, 2.63; 24, 1.8*) It was further held, however, that all extra judicial contracts entered into between the spouses for the separation of goods in community and the non-liability of each for the future debts which may be incurred by the other are utterly ineffectual against creditors or other third parties not representing either of the spouses (*Voet 24, 2.17 and 19*). In a later case (*Scholtz v. Felmore*) [4], the report of which I have been unable to obtain, Sir Henry de Villiers (later Lord de Villiers) held that the general rule is that a voluntary deed of separation between parties is binding as between these parties, but that it does not affect the right of creditors. In *Danovich's v. Danovich's Executors* [5] the spouses had entered into a notarial agreement of separation, by which the community of property was cancelled. After the husband's death the wife claimed half of the husband's estate. On the facts here it was held that the cancellation of the community amounted to a donation between husband and wife, and the wife was declared entitled to half the estate.

It is not necessary to consider the bearing of these cases so far as donations between the spouses governed by the *thesawalamai* are concerned, since the deed of separation in this case can under no circumstances be called a donation. Applying the general principle of the common law, in the absence of anything to show that such principle is in any way repugnant to the law governing the parties here, I would hold that the deed P 1 is binding as between the parties, and the wife cannot now

[1] *1 Times of Ceylon Law Reports 274.*
[2] *22 N. L. R. 198.*
[3] *1 Menzies 238.*
[4] *S. C. Jute's Reports 192.*
[5] *(1919) Transvaal Provincial Divn. 198.*

seek to obtain any benefit from property acquired by her husband after the execution of the deed contrary to its express terms. The answer to the first issue should therefore have been in the affirmative, and the claim of the second defendant should have been rejected.

On the question of possession, the evidence is clear, assuming that the wife was in possession of the whole land from 1919 to 1922, in the latter year, since the property was conveyed by her consent to her father, her possession then continued with his permission, she recognizing his title. On the evidence she cannot establish title by prescription.

In all these circumstances, the finding of the trial Judge that the conveyance by the husband, the first defendant, in 1929 to the plaintiff was without consideration does not in any way help the defence of the second defendant, nor is it repugnant to plaintiff's claim.

The appeal must be allowed, and the decree entered in the lower Court must be set aside. Plaintiff is entitled to judgment in accordance with sub-sections (*a*) and (*b*) of the prayer of his plaint, with costs. There is no evidence as to damages. He is also entitled to the costs of this appeal.

Appeal allowed.