1921.

Present: Ennis and Schneider JJ.

VELUPILLAI *et al.* *v.* MUTTUPILLAI.

14—D. C. Jaffna, 3,531.

Tesawalamai—*Property acquired after death of second wife—Is it acquired property of the second marriage ?*

S, a Tamil, subject to the *Tesawalamai*, was married twice. By his first wife he had a child R, and by his second wife he had a child V. After the death of the second wife, S purchased a land at Anuradhapura, and died some time later. V died in 1917 intestate and issueless.

Held that, on the death of S, the property devolved on R and V in equal shares, and on the death of V his half share devolved on R, and no portion devolved on V's mother's mother.

THE facts are set out in the following judgment of the District Judge:—

One Sivagurunather was married twice. By the first marriage he had one child Rasamma, the second petitioner, appellant; and by his second marriage with Chinnachchipillai (administratrix's daughter) he had another child Visuvalingam.

After the death of the second wife, Sivagurunather purchased a piece of land at Anuradhapura. Sivagurunather died first, and in 1917 Vivuvalingam died. Visuvalingam's estate was administered by his mother's mother, the present administratrix in this case.

The petitioners, appellants, filed papers for judicial settlement of the estate, making the administratrix and others as respondents. The disputes between the parties were settled, and a paper of settlement was filed. By that paper the second petitioner, appellant was given the Anuradhapura land, but the administratrix, respondent, reserved to herself the right to claim a share of the Anuradhapura land if so advised.

Later, on the application of the administratrix for a declaration in her favour, the District Judge made the following order: The question to be decided is whether property acquired after the death of the second wife by a husband who was married twice should, for the purposes of the administration of the estate of the only child of the second marriage, be treated as the acquired property (*thediathetam*) of the second marriage, or whether it should be treated not as acquired property of the husband, but as his own property which, on his death before the child of the second marriage, devolved on the only child of the first bed and the only child of the second bed in equal shares, and that the half share of the child of the second bed on his death devolved upon his half brother, the child of the first bed.

The *thediathetam* is the property in which under the *Tesawalamai* both husband and wife have a mutual interest, and which is in common between them; it comprises the profits arising from each of their respective separate properties, namely, the husband's *mudusom* and the wife's dowry and inheritance and of what is acquired by the exertions of the spouses during the marriage (see *Mutukristna, pp. 260, et seq.*).

It follows that if the wife is living apart from the husband, and while so living apart acquired money, we will say, by teaching or by typewriting, with which money she bought a property, that property clearly would not fall into the *thediathetam*. The decision in *Mutukristna, pp. 181, 182*, is clearly grounded on such a consideration. I think if it had been proved in that case that though the spouses were living apart, yet the wife acquired the land, we will say, with the profits arising from her dowry property, the decision would have been different.

The test would always be out of what fund the property was acquired ?

If, then, of two married persons, the wife dies first, the presumption, until the contrary is proved, is that property acquired by the husband after the death of the first wife and before his second marriage is the acquired property of the first marriage.

Similarly, property acquired by the husband after the death of the second wife must be presumed to be the acquisition of the second marriage.

I am of opinion that "during marriage" does not imply duration of time, but connotes merely the fact of marriage. In other words it means simply by reason or in consequence of the marriage.

That appears to be the view upon which the case in *Mutukristna, p. 16*, was decided. The assessors were asked (see *p. 17*) whether if a father who has a child by the first marriage enters into a marriage with his concubine without making a division of the accumulation before the second marriage, the children of the first bed were not entitled to succeed to all the dowry property of their mother, together with the acquisition up to the second marriage. The answer was in the affirmative. And the assessors further advised that the half of the father's *mudusom* and the entirety of the acquisition from the second marriage onwards should go to the children of the second bed.

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I think, were it only on the ground of convenience this arrangement is commendable; otherwise we should have to find out what was acquired by the husband up to the death of the first wife, what he acquired between that time and the second marriage, what he acquired during the second marriage, and lastly what he acquired after his second wife's death. If there were three wives, it would be still more complicated.

On a consideration of the authorities quoted, I am of opinion that Mr. Niles is right, namely, that half the property in question devolved on the petitioner and the other half on the administratrix. Order accordingly. Petitioner will pay the costs of the administratrix.

The petitioner appealed.

Balasingham, for the appellant.—Property acquired after the death of the second wife is not acquired property of the second marriage, either under the old *Tesawalamai*, or under the Ordinance. It was not acquired during the second marriage.

The deceased died in 1917 after Ordinance No. 1 of 1911 came into force. The stepsister is the heir to Visuvalingam under section 27, see also section 19.

No appearance for the respondent.

June 27, 1921. ENNIS J.—

This is a question of succession to the estate of one Visuvalingam, who died leaving a sister and a maternal grandmother. The property in dispute, on the death of the intestate's father, passed to two children in equal shares. The learned Judge has held that the half share which Visuvalingam acquired from his father should devolve equally upon the sister and maternal grandmother. The sister is the appellant. Counsel for the appellant has referred us to section 27 of the Ordinance No. 1 of 1911 as explained by section 19, and under those sections it seems clear that the appellant is entitled to succeed in the appeal, and would seem entitled to the whole of the property in dispute. I would accordingly allow the appeal, with costs.

SCHNEIDER J.—I agree

Appeal allowed.