1957 *Present:* **H. N. G. Fernando, J., and T. S. Fernando, J.**

EMJAY INSURANCE CO., LTD., Appellant, *and* JAMES PERERA, Respondent

S. C. 513—D.C. Colombo, 29,431/M

Evidence—"Admission"—No requirement that it should be adverse to the person who made it—Statement made by a deceased person—Admissibility as admission against representative in interest—Contract of life insurance—Administrator's position as representative in interest of deceased policy holder—Evidence Ordinance, ss. 17, 18, 21, 32.

A statement, in order to be an "admission", need not be "adverse" to the person making it. Section 17 of the Evidence Ordinance makes it clear that the only characteristics which a statement must possess in order to constitute it an admission are (1) that it suggests an inference as to a relevant fact or a fact in issue, and (2) that it must be made by one of the persons and in the circumstances "hereinafter mentioned". The following sections contain no reference to the need that the statement should be adverse to or against the interest of the maker, and section 21 permits *all* admissions to be proved as against the maker or his representative in interest.

Sections 17 to 21 and section 32 respectively of the Evidence Ordinance constitute independent heads of admissibility in regard to the reception of statements of deceased persons; the conditions set out in section 32 do not have to be fulfilled in the case of such statements which are within the terms of sections 18 and 21.

An insurance company sought to repudiate a claim made by the administrator of the estate of a deceased holder of a policy of life insurance on the ground that the deceased had made a false or incorrect declaration, being of the basis of the contract, as to the state of his health at the time of the declaration.

Held, that a statement made by the deceased subsequently, but to the effect that he had been suffering from certain symptoms at or about the time of the declaration, was an "admission" provable under sections 18 and 21 of the Evidence Ordinance.

APPEAL from a judgment of the District Court, Colombo.

Ivor Misso, with *N. C. J. Rustomjee* and *N. W. Dissanayake*, for the defendant-appellant.

Kingsley Herat, with *Stanley Perera*, *S. D. Jayasundere* and *A. B. Walgampaya*, for the plaintiff-respondent.

Cur. adv. vult.

August 2, 1957. H. N. G. FERNANDO, J.—

The plaintiff is the administrator of the deceased holder of a policy of life insurance. His claim on the policy has been resisted on the ground that the deceased had on 31st January 1950 made a false or incorrect declaration, being of the basis of the contract, as to the state of his health, in an application for reinstatement of the policy which had lapsed a short time before. The position of the insurance company was, in brief,

2——J. N.B 18533–1,995 (11/59)

that the deceased was suffering from tuberculosis at the time of the declaration, and it is not disputed that the plaintiff's action had to fail if this allegation was proved.

The company relied on evidence proving that the deceased was admitted to the Welisara Chest Hospital on April 4th 1950 with symptoms of tuberculosis, that he was treated for that disease thereafter and that he died of tuberculosis at the Chest Hospital in May 1953. This evidence by itself raised an inference that he might have been suffering from the disease prior to the time of admission, but was insufficient to prove that he had contracted the disease on or before January 31st 1950. But the company also relied on a statement alleged to have been made to the admitting clerk by the deceased on the day of his admission to the hospital. In answer to questions put by the admitting clerk, the deceased had stated his symptoms to be malaise, loss of strength, cough and night sweats, and had stated further that the duration of these symptoms since the first onset had been six months. In the context of the other proved facts, these statements, if admissible, would be quite sufficient to prove that the deceased had suffered in January 1950 from the symptoms which were present at the time when the statement was made. There is nothing in the evidence which casts any doubt on the correctness of the statements or with respect to the credibility of the testimony of the admitting clerk. Counsel for the company has argued that the learned trial Judge wrongly ruled out the statement, and I agree that if it is received in evidence, the plaintiff's case must fail.

Two points were argued by counsel for the respondent with much insistence: *firstly* that the deceased's alleged statement to the Hospital clerk is not admissible under section 14 of the Evidence Ordinance, and *secondly* that the statement is not an admission which can be proved under sections 18 and 21 of the Ordinance.

As to the first point, the argument is that declarations as to the mental or bodily feelings or state of health of the declarant fall within the *res gestae* principle, and must, to be receivable under section 14, have been made at or about the time at which the feelings or state of health are alleged to have existed. I have to agree that there is much in the English Commentaries to justify this argument. While the language of illustration (m) to section 14, read particularly in contrast to that of illustration (l), is undoubtedly open to the construction that a declaration as to the state of health of an assured at a former point of time would be receivable under the section, the intention might well have been merely to express in statutory form the decision in *Aveson v. Kinnaid* [1] *admitting a contemporaneous declaration.* However, the view I have formed as to the admissibility of the statement now in question under sections 18 and 21 renders unnecessary a definite expression of opinion as to the scope of illustration (m) to section 14.

The substantial ground of objection to the admissibility of the statement under sections 18 and 21 is that a statement *of a deceased person* cannot be admitted under those sections; counsel's contention was that section 32 is exhaustive of cases in which statements of deceased persons

[1] *6 East. 188.*

may be proved, subject only to the exception that any such statement may be admitted under section 14 as forming *pars rei gestae*.

There is no express provision in section 32 indicating an intention that its provisions should be exhaustive, nor is there any indication in section 18 that a statement of a deceased person is not to be regarded as an admission although it otherwise falls within the scope of one of the definitions contained in the section. It is not therefore unreasonable to take the view on first impression that section 18 (read with section 21) formulates a rule of admissibility distinct from that set out in section 32. But counsel contends that such a view must be rejected because it would be contrary to those fundamental principles of the English Law of Evidence which were given statutory expression in our Ordinance. The judgment of the Privy Council in *Eliatamby v. Eliatamby* [1] emphatically rejected the proposition that the Ceylon Ordinance " practically swept away all the English Law relating to hearsay ", thus underlining the need to bear the hearsay principle in mind in construing our Statute and to avoid a construction offensive to that principle except perhaps where such a construction is made imperative by clear words. Accordingly, the most appropriate mode of examining counsel's contention is to consider whether the statement now in question would have been admissible under English Law prior to the enactment of the Evidence Act of 1938 which introduced certain new exceptions to the hearsay rule.

In *Smith v. Smith* [2], the administrator of a deceased's Estate was sued for the recovery of a watch which was claimed by the administrator as property of the deceased. A statement by the deceased that he had given the watch to the plaintiff was admitted as evidence against the administrator and in proof of the fact that the watch was the property of the plaintiff.

Again, in *Crease v. Barrett* [3] (referred to at p. 243 of Phipson [4]) a claim was made to certain rights in minerals raised from a mine on the ground that the mine was situated under the waste of a manor. A statement by a deceased lord of the manor, in a lease of adjoining lands, to the effect that the land over the mine was private property *and not waste of the lord's manor* was admitted as evidence to negative the claim. I should note that the claimant was the lessee of the lord for the time being, and that the statement of the former lord was therefore one made by a person from whom the claimant derived his title.

In *Doe v. Pellet* [5], (also referred to in Phipson) B's heir sought ejectment of D, the heir of B's widow; the widow, who had continued in possession for twenty years after B's death, had made a statement that she held the land for life and that it would go to B's heirs after her death. This statement of D's predecessor in title was held to be admissible against D.

In *Tucker v. Oldbury U. D. C.* [6] the dependant of a deceased workman sued the employer under the Workmen's Compensation Act for compensation for injuries sustained by the workman in an accident. The employer relied on a statement by the workman himself as to the cause

[1] *(1925) 27 N. L. R. 396.*
[2] *3 Bing. N. C. 29.*
[3] *1 C. M. & R. 919.*
[4] *Phipson, Law of Evidence, 9th Edition.*
[5] *5 B & Ald. 223.*
[6] *(1912) 2 K. B. 317.*

of the accident which would negative liability under the Act. It was held that the statement was not receivable as an admission against the defendant because the workman was neither a party to the suit, nor a person from whom the defendant derived his title. In this case the title of the workman was an independent statutory one : but if it had not been so, and if the right to claim compensation had been derivative, as for instance one enforceable by the administrator of the deceased's estate, the statement would presumably have satisfied the requirements of the English Law which are given statutory form in our section 18.

But can it be supposed that these cases to which I have referred are only illustrations of the English Law relating in particular to statements of deceased persons as expressed in our section 32 : that the statements were admitted as declarations of deceased persons against their pecuniary or proprietary interests ? There are cogent reasons for the view that such a supposition is erroneous. In Phipson (at page 228), it is stated that there are four exceptions to the Rule excluding hearsay, the first exception dealt with being " admissions and confessions ". Statements made by deceased persons are separately listed as the third class of exception. In considering (at page 230) the principle of allowing evidence of admissions, the author mentions as one suggested ground, that an admission is probably true, as being against interest. But this ground is criticized for two reasons. *Firstly* that statements against interest are not in English Law receivable *per se*, but only where the declarant is dead, and *secondly* that a statement made by a party is receivable against him *even though when made it was in fact in his interest.* I might add in amplification that a statement, in order to be an " admission ", need not be " adverse " to the person making it. Section 17 of our Ordinance makes it clear that the only characteristics which a statement must possess in order to constitute it an admission are (1) that it suggests an inference as to a relevant fact or a fact in issue, and (2) that it must be made by one of the persons and in the circumstances " hereinafter mentioned". The following sections contain no reference to the need that the statement should be adverse to or against the interest of the maker, and section 21 permits *all* admissions to be proved as against the maker or his representative in interest. Phipson ultimately favours the view that admissions are received in evidence because a party's own declaration, whether for or againt his interest when made, may be taken to be true *as against himself*. It would appear therefore that the ground of the reception of admissions is different from that which justifies the reception of statements of deceased persons made against their interest.

In the decided cases also, these two grounds for the reception of statements of deceased persons are regarded as distinct from each other. Thus in *Crease v. Barrett*[1] where a declaration was received as an admission, it was sought to bring in the same declaration as being one made by a deceased person against his proprietary interest : but this second ground of admissibility was rejected for the reason that the Court held that the declaration was not against the interest of the deceased. It is clear that here the principle of our section 18 was relied on despite the

[1] *1 C. M. & R. 919.*

inapplicability of the principle of our section 32. So also in *Tucker v. Oldbury U. D. C.*[1], the Court, having first held that the statement of the deceased workman could not be received as an admission, thereafter proceeded to consider whether it could be received as a declaration against interest and decided the contrary. The references in Phipson (at pages 244 and 329 respectively) to the *Dysart Peerage Case*[2], show that the two grounds for reception were treated as distinct from each other. I am satisfied from reference to the English cases that the English Law rendered an "admission" by a deceased person receivable without regard to the question whether it fulfilled the requirements which are mentioned in our section 32, and that accordingly it would be wrong to suppose that there was any intention to restrict the scope of section 18 only to statements of persons who are alive.

No Indian cases were cited at the argument in appeal, and I do not imagine that a search for them would assist the contention of Counsel for the respondent. Monir (*Law of Evidence, 2nd Edition 1940*) does not in his commentary on sections 17 to 21 refer to any limitation of the scope of those sections to statements of persons who are alive; on the contrary, the following passages from his text are to the opposite effect :—

"The heir is a representative of the ancestor through whom he claims. A widow is the representative of her husband if she claims through him . . . . An administrator is the representative of the intestate, and therefore an admission by the latter is provable against the former. The admissions of a testator are admissible against his representative, that is against the executor." (at page 153).

"Admissions by the predecessors in title of the parties :—Statements of a person, from whom a party to the suit has derived his interest in the subject-matter of the suit, are receivable as admissions against the latter, if the statements were made during the continuance of the interest of the former. The party against whom the statement is tendered in evidence is, in such a case, in "privity" with the person making the statement; and the ground upon which such statements are received is that the maker of the statement and the party who has derived his interest from him are identified in interest. Privies are of three classes; privies in blood, as heir and ancestor, privies in law, as executor and testator, or administrator and intestate, and privies in estate or interest, as vendor and purchaser, grantor and grantee, donor and donee, lessor and lessee, joint tenants, et cetera." (at pages 152 and 153).

"Further, a declaration, when admitted as an admission, is original evidence and not hearsay. An admission may therefore be proved by any witness who heard it, and the person making it need not be called at all." (at page 138).

In Woodroffe and Ameer Ali (Law of Evidence 9th Edition at pages 254, 255), reference is made to the rule that the admissions of one person are evidence against another in respect of "privity" between them, and the term "privy" is explained to include privies in blood *as heir to ancestor*,

[1] *(1912) 2 K. B. 317.*

[2] *6 App. Cas. 489.*

and privies in law *as executor to testator or administrator to intestate.* The case of *Smith v. Smith*[1] is cited, as well as an Indian decision that a declaration of a testator as to the disposition of her ornaments by will would be an " admission " which could be proved against her representatives.

These references in the Indian Text Books to declarations by deceased persons as being admissions receivable against their privies would be quite misleading, if not incorrect, unless the true position is that the death of a declarant does not preclude the reception in evidence of his declaration as an admission against his representatives in interest.

For these reasons I would hold that sections 17 to 21 and section 32 respectively constitute independent heads of admissibility in regard to the reception of statements of deceased persons, and that the conditions set out in section 32 do not have to be fulfilled in the case of such statements which are within the terms of sections 18 and 21. Hence the statement of the deceased policy-holder in the present case, being a statement made by a person from whom the plaintiff has derived his interest in the policy, is an " admission " provable against the plaintiff who as administrator is a representative in interest of the deceased. As earlier pointed out, the statement establishes the fact upon which the company relies as the ground of repudiation.

The appeal is allowed and the plaintiff's action is dismissed with costs in both Courts.

T. S. Fernando, J.—I agree.

Appeal allowed.