

*Present* : The Hon. Sir Joseph T. Hutchinson, Chief Justice,  
and Mr. Justice Wendt.

1909.  
March 23.

THE ASSISTANT GOVERNMENT AGENT *v.* FERNANDO  
*et al.*

*D. C., Kalutara, 149.*

*Burden of proof—Party asserting that a person was alive at a particular time—Presumption of continuance of life and subsistence of marriage—Entry made by relative—Proof of age—Evidence Ordinance (No. 12 of 1895), ss. 32, sub-section (5) and 107.*

There is no presumption as to the continuance of life or of an admitted marriage. A party who asserts that a person was alive at a particular date must prove such fact.

A statement as to a person's age, made by a deceased relative, is admissible in evidence under section 32 (5) of the Evidence Ordinance.

*Ram Chandra Dutt v. Jogeswar Narain Deo*<sup>1</sup> and *Oriental Government Security Life Assurance Co., Ltd., v. Narasinha Chari*<sup>2</sup> followed.

**A** PPEAL from a judgment of the District Judge of Kalutara (P. E. Pieris, Esq.). The facts material to the report sufficiently appear in the judgment of Wendt J.

*Bawa* (with him *V. M. Fernando*), for the fourth defendant, appellant.

*H. Jayewardene*, for the first defendant, respondent.

*Cur. adv. vult.*

<sup>1</sup> (1893) I. L. R. 20, Cal. 758.

<sup>2</sup> (1901) I. L. R. 25, Mad. 183.

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This is a land acquisition case, and there is a contest between the first and the fourth defendant. The facts material to its decision are as follows : Siman Perera acquired four-fifths of the land in question by a deed of conveyance AA 1 dated July 1, 1852. At some date subsequent to the year 1855 he transferred two-fifths, and the title of the transferee is not now in question. Siman Perera made no disposition of the other two-fifths of the land, but died leaving a last will, which did not specially deal with this land, but devised the residue of his estate absolutely to his widow, the fourth defendant. She accordingly claims the two-fifths last mentioned as having formed part of the residue. The first defendant, on the other hand, avers that Siman Perera was first married to one Justina in community of property ; that that marriage was subsisting at the date of the acquisition by Perera in July, 1852 ; and that upon the dissolution of the marriage by Justina's death two-fifths out of the four-fifths passed by intestate succession to her children, under two of whom the first defendant claims. The first defendant's statement of claim did not give the date of Justina's death, nor even state, except inferentially, that it had occurred subsequent to Perera's acquisition of the four-fifths. The various statements of claim were filed on the one day, and there were no pleadings in the nature of answers by any of the claimants to the claims of their adversaries. At the trial the following rather general issues were framed by the Court on the question I am now dealing with, viz. :—

Was Siman Perera entitled to four-fifths or two-fifths of the land ?

Was Andris Silva entitled to three-fifths ?

At the date of Justina Fernando's death what interest had Siman in the land ?

What interest have the various claimants acquired by prescription, purchase, or inheritance ?

Evidence was then gone into after the Court recorded an admission by all parties that Siman Perera was entitled to four-fifths of the land. On behalf of the first claimant document AA 2 was produced whereby it was sought to prove that Justina died on October 23, 1852. In giving evidence on behalf of his mother, the fourth defendant, the third defendant stated that Justina died on October 23, 1851. He was speaking of an event which occurred before his birth, but professed to have got the date from a letter of his father's, which he said have been taken from him by Justina's son, one of the vendors to first defendant. Siman's marriage to fourth defendant was in February, 1855, but the parties were said to have lived together before that date.

The greater part of the argument before us was devoted to the question, On whom lay the onus of proof of the date of Justina's death ? For the first defendant it was contended that her marriage

having been admitted, and it having also been admitted by the third defendant that she was alive, and the marriage subsisting till October, 1851, that is, within nine months of the acquisition of the property by Perera, there was a presumption in favour of the continuance of life under section 107 of the Evidence Ordinance, and that the burden therefore lay upon the fourth defendant to show that she died before July 1, 1852. On the other hand, the appellant argued that she had a complete paper title under Siman Perera, the admitted owner, and that the onus of proving every fact necessary to divest Perera of his admitted title rested upon the party relying on it.

Section 107 of the Evidence Ordinance is not applicable, because, as pointed out by Lascelles A.C.J. on October 11, 1906, in the case No. 4,365, C. R., Kalutara, brought by Siman Perera's widow, the question here is not whether Justina is alive or dead, but whether she (known to have been dead in 1855) died before or after July 1, 1852. There is then no presumption as to the date of Justina's death, neither is there any presumption as to the continuance of the admitted marriage between her and Siman Perera. Such continuance is essential to first defendant's title, and he must prove it. Marriage being contracted for the life of the parties, I think it would be sufficient to show that they were both alive at the crucial date; the onus would then lie on the opposite party to prove a dissolution by judicial decree.

At the trial the proctor for the first and second defendants began and called the second defendant, who produced the document AA 2 as proof of the date of Justina's death. This document was as follows :—

“ Extract from an entry made by me, the undersigned, John Marselis Perera Seneveratne, N. P. of Dehiwala, in the family register in my possession of the death of the first wife of my uncle, the late Siman Perera Gunaratne Jayewardene, Notary of Kalutara.

“ On October 23, 1852, my uncle Siman Perera's wife died, Saturday, 7 o'clock, at Desester Cultura.

“ True extract.

“ Dehiwala, September 10, 1891.”

“ Signed \_\_\_\_\_.”

Evidence was given that J. M. P. Seneveratne, the writer of this, was Siman Perera's sister's son, and was dead, and Siman Perera's son John William, vendor to first defendant, deposed that Seneviratne kept a register of the events in the family; that witness “ had seen the original register.” “ It contained an entry of the date of my mother's death. AA 2 is a correct copy of it. It contains his signature to the certificate. He is now dead. The leaf has been torn off from the register since the copy was made and cannot now be found.” The original register was not produced or its absence

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accounted for. The document AA 2 was said to have been produced in evidence in July, 1906, at the trial of the case No. 4,365 by the defendant in that action.

Appellants' counsel argued that AA 2 was not admissible under section 32, sub-section (5), of the Evidence Ordinance to prove the date of Justina's death, even if admissible to prove her relationship, because the date did not "relate to the existence of any relationship." It has, however, been held in India (*Ram Chandra Dutt v. Jogeswar Narain Deo* <sup>1</sup> and *Oriental Government Security Life Assurance Co., Ltd. v. Narasinha Chari* <sup>2</sup>) that the date of a person's birth, by fixing the time of the commencement of his relationship to his father, "relates to the existence" of that relationship. I agree with the reasoning upon which that conclusion is based; and as the date of death may similarly be said to mark the termination of the relationship of the decedent, I think the register admissible to prove the date of Justina's death. It is true the register is not produced, but AA 2 is itself a declaration made *ante litem motam* by the keeper of the register, and satisfies the requirements of sub-section (5). The declarant was a notary public, and presumably a person of good social standing and respectability. There is nothing to contradict the date he assigns to Justina's death, except the third defendant's statement already mentioned, and that is obviously of much less evidentiary value. I therefore think the learned District Judge was right in holding that Justina was alive at the date of her husband's acquiring the four-fifths of the land.

There remains the plea of *res judicata* embodied in issue No. 7. We have sent for and examined the record of the action No. 277, D. C., Kalutara, in which the decree that is relied upon was pronounced. It is quite clear from the District Judge's judgment (which in appeal was "affirmed with costs," no reason to the contrary appearing to this Court) that the dismissal of the action did not proceed upon any adjudication of title, but upon a finding that plaintiff's possession had not been disturbed, and that therefore they had no cause of action. There is therefore no estoppel as to the title. The appeal will therefore be dismissed with costs.

HUTCHINSON C.J.—I concur.

*Appeal dismissed.*

<sup>1</sup> (1893) I. L. R. 20 Cal. 758.

<sup>2</sup> (1901) I. L. R. 25 Mad. 183.