1958 *Present:* **Weerasooriya, J., and Sansoni, J.**

WIJESEKERA, Appellant, *and* WELIWITIGODA *et al.*, Respondents

S. C. 396—D. C. Colombo, 211/Entail

Evidence—Marriage contracted in a foreign country—Proof—Sufficiency of a previous statement of deceased husband—"Derived their interest"—Evidence Ordinance, ss. 17 (1), 18 (3) (b), 21, 21 (c), 32 (5), 50.

Where the question for decision was whether C was the lawful issue of a valid marriage contracted between A and B—

Held, (i) that a previous statement of A, admissible under section 32 (5) of the Evidence Ordinance, to the effect that he was married in India to B was sufficient presumptive evidence of a valid marriage between A and B. In such a case, it is not essential to prove the formalities necessary for a valid marriage under Indian law.

(ii) that evidence that during the life-time of A his relatives regarded C as his legitimate child and conducted themselves accordingly towards her was admissible under section 50 of the Evidence Ordinance.

Meaning of expression "derived their interest" in section 18 (3) (*b*) of the Evidence Ordinance considered.

APPEAL from a judgment of the District Court, Colombo.

H. W. Jayewardene, Q.C., with *V. W. Vidyasagara*, for the petitioner-appellant.

S. J. V. Chelvanayakam, Q. C., with *J. M. Jayamanne*, for the 1st respondent.

C. D. S. Siriwardene, for the 5th respondent.

Cur. adv. vult.

March 21, 1958. WEERASOORIYA, J.—

The main question for decision in this appeal is the legitimacy of the 1st respondent Mrs. Virginia Lavinia Weliwitigoda who has been declared by the District Judge of Colombo to be the lawful issue of a marriage contracted by her father Henry Wijesekera with a lady called Agida who died in Madras in about the year 1938.

Henry Wijesekera's mother Mrs. Caroline Wijesekera had by her Codicil No. 2085 dated the 23rd August, 1935, devised to Henry Wijesekera (her eldest son) certain properties at Alston Place and Bankshall Street subject to a fidei commissum in favour of his children. It was also provided that on his death the properties shall devolve on his children subject however to a life interest in his wife in respect of a half share should she survive him, and in the event of Henry Wijesekera leaving him surviving no lawful children then, subject to the said life interest, the premises at Alston Place were to devolve on one of Mrs. Caroline Wijesekera's grandsons, Edward, who is the petitioner-appellant and a child of Edwin Wijesekera, while the premises at Bankshall Street were to devolve on another grandson, Rienzie, a child of Albert Wijesekera, both devises being subject, however, to certain benefits in favour of the respective wives of Edward and Rienzie and their issue the nature of which is not material to this appeal. Both Edwin Wijesekera and Albert Wijesekera were dead at the date of the Codicil. Mrs. Caroline Wijesekera died in 1939 and Henry Wijesekera in 1950.

The proceedings from which this appeal arises relate only to the devolution of title to the premises at Alston Place. Those premises were sold on the orders of the District Court of Colombo and the nett sum realised, less certain estate duty charges payable on the estate of Mrs. Caroline Wijesekera, were brought into Court. Thereafter the appellant made an application that he be paid the accrued interest on that sum. The basis of the application is that Henry Wijesekera did not leave surviving him either a lawful wife or lawful issue and that in terms of the Codicil the appellant is entitled to the interest. Of the parties who were

made respondents to the proceedings those named as the 1st, 6th and 7th respondents opposed this application. The 1st respondent in those proceedings is also the 1st respondent in this appeal.

The 1st respondent's claim that she is the lawful child of Henry Wijesekera and his wife Agida was upheld by the District Judge. The 6th respondent Maggie Nona is the mother of the 7th respondent Emaline. The 6th respondent claims that she was lawfully married on the 6th October, 1940, to Henry Wijesekera as appears from the marriage certificate 6R1. (This marriage would have been subsequent to the dissolution of the marriage, if any, between Henry Wijesekera and the 1st respondent's mother Agida upon her death in 1938). The 6th respondent's claim too has been upheld by the District Judge. On that finding the 6th respondent has been declared entitled to a half-share of the accrued interest on the sum of money lying in Court. But the claim of the 7th defendant that she is a child of the marriage between Henry Wijesekera and the 6th respondent was rejected by the District Judge. That finding stands as no appeal against it was filed by the 7th respondent. As for the finding in favour of the 6th respondent, which is mainly one of fact, it would appear from the grounds set out in the petition of appeal filed by the appellant that he does not seriously challenge its correctness, and it is not necessary, therefore, to make any further reference to it in this judgment.

Not very long after Henry Wijesekera married the 6th respondent Maggie Nona he filed an action against her for a dissolution of the marriage on the ground of her malicious desertion and adultery. That action was dismissed. The evidence which Henry Wijesekera gave in that case in 1942 was put in evidence by the 1st respondent in these proceedings marked 1R5. According to 1R5 he had said that he was previously married in India, that his wife Agidahamy died in Madras in 1938, and that he had one child by that marriage. Although the fact of the marriage is hotly contested it is common ground that the child referred to in that evidence is the 1st respondent. To use the words of learned counsel who appeared for the appellant in the District Court, there is no doubt that Henry Wijesekera looked after her very affectionately. Under cross-examination in the divorce case Henry Wijesekera stated that when he was a small boy he went to the United States of America where he lived for twenty one years and contracted two marriages, that he returned to Ceylon in 1924 and then met Agidahamy, that as his relations were opposed to his marrying her he took her first to the Federated Malay States and then to India where he married her and where the 1st respondent was born. He admitted that till he married Agidahamy in India he was living with her as his mistress, and that his marriage was not recognised by "his people" as she was not of their caste. Even before he married the 6th respondent in 1940 he lived with her for some time as his mistress.

Mr. Jayawardene who appeared for the appellant at the appeal raised objections both to the admissibility of the evidence given by Henry Wijesekera in the divorce case that he was married to Agidahamy as well

as to its weight and sufficiency. Those objections also apply to statements made to the same effect by Henry Wijesekera as testified to by the witness Virginia Peiris and Proctor Welwitigoda who were called by the 1st respondent and whose evidence has been fully accepted by the trial Judge. The objection to the admissibility of these statements was on the ground that they amounted to admissions as defined in section 17 (1) of the Evidence Ordinance and that although made by Henry Wijesekera they may, by virtue of section 18 (3) (*b*), be proved *against* the 1st respondent (who, it was submitted, derives her interest in the subject matter of the suit from Henry Wijesekera) but cannot be proved *by* her except as provided in section 21 of the Evidence Ordinance. As regards paragraph (*c*) of that section, Mr. Jayawardene argued that it permitted an admission, if it were relevant otherwise than as an admission (e.g. under section 32) being proved only by or on behalf of the person making it and not by any other person. I do not think, however, that Henry Wijesekera is a person from whom the 1st respondent has derived her interest in the subject matter of these proceedings so as to render the statements imputed to him admissions under section 18 (3) (*c*). The argument that the statements amount to admissions therefore fails and it is not necessary to consider the scope of section 21(*c*). In my opinion the learned District Judge was right in holding that the statements were relevant under section 32 (5) of the Evidence Ordinance.

The objection to the weight or sufficiency of these statements was taken on various grounds. In the first place it was stressed that the marriage is alleged to have been contracted in India and there was no proof of what were the necessary formalities for a valid marriage under Indian law or that those formalities were complied with. The case of *Armitage v. Armitage* [1] was cited to show that where the alleged marriage took place in a foreign country the Court insists on evidence that the marriage was duly celebrated according to the legal formalities in force there, and Mr. Jayawardene contended that the same rule would apply in the case of a statement which is admissible under section 32 (5) of the Evidence Ordinance as relating to the fact of marriage. In the case cited, however, the marriage was said to have taken place in New Zealand before it had become a British Colony and, having regard to the primitive conditions which prevailed there, the Court refused to act on a bare statement in the affidavit of the male contracting party asserting the solemnization of the marriage in question. I do not think that this case or the other cases referred to by Mr. Jayawardene in dealing with the particular point under consideration establish any rule as contended for by him. The case of *Goldstone v. Smith* [2], to which we were referred by Mr. Chelvanayakam, shows that the presumption *omnia rite esse acta* could be applied in deciding whether the fact of a foreign marriage had been duly proved. All that section 32 (5) requires is that the statement should relate to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship, in any such way, the person making the statement has special means of knowledge, and that the

[1] *L. R. (1866-67) Equity 343.*

[2] *(1921-22) 36 T. L. R. 403.*

statement should have been made before the question in dispute was raised. The provision is an exception to the rule against hearsay and has been enacted primarily to meet a situation where the matter sought to be established involves remote facts of family history which are incapable of direct proof. In the words of Lord Blackburn in *Sturla v. Freccia* [1] the ground is " that they were matters relating to a long time past, and that it was really necessary to relax the strict rules of evidence there for the purpose of doing justice ".

It was next argued that the statements should not be acted upon because of their self-serving nature. But when Henry Wijesekera represented that he had been married to Agidahamy and that the 1st respondent was a child of that marriage I do not see that what he stated was in his own interests, since under his mother's Codicil he would have been entitled to the life interest in both the properties whether or not he was married to Agidahamy or the 1st respondent was their child. While, on the other hand, if the statements were designed to help the 1st respondent, a question that poses itself is why he should have been so inclined unless it be for the reason that she was the lawful issue of the marriage. These statements can, therefore, be distinguished from the statement which was excluded in *Plant v. Taylor* [2] (being another of the cases relied on by Mr. Jayawardene) on the ground (among others) that it was obviously in the interest of the person making the same.

It seems to me that the weight and sufficiency of the statments as evidence establishing the fact of Henry Wijesekera's marriage to Agidahamy were matters for the trial Judge to decide. It has not been shown to us that in acting on those statements the learned Judge applied any wrong principle. Moreover, as pointed out by Mr. Chelvanayakam, the case for the 1st respondent does not rest on those statements alone. There is the additional evidence that during the lifetime of Henry Wijesekera his relatives regarded the 1st respondent as his legitimate child and conducted themselves accordingly towards her. This evidence is admissible under section 50 of the Evidence Ordinance and has been accepted by the District Judge. I am also inclined to agree with him that the reference in the Codicil to the wife of Henry Wijesekera was a recognition by Mrs. Caroline Wijesekera that at the date of its execution Agida was married to him.

In my opinion the appeal fails and must be dismissed with costs payable to the 1st respondent and to Maggie Nona, who was the 6th respondent in the proceedings in the Court below but is the 5th respondent to this appeal.

SANSONI, J.—I agree.

Appeal dismissed.

[1] *(1879) 5 Appeal Cases 623 at 641.*

[2] *7 H. & N. 211.*