WELGAMA
VS.
WIJESUNDERA AND ANOTHER

SUPREME COURT
S. N. SILVA, CJ,
BANDARANAYAKE, J AND
JAYASINGHE, J
SC APPEAL 2/2003
CA L. A. 24397
D. C. COLOMBO NO. 31166/T
MAY 20, JUNE 17, JULY 11, AUGUST 29 AND NOVEMBER 3, 2003
AND FEBRUARY 17, 2004

Testamentary Action — Determining the date of death for purpose of deciding. date when estate passed to heirs and for grant of letters of administration - Presumption of life - Evidence Ordinance, section 107 - Presumption of death - Evidence Ordinance, section 108 - Interpretation Act, No. 10 of 1988 amending the period for presumption of death from "seven years" to "one year' - How may court decide the date of death as a fact - Does the amendment date back to the day deceased disappeared, viz. 13.02.1983 or should one year be counted from the date of the amending Act, viz. 02.04.1988? - Intermeddling with the estate on the basis of deceased's power of attorney - Effect of intermeddling on the date of death.

The appellant is the widow and the respondents are the two sisters of Upali Wijewardena who disappeared on his way to Colombo from Kuala Lumpur in his private lear jet on 13.02.1983. Neither the air craft nor the remains of Wijewardena were traced. At the time of his disappearance neither the appellant nor the respondents sought to institute testamentary proceedings, but on 07.10.1987 the respondents filed DC Colombo Case No. 30927/T. They complained that the appellants acting on the power of attorney issued by Wijewardena (deceased) intermeddled with the estate "while he was alive" and sought letters of administration *pendente lite* under section 539A of the Civil Procedure Code (then in force) on the basis that Wijewardena died on 13.02.1983. The court did not publish order nisi but ordered that the appellant's objections be issued to the respondents.

When the matter was taken to the Court of Appeal by the respondents, the appellant explained that the respondents were estopped from pleading death on 13.02.1983 and that as on the date of his disappearance the deceased's liabilities exceed his assets. He owed Rs. 50 million to the Revenue Department and Rs. 200 million to the People's Bank; steps were taken to settle these debts on the basis of the power of attorney and the respondents acquiesced in restructuring the companies and in fact accepted office as directors of separate companies.

In the meantime on 21.04.1988, section 108 of the Evidence Ordinance was amended by Act, No. 10 of 1988 substituting the words "seven years" with " one year" for the purpose of reducing the period of presumption of death. Consequently the Court of Appeal litigation in DC Colombo No. 30927/T was withdrawn by the respondents who also consented to letters of administration being granted to the appellant in DC Colombo No. 31166/T filed on 28.04.1988. In that action court ordered final accounts to be filed on 08.03.1993.

Notwithstanding the settlement reached regarding DC Colombo No. 309271/ T which was withdrawn of consent, respondents insisted in Case No. 31166/ T that the court should hear the matter as if Wijewardena died on 13.02.1983. The appellant contends that she filed action on the basis that the decreased died on 21.04.1988, the date of the amending Act, No. 10 of 1988. The District Judge held that on the basis of the evidence and documents the date of the death was 13.02.1983. The Court of Appeal affirmed the order of the District Judge that the date of death has to be established on evidence and not in terms of section 108 of the Evidence Ordinance, as amended.

HELD:

(Bandaranayake, J. dissenting)

The date of the death for purpose of the estate should be taken as 21.04.1988.

***Per* S. N. SILVA , CJ**

".....The question is from which date the period of one year should be computed? Is it one year immediately preceding 21.04.1988 as contended by the President's Counsel for the appellant or one year from the date of disappearance as contended in particular by Counsel for the 2nd respondent.? I am inclined to agree with the President's Counsel for the appellant for two reasons.

Firstly the amendment to the Evidence Ordinance is procedural in nature. It applies prospectively and a party could avail of it only after it comes into force. Therefore, the earliest date on which a party could establish the fact of death on the basis of the presumption is the date on which the law comes into operation. *A fortiori* the relevant period within which it should be proved that the person was not heard is the period of one year immediately preceding that year.

Secondly, if the presumption of death is to relate back to one year after 13.02.1983 as contended by Counsel for the 2nd respondent or to 13.02.1983 as contended by President's Counsel for the 1st respondent, it would lead to the incongruous result as noted above, in which the person will be presumed to be alive as well as dead during the same period.".

Per **BANDARANAYAKE, J.** (dissenting)

1. "Section 107 of the Evidence Ordinance could be regarded as a provision which considers the burden of proof of the death of a person known to have been alive within thirty years and section 108 refers to the burden of proof regarding a person who is alive and had not been heard of for seven years".

2. "It would be necessary according to Pulle, J (in *Davoodbhoy* v. *Farook*) (1959) 63 NLR 97) to prove such death in terms of section 101 of the Evidence Ordinance".

3. "The period of seven years referred to in section 108 was amended by Act, No. 10 of 1988 by reducing the period of seven years to one year."

4. "That section (108) does not create a presumption as to the *time of death* of a person in question".

5. ....."Although the deceased was not seen after 13.02.1983, the appellant had dealt with his property as he was alive and living elsewhere.".

" The respondents have continued to state that the appellant was last seen or heard on 13.02.1983. The appellant has not disputed this fact nor has taken any steps to prove anything to the contrary. Therefore there could not be any dispute between the parties that the deceased was last seen or heard on 13.02.1983.".

6. "I cannot see any basis for the date of the amended section 108, which came into force to be regarded as the date of the death of the deceased and in my view the contention that the date is to be presumed as at 21.04.1988 is not only contradictory and untenable, but also is an attempt to give an artificial and baseless interpretation to the amended section ."

Cases referred to :

1. *Silva* v. *Silva* 10 NLR 234 (FB)
2. *Amalgamated Investment and Property Company Ltd.* v. *Texas Commerce International Bank Ltd.* 1984 QB 84 at 122
3. *Doe* v. *Nepeani*(1833) Reports of cases of the Court of Kings Bench Vol. IIP. 219 at P226
4. Re Benham's Trusts (1867) Law Times Reports Vol. XVI P349
5. Re Phenes Trust (1870) Law Time Reports Vol. Xxi - p 107 (1870)5CH App. 139
6. *Re Rhodes* vs. *Rhodes* (1888) Law Times Reports Vol. LVII p. 652
7. *Rex* v. *Taylor* (1950) Kings Bench Division P. 368
8. *Warkins* v. *Warkins* (1953) 2 AER P. 1113
9. *Thompson* v. *Thompason* (1956) 1 AER P. 603
10. *Davoodbhoy* v. *Farook* (1959) 63 NLR 97
11. *Pattison* v. *Kalutara Special Criminal Investigation Bureau* (1970) 73NLR 399
12. *Assistant Government Agent* v. *Fernando* (1909) 12 NLR 83
13. *Doe* v. *Nepean* (1833) 5 B & Ad 86
14. *Nepean* v. *Doe* (1837) 2 M & W 894
15. *Re Rhodes* (1887) 36 Ch.D. 586
16. *Hamy Vel Muladeniya* v. *Siyatu* (1945) 46 NLR 95
17. *Tikiri Banda* v. *Ratwatte* (1894) 3 CLR 70

18. *Prins* v. *Peiris* (1901)4 NLR 353
19. *Silva* v. *Salman* (1916) 19 NLR 305
20. *Lal Chand Matwari* v. *Mahant Ramrup Gir and Another* TLR Vol XLII 1925-26 P159
21. Re Green's Settlement (1865) LR 1 p. 288
22. *Dowley v. Winfield* (1844) 14 sim 277
23. *Wing v. Angrave* (1860) 8 HLC 183
24. *Hickman v. Upsali* (1876) 4 CH. D. 145

APPEAL from the judgement of the Court of Appeal.

Nihal Jayamanne P. C. with *Ronald Perera*, V. *Choksy*, *Noorani Amarasinghe*, *Uditha Collure* and *Dilan de Silva* for appellant.

Wijeyadasa Rajapakse, PC with *Navin Marapana* for respondents.

Cur.adv.vult.

April 1st 2005

SARATH N. SILVA, C. J.

This is an appeal from the Judgment dated 11.01.1999 of the Court of Appeal. By that Judgment the Court of Appeal dismissed the application of the appellant for leave to appeal from order dated 28.11.1997 of the District Court.

The hearing of the application for Special Leave to Appeal before this Court and of this appeal were adjourned for considerable periods of time to enable the parties to arrive at a settlement of the dispute. Upon the failure to arrive at a settlement, Counsel made submissions and thereafter tendered extensive written submissions.

The dispute relates to the administration of the estate of the late Philip Upali Wijewardena, leading public figure and a businessman. He embarked from the Kuala Lumpur International Airport in his private Lear Jet on 13.02.1983 with the recorded destination being Colombo. The aircraft failed to give a position report overhead Medan to the Kuala Lumpur Air Traffic Control Centre and did not regain contact with any Ground Control Center, thereafter. Neither the remains of Wijewardena nor of any of the passengers have been found. It is reported that some fishermen in

Indonesia have found a wheel of an aircraft and a part which could be related to that aircraft. The heirs are his widow, the present appellant and his two sisters, being the Respondents. Although, Wijewardena disappeared in the circumstances stated above on 13.02.1983, neither the Appellant nor any of the Respondents sought to institute Testamentary proceedings for Letters of Administration in terms of Section 530(1) of the Civil Procedure Code (which was then applicable) on the basis that he died on 13.02.1983 being the day on which the aircraft he was in disappeared. Wijewardena had appointed one Ramalingam Murugiah as his Attorney and his affairs were carried out on the basis of the said Power of Attorney. Subsequently, the said Murugiah gave a substituted Power of Attorney in favour of the Appellant.

On 07.10.1987, the two Respondents filed a petition in the District Court of Colombo (No. 30927/T), seeking Letters of Administration in respect of the estate of Wijewardena. It was pleaded in the petition (paragraph 7) that the Petitioners have reason to believe that the Respondent (the present appellant) has been willfully asserting that the deceased is still alive for the unlawful and illegal purpose of administering wrongfully, intermeddling and to do what she solely wishes with the considerable assets of the deceased, without any authority or supervision from this Court. They also pleaded that the action taken by Murugiah and the Appellant on the power of attorney referred to above is unlawful. They applied to administer the estate on the basis that Wijewardena died on 13.02.83 and sought inter alia Letters of Administration pendente lite in terms of Section 539A of the Civil Procedure Code (which was then applicable). The District Court refused to grant Letters of Administration pendente lite. However, the Court issued Order Nisi on 08.10.1987. On 19.10.1987 the Appellant filed papers and made an application to recall the Order Nisi that had been issued. The District Court then noted that the Order Nisi had not been signed and made order that no Order Nisi be published. It was further directed that Notice of objection be issued on the present Respondents. The Respondents filed an application for Leave to Appeal to the Court of Appeal from the order made by the District Court on 19.10.1987. They also filed an application in Revision and a Final Appeal from the same Order.

On 28.04.1988, the Appellant filed petition in the District Court (Case No. 31166/T) seeking Letters of Administration. The application was filed on the basis of the amendment to Section 108 of the Evidence Ordinance

made by Act, No. 10 of 1988, which came into force on 21.04.1988. The District Court issued Order Nisi on the basis of this application, in terms of Section 531 of the Civil Procedure Code and directed service on the Respondents.

At this juncture, when cases were pending in the District Court and Court of Appeal as aforesaid, the parties entered into a settlement on 18.01.1989. The settlement has been signed by the appellant and the Respondents on the basis of which the Respondents withdrew the Applications for Leave to Appeal, Revision, and the Final Appeal referred to above. A schedule to the Settlement Agreement specifies the Companies in respect of which the deceased had interests and the Appellant agreed on her part to the appointment of the Respondents and their children to positions in the Boards of Directors of specified Companies and to make certain payments as fees. It is specifically provided that subsequent to the execution of the agreement and the appointment of Directors, as referred to, the Respondents will consent to Letters of Administration in respect of the estate of the deceased being issued to the Appellant in the District Court case No. 31166/T, as the widow of the deceased without her providing any security for this purpose other than a personal bond. The Respondents also agreed to withdraw the testamentary action No. 30927/ T filed by them in the District Court. It was specifically agreed that the Respondents will withdraw the allegations made against the Appellant in paragraph 7 of the petition filed in that action, the contents of which paragraph have been referred to above.

On the basis of the foregoing settlement Appellant was issued with Letters of Administration.

On 26.11.1992 the Letters of Administration were signed by the Addl. District Judge who directed that the inventory and the final account be filed on 08.03.1993. In clause 3 of the settlement Agreement it is specifically stated that the Appellant, "undertakes to furnish accounts in respect of each and every year of her administration of the said Estate of the deceased to the Parties of the First Part (Respondents) before the Thirty First day of December in each and every year commencing from 31st March, 1990"

The dispute was rekindled by the failure on the part of the Appellant to file the inventory and final account as directed by Court or to render accounts as agreed to in clause 3 of the Agreement referred above. The Respondents

filed a petition and affidavit on 02.04.1997 in case No. 31166/T (being the application filed by the Appellant in which Letters of Administration had been issued.), allgeging inter alia, that the deceased died on 13.02.1983 and the Appellant intermeddled and/or dealt with the assets of the deceased for her own benefit on the basis of a Power of Attorney which was null and void, for her own benefit in fraud of the Respondents. They sought an order against the Appellant from the District Court to file a further inventory and valuation of the deceased's property at the date of his death, namely 13.02.1983 and a final account of the administration of the estate on or before a date to be fixed by Court.

The Appellant filed objections on 29.07.1997 stating that the Respondents are estopped from asserting that the deceased died on 13.02.1983 after they withdrew case No. 30927/T filed by them and consented to Letters being granted to her in case No. 31166/T filed by her on the basis that death took place on 21.04.1988 being the date on which the amendment to the Evidence Ordinance came into force. She further stated that as at the date of disappearance the liabilities of Mr. Wijewardena exceeded his assets, with about Rs. 50 Million due to the Inland Revenue Department and nearly Rs. 200 Million due to the People's Bank on debts of his companies covered by personal guarantees. That, action was taken on the Power of Attorney to avoid a bankruptcy situation in which the Peoples Bank would have taken over the assets. The debts were settled and the assets were restructured. That, the Respondents acquiesced in such restructuring which was done on the basis that Wijewardena was alive and on the authority of the power of attorney by accepting Directorship in Companies that came into existence after 13.02.1983, in terms of Settlement Agreement referred to above.

The Additional District Judge, in the first part of his Order dated 28.11.1997, came to a finding that the Appellant has delayed in filing the final account and inventory. In the second part of his Order the Judge has noted that for the purpose of filing the final account and inventory it is necessary to decide on the date of death and on the documentary evidence adduced as to the disappearance of the aircraft he held that the date of death was 13.02.1983. The Appellant was accordingly directed to file the inventory and final account within 6 months on the basis that the death took place on 13.02.1983. The Court of Appeal dismissed the application for Leave to Appeal on the basis that the date of death cannot be decided

in terms of Section 108 of the Evidence Ordinance. That, the date of death should be established on evidence and on the documentary evidence the District Court correctly held that death took place on 13.02.1983.

At the stage of granting Special Leave both parties were permitted to raise questions on which the appeal will be considered. The questions raised by the Appellant are based on the premise that the direction made by the District Court to file the inventory and final account with effect from 13.02.1983 is erroneous and that the date of the inventory and commencement of the accounting should be taken as one of the following.:

(i) in view of section 553 of the Civil Procedure Code which requires a final account of the "executorship or administration", the point of commencement should be the date on which an order was made to issue Letters of Administration to the Appellant being 24.04.1989;

(ii) in view of the Settlement Agreement which requires the Appellant to furnish an account of her administration of the estate, commencing 31st March 1990, (clause 3), that should be taken as the date operative between the parties,

(iii) in view of the Appellants application for Letters of Administration being filed on 28.04.1988 on the basis of the amendment to Section 108 of the Evidence Ordinance which came into force on 21.04.1988, that date should be taken as the date on which the estate came into being and the operative date for the inventory and the accounting.

Submissions of President's Counsel for the Appellant relate mainly to the premise formulated in (iii) above.

The Respondents raised the question that the Appellant should account from the date she began to intermeddle with the estate of the deceased being the date of disappearance of the deceased and that the presumption operative in terms of Section 108 of the Evidence Ordinance and/or that Letters of Administration issued, should relate back to that date. Initially, only one set of submissions were filed on behalf of both Respondents. Later, a separate submission was filed on behalf of the 2nd Respondent in which it has been contended that even assuming that the Amendment to

Section 108 of the Evidence Ordinance applies, the date of death should be taken as one year after the date of disappearance *viz.* 13.02.1984. In the joint submission made on behalf of the Respondents it was contended that the Settlement Agreement was void.

The question raised by the parties relate to the principal fact in issue, being the date of death of Wijewardena, which has been addressed from different aspects of fact and the application of principles of Law. It is to be borne in mind that we have to examine the issue solely from the perspective of a testamentary action. We are here, not concerned with the circumstances relevant to the disappearance of the ill-fated aircraft but, with the estate of Wijewardena. The dispute is, to state it plainly, as to the property of Mr. Wijewardena and the manner in which it should be accounted for; if as at 13.02.1983, being the date of disappearance, Mr. Wijewardena owned no property, there would have been no dispute.

From the perspective of the Law, property is identified only with reference to rights and obligations in relation to such property. I use the words rights and obligations to include all the jural co-relatives identified in jurisprudence that may relate to property. For example, if we take an immovable property such as a block of land, from the perspective of the Law, we are not concerned whether it is fertile or infertile, flat of steep but, only with the rights of ownership, possession, use enjoyment and so on. These rights are identified in relation to property, as being vested with a person or other legal entity that can hold such rights. The same applies to all forms of movable property and legally recognized relationships, be it in contract or otherwise. Since property and legal relationships are identified with reference to persons who are vested with rights and obligations, it is essential for the legal system that such persons be clearly identified, at any given point of time.

The death of a person, in physical or material terms means, the cessation of life. In legal terms, it means the passing of the dead persons rights and obligations that survive, to the heirs or the persons who inherit his property.

For the purpose of testamentary proceedings, at the moment of death the property of the deceased (the bundle of rights and obligations) become the estate and pass without interval to the heirs. This basic premise

of the law has been clearly stated in a decision of the Full Bench of the Supreme Court in the case of Silva vs. Silva (1) Grenier A. J. stated as follows :

> ".....On the death of a person his estate, in the absence of a will, passes at once by operation of law to his heirs, and the dominium vests in them. Once it so vests they cannot be divested of it except by the several well-known modes recognized by law ."

The Law does not and cannot recognize an interval between the death and the passing of property, since rights and obligations, from which perspective only, property and legal relationships are identified in law, have to be, at any given point of time vested or reposed in a person or a legal entity.

Moving from the general propositions stated above, to the specific facts of the case; when the aircraft in which Wijewardena was travelling disappeared on 13.02.1983, and he was not heard of thereafter; the obvious question that arose in relation to his property rights and obligations was whether they could be dealt with on the basis Wijewardena was alive or on the basis he was dead. The preceding analysis reveals that from a legal perspective as to property rights and obligations, there could be no intermediate situation.

The question whether a person is dead or alive, is one of fact and in this instance the fact in issue is the date of death since the estate for purpose of Testamentary proceedings came into existence on that date and the property rights and obligations thereupon pass to the heirs. There is no direct evidence as to the death of Mr. Wijewardena. However, this does preclude the proof of that fact with circumstantial evidence. Although, a basic premise of our Law of Evidence, it is relevant to state here the standard of proof that would apply. Section 3 of the Evidence Ordinance states as follows :

> *" A fact is said to be proved when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."*

Documentary evidence was adduced by the Respondents with their petition dated 02.04.1997 filed in the District Court seeking an accounting from 13.02.1983, alleging that on a balance of probability that Mr. Wijewardena died on that date. Upon an acceptance of the evidence the impugned orders have been made by District Court and the Court of Appeal. However, it is obvious that this evidence was available to them as far back as 1983. The significant matter is that neither the Respondents, nor the Appellant nor any of the persons who had claims against Mr. Wijewardena, sought to assert that the death took place on 12.02.1983 and to institute Testamentary proceedings, at that stage, on this material. They all chose to go along with what is generally described as the "presumption as to life and death" as contained in Section 107 and 108 of the Evidence Ordinance. These two sections that appear in the part dealing with the burden of proof, prior to the amendment to Section 108 effected by Act, No. 10 of 1988 read as follows :-

107. " When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it".

108. Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it."

Coomaraswamy in his book on the Law of Evidence (Vol. II book I at page 429) describes the operation of the presumption of life thus :

"When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it. In other words, the court has to presume that the man is alive until the contrary is proved by those who affirm that he is dead. If not so proved, those who affirm that he is alive will succeed. This is known in English Law as the presumption as to continuance of life. It derives its authority from the presumption of continuance recognized in Section 114(c), but it appears to be obligatory, whereas Section 114(c) is discretionary. It is a rebuttable presumption."

These two sections do not lay down inflexible principles of law. They are only rules of evidence that state the burden in a proceeding before any

Court in which the fact in issue is whether a person is dead or alive. In terms of Section 107 where it is shown that the person was alive within thirty years, it is presumed for evidentiary purposes that the person continues to be alive and the fact of death has to be proved by the person who alleges it, on a balance of probability as noted above. Section 108 is a proviso which comes into operation in the background of the presumption of life as contained in Section 107. The manner in which the proviso works, could be stated in practical terms as follows :

The presumption of life continues to apply since the person has been alive within thirty years and a party not being possessed of evidence to prove the fact of death, adduces evidence short of that by proving that the person has not been heard for seven years (prior to the amendment) by those who would naturally have heard of him if he had been alive, then the presumption shifts and it is presumed that the person is dead. In such circumstances the party who alleges that the person is alive has to prove that fact on a balance of probability. The presumption of life is no longer operative.

It is now necessary to apply these presumptions to the facts of this case.

As at 13.02.1983 being the date of disappearance of Wijewardena had been alive within thirty years. Therefore, Mr. he is presumed to be alive. The Appellant and others who dealt with his property, rights and obligations functioned on the premise that he was alive and the Appellant acted for and on his behalf. Section 107 which lays down the presumption of life does not debar any person from adducing evidence and proving the fact of death. The Respondents did not avail of this option. By Act, No. 10 of 1988, Section 108 was amended by substituting a period one year in place of the period of seven years. The amendment was certified on 21.04.1988 and within one week on 28.04.1988 the Appellant filed the present case for Letters of Administration pleading specifically that Wijewardena should be presumed to be dead in terms of Section 108 of the Evidence Ordinance as amended. The present Respondents who were cited in that application accepted that basis and agreed to the grant of Letters of Administration.

The question to be considered is whether in this state of things, the Respondents could nearly nine years later, in April 1997 file papers alleging

that, Mr. Wijewardena died on 13.02.1983. To my mind the following points militate against this belated change of position on the part of the Respondents, which found favour with the District Court and the Court of Appeal. They are :

(i) After the disappearance of Mr. Wijewardena on 13.02.1983 the Appellant acting on the presumption of life dealt with his affairs in terms of the power of Attorney as stated above. The Respondents who knew of this course of action, did not seek to stop it by instituting a Testamentary proceeding on the documentary evidence as to the disappearance which according to them establish on a balance or probability that Mr. Wijewardena, died on 13.02.1983.

(ii) On 07.10.1987 the Respondents filed case No. 30927/T for Letters of Administration on the premise that Mr Wijewardena died on 13.02.1983. It is significant that they relied on the same documentary evidence adduced with the petition dated 02.04.1997 to prove the fact of death and also made the same allegation that the Appellant fraudulently and wrongfully dealt with the affairs on the basis of the Power of Attorney. The Respondents later withdrew this application and all proceeding in the court of Appeal, filed from the order of the Additional District Judge refusing to sign the Order Nisi in their favour, without any reservation of their right to reagitate the same matter;

(iii) In the Settlement Agreement, the Respondents specifically withdrew the allegation in paragraph 7 of their petition dated 07.10.1987 filed in case No. 30927/T which reads as follows :

"The Petitioners (present Respondent) have reasons to believe that the Respondent (present Appellant) has been willfully asserting that the said deceased is still alive for the unlawfully and illegal purpose of administering wrongfully intermeddling and to do what she solely wishes with the considerable assets of the deceased without any authority or supervision from this Court and also completely disregarding the rights and interests of the Petitioners who are the sisters of the late Upali Wijewardena (deceased)" Thereby, they accepted the validity of the action taken by the

Appellant on the basis of that Wijewardena was alive by virtue of the power of attorney. Their acquiescence in the course of action taken by the Appellant is confirmed by the acceptance of Directorships in companies formed after 13.02.1983 in terms of that Power of Attorney.

(iv) The Respondents consented to Letters of Administration being granted to the Appellant in her application in which the fact of death is asserted in terms of Section 108 of the Evidence Ordinance, as amended. The Respondents did not contest this position at that stage and seek to establish that the death took place on 13.02.1983. On the contrary, they withdrew their application for Letters filed on that basis as noted in (ii) above.

The Respondents have thus acquiesced in the course of action taken by the Appellant after 13.02.1983 in attending the affairs of Mr. Wijewardena in terms of the Power of Attorney. On the basis of their conduct itemized above including the Settlement Agreement and the two Testamentary cases, they are estopped in law from asserting in 1997 that Mr. Wijewardena's date of death, for the purpose of the administration of his estate, should be taken as 13.02.1983. The operation of the doctrine of estoppel is stated in Section 115 of the Evidence Ordinance as follows :

"When one person has by his declaration, act, or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing. "

In England the doctrine of estoppel has been stated as a general principle by Lord Denning M. R. in the following statement made in Amalgamated Investment and Property Co. Ltd., *vs.* Texas Commerce International Bank Ltd. (2)

"The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become over loaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been

sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth, All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption-either of fact or of law - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands."

Although, certain doubts have been expressed in England or to the Application of a unified doctrine of estoppel, the statement of Lord Denning could be read in harmony with the principle in Section 115 of our Evidence Ordinance.

The Appellant applied for Letters of Administration on the basis of the presumption in Section 108 of the Evidence Ordinance, as amended. The Respondents who had previously applied for Letters on the basis of circumstantial evidence that the death took place on 13.02.1983 dropped that premise and acquiesced in the position taken by the Appellant. The Court has to decide the fact in issue as to date of death in relation to the parties and then apply it to property, obligations and so on, as noted above. There is no question of the date of death being decided as a matter of general or public importance, in which event different considerations may have to be taken into account. Between the parties, based on their conduct, as analysed above, the date of death must necessarily be decided on the basis of the application of the presumption in Section 108 of the Evidence Ordinance, as amended. This process of reasoning may not be amenable to common sense or logic but, from the perspective of the Law, the reasoning has to be applied so that at any given point of time, it produces a clear and unambiguous answer as to whether a person is considered as alive or dead. There cannot be any intermediate period of doubt or ambiguity. The preceding analysis shows that rights and obligations in relation to property and transactions are workable only on a clearly defined line of demarcation in which a person is considered to be alive upto a specified date and dead thereafter. As at the date of death thus determined, the estate comes into being and the rights and obligations in

relation to property and transactions that survive after death, pass to the heirs or persons to whom they are devised or bequeathed.

The presumption of death in Section 108 is a proviso to the general presumption of continuity as contained in Section 107. The general presumption as to continuity of life is couched in wide terms for obvious reasons. In the absence of specific evidence as to the fact of death, the law has to presume that the person who was alive continues to be alive. In this background of a presumption of continuity of life, the presumption of death as contained in the proviso operates only where it is "proved" that the person "has not been head of for seven years (prior to the amendment) by those who would have naturally heard of him, if he had been alive." On the reasoning set out above, the question can now be narrowed down to its core. On what date does the presumption of death begin to operate? Does it relate back to the date the person was not heard of as contended by the Respondents? Or, is it at the end of the period as contended by the Appellant?

If the answer is based on the principle of relation back as contended by the Respondents, the person will now be presumed to be dead during the period he was presumed to be alive in terms of Section 107. As noted above, for rights and obligations in relation to property and transactions to be worked, there has to be a clear dividing line, A person cannot be presumed to be alive and dead during the same period. If so, all transactions entered on the basis that the person is alive would be put asunder and there would be uncertainty as to their validity. Furthermore, in terms of Section 108, the presumption arises only when it is "proved that he has not been heard of for seven years (prior to the amendment) by those who would naturally have heard of him if he had been alive...." The fact could be said to be 'proved' only at the end of the period.

The conclusion arrived at pursuant to the preceding analysis, flowing from the Law of Property, to succession and the application of Section 107 and 108 of the Evidence Ordinance is supported by the series of judgments in England which relate to trusts, legacies, prescription and bigamy cited by President's Counsel for the Appellant. In all these cases the evidence was that the person in question disappeared and it has been consistently held that the absence of evidence as to the date of death, the fact of death has to be presumed at the end of the period of seven years.

In a chronological order the cases are as follows :

1. Doe vs. Nepean (3) Judgment of Denman C. J.
2. Re. Benham's Trusts (4)
3. Re. Phenes Trust (5)
4. Re. Rhodes; Rhodes vs. Rhodes (6)
5. Rex vs. Taylor (7)
6. Warkins vs. Warkins (8)
7. Thompson vs. Thompson (9)

A further complication arises in this case from the amendments to section 108 of the Evidence Ordinance effected by Act, No. 10 of 1989 certified on 21.04.1988. The amendment simply substitutes three words "for one year" in place of the words "for seven years" in Section 108. I would reproduce the comment made by Coomaraswamy with regard to this amendment with which I am in entire agreement:

> *"Prior to the 21st April, 1988, when Amendment Act, No. 10 of 1988 was certified, the Ordinance, following the wisdom of more mature systems like the English Law very properly fixed this period at seven years. But the Amendment drastically reduced the period to one year. It is submitted that this is a retrograde step which will lead to many complicated and anomalous situations and should be rectified forthwith. To depart from a provision which has worked satisfactorily and which was based on the wisdom of the ages and to amend the law in this way, perhaps in order to benefit one individual or more, is not in the best interests of justice and can do violence to the symmetry of the law. It imposes an unnecessary heavy burden on those who seek to show that the person is alive. It will also result in the fouling of title to property. It certainly shows the wisdom of the legislature in a very poor light. " (Vol. II Book 1, P.430)*

When the amendment came into force on 21.04.1988 a period of 5 years and 2 months had elapsed from the date of disappearance. Therefore, the presumption of life was operative. With the amendment the fact of death could be presumed after one year. The question is from which date should the period of one year be computed. Is it one year immediately preceding 21.04.1988 as contended by President's Counsel for the Appellant or one year from the date of disappearance as contended in

particular by Counsel for the 2nd Respondent. I am inclined to agree with the submission of President's Counsel for the Appellant for two reasons:

Firstly, the amendment is to the Evidence Ordinance is procedural in nature. It applies prospectively and a party could avail of its provisions and institute proceedings only after it comes into force. Therefore, the earliest date on which a party could establish the fact of death on the basis of the presumption is the date on which the law came into operation. A fortiori, the relevant period within which it should be proved that the person was not heard is the period of one year immediately preceding that date.

Secondly, if the presumption of death is to relate back to one year after 13.02.1983, as contended by Counsel for the 2nd Respondent or to 13.02.1983 itself as contended by Presidents Counsel for the 1st Respondent, it would lead to a incongruous result, as noted above, in which the person would be presumed to be alive as well as be dead during the same period.

For these reasons I uphold the submission of President's Counsel for the Appellant that the date of death for the purpose of the estate should be taken as 21.04.1988 as being the earliest date on which it could be established in terms of Section 108 of the Evidence Ordinance that the presumption of death applies.

President's Counsel for the 1st Respondent has submitted that the Appellant should be considered as an *Executor de son tort* from the date on which she started to intermeddle with the estate of the deceased being the date of disappearance. He cited the following passage from Wharton's Lexicon and from Executors and Administrators by N. E. Mustoe :

"Executor de son tort,..... If a stranger takes upon himself to act as executor or administrator (see. 14 Halsbury's L of E, 2nd edn. Para 282), without any just authority (as by intermeddling with the goods of the deceased, and any other transactions), he is called in law an executor of his own wrong, de son tort, and is liable to the extent of the assets which have come to him and to all the trouble of an executorship without any of the profits or advantages ...."

An executor de son tort can discharge his liability by obtaining probate if he is entitled, or by accounting to the personal representative, or to the Court, in an administration by the Court."

(Whartons Lexicon 14th edition page 390)

"Any person who is not an executor or an administrator , but who intermeddles with the deceased's property, may make himself liable to the obligations of an executor de son tort (by his own wrong). Very slight acts on intermeddling, will make a person an executor de son tort, e.g. advertising for claims, paying or receiving payment of debts, or carrying on the deceased's business." (Executors and Administrators by N. E. Mustoe 4th Ed. page 6)

The preceding analysis reveals that from the perspective of the Law the property of a person has to be dealt with on the basis that he is alive or dead with a clear dividing line. As at the date of disappearance, the presumption of life was operative and the affairs of Mr. Wijewardena were carried on, on the basis he was alive. The finding stated above is that, the presumption of death operates from 21.04.1988 being the earliest date on which the matter could have been established in Court. It is a sine qua non for a person to be considered an *Executor de son tort*, that it be established in the first instance that the person is dead and there is an estate. Therefore the liability of an *Executor de son tort* cannot be attributed to the Appellant in the manner contended for by Counsel. If at all, the Appellant could be considered an *Executor de son tort* from 21.04.1988. This would be unnecessary since the doctrine of relation back relied on by the Respondents would apply and the letters granted subsequently would relate to the date of death as determined. In this connection I would cite the following passage from Whartons Law Lexicon - 4th Edn. - Page 858 relied on by the Respondents -

"Relation, where two different times or things are accounted as one, and by some act done the thing subsequent is said to take effect 'by relation' from the time preceding. Thus letters of administration relate back to the intestate's death, and not to the time when they were granted."

Accordingly I allow the appeal and set aside the order dated 28.11.1997 of the District Court and the judgment dated 11.01.1999 of the Court of Appeal. The Appellant being the Administratrix of the Estate is directed to file the inventory and final account on the basis of that the Eatate of the deceased came into being on 21.04.1988. Since the Administratrix has failed to file any account either in compliance of the Settlement Agreement

or in compliance with the order made by the District Court, she is directed to file the said inventory and account finally within 3 months of the date of this Judgement.

No costs.

JAYASINGHE , J.,— I agree.,

Appeal allowed.

SHIRANI A. BANDARANAYAKE, J. (Dissenting)

I have had the benefit of reading, in draft, the judgment of His Lordship the Chief Justice. Whilst I am in agreement with the factual position considered in the said draft, I regret very much that I am unable to agree with His Lordship's answer to the question as to the exact date of the presumption of death begins to operate, in connection to the estate of the deceased coming into being to the appellant for the purpose of inventing and accounting. The reasons for my inability to agree with the draft judgment are as follows :

At the stage of granting Special Leave to Appeal, both parties were permitted to raise questions on which the appeal was to be considered and consequently three questions were so raised. However, learned President's Counsel for the appellant made submissions mainly on question No. 3, which was in the following terms:

> "In view of the appellant's application for letters of administration being filed on 28.04.1988 on the basis of the amendment to section 108 of the Evidence Ordinance, which came into force on 21.04.1988, that date should be taken as the date on which the estate came into being and the operative date for the inventing and the accounting.".

Having considered the aforementioned question, it has been narrowed down in the draft judgment to read as follows:

"On what date does the presumption of death begin to operate? Does it relate back to the date of the person was not heard of as contended by the respondents? Or is it at the end of the period as contended by the appellant?"

The appeal was chiefly considered on the basis of Sections 107 and 108 of the Evidence Ordinance. These two sections are contained in Part III, which deals with the burden of proof. Section 107 of the Evidence Ordinance could be regarded as a provision which considers the burden of proof of the death of a person known to have been alive within thirty years and Section 108 refers to the burden of proof regarding a person who is alive and has not been heard of for seven years. Having said that, it is also necessary to be borne in mind that both these sections are also referred to as sections dealing with the presumption of death and the presumption of continuance of life. Considering this aspect, E. R. S. R. Coomaraswamy, (The Law of Evidence, Vol. II, Book I, pp. 428-429) is of the view that,

"The fact is that rules as to burden of proof and presumptions are so involved together that it is artificial to separate a given situation and to state that it is a pure rule of the burden of proof and not of a presumption. Every rebuttable presumption in favour of one party necessarily involves a rule as to burden of proof in the other and *vice versa.* It is, therefore, proposed to consider the rules in sections 107, 108, 109, 110 and 111 as giving rise to the contrary presumptions which a court shall draw.".

At the same time it would be necessary to be borne in mind that there is a school of thought that Sections 107 and 108 of the Evidence Ordinance do not enact a presumption of law or fact, but enact rules governing the burden of proof. In fact Basnayake, C. J. , in *Davoodbhoy* v. *Farook* [10] observed that,

"It is essential to bear in mind that Sections 107 and 108 do not enact a presumption of law or fact, but enact rules governing the burden of proof like any one of the other rules that precede them.".

A similar view was taken by Pulle, J., in the same decision to the effect that,

"A rule of evidence as to burden of proof does not generate a presumption of fact."

The view that has been taken by Pulle, J., thus emphasizes the fact that one cannot always discharge the burden that the person in question is dead by leading evidence to indicate that the said person had not been heard of for seven years by those who would naturally have heard from him. It would be necessary according to Pulle, J., to prove such death in terms of Section 101 of the Evidence Ordinance. In Pulle, J.,'s words :

> "In my view there is nothing in section 108, which compels a Court to hold, upon proof that a person has not been heard of for seven years by those who would naturally have heard of him if he had been alive, that the fact of that person's death has been established by him on whom the burden lies under Section 101 to prove such death.".

Sections 107 and 108 of the Evidence Ordinance, No. 14 of 1895 reads as follows:

> "Section 107-
> When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.
>
> Section 108 -
> Provided that, when the question is whether a man is alive or dead, and it is proved that he is not being heard of for seven years by those who would naturally have head of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.".

The Period of seven years referred to in Section 108 was amended by Act , No. 10 of 1988 by reducing the period of seven years to one year. This amendment was certified on 21.04.1988.

According to Section 108 of the Evidence Ordinance, when the question as to whether a person is alive or dead is taken into consideration, and it is proved that the person referred to has not been seen or heard of for, earlier seven years and since April 1988, for one year, by those who would have naturally have heard from him, in the event if he was alive, the burden of proving that the said person is alive is shifted to the person who relies on it.

A careful consideration of the contents in sections 107 and 108, indicate that both sections should be read together as the latter is a proviso to the

earlier Section. Whilst section 107 creates a legal presumption, of continuance of life if nothing is shown to the contrary, section 108 provides for the burden of proving that a person to be alive by shifting it to the person asserting it by denying the death. Considering the operation of section 108 of the Evidence Ordinance, H. N. G. Fernando, C. J., in *Pattison* v. *Kalutara* Special *Criminal Investigation Bureau* [11] stated that,

> "Section 108 of the Evidence Ordinance provides that when a person has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to them who affirm that he is alive."

However, it is to be borne in mind that section 107 does not create a presumption as to the time of death of a person in question. Therefore this section will not be applicable to a case where the question is not whether a person is alive or dead, but whether a person died on a specific date. Considering this position, E.R. S.R. Coomaraswamy is of the view that,

> "A party who asserts that a person was alive at a certain date must prove such fact."

In fact in *Assistant Government Agent* v. *Fernando* [12] Wendt J., considering the provision in section 107 stated that, 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 it. In Wendt, J.'s words :

> "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, 1852."

Wharton's Law Lexicon, (4th Edition pg. 796) defines the presumption of life or death and the details are given in the following form:

> "When a person is once shown to have been living, the law will in general presume that he is still alive, unless after a lapse of time considerably exceeding the ordinary duration of human life; but if there be evidence of his continued unexplained absence from home and if

the non-receipt of intelligence concerning him for a period of seven years, the presumption of life ceases and he is presumed to be dead at the end of seven years. **But the law raises no presumption as to the time of his death**. And therefore, if any one has to establish the precise time during those seven years at which such person died, he must do so by evidence."

In support of this position Law Lexicon refers to the decisions in *Doe* v. *Nepean (13) Nepean* v. *Doe (14) and Re Rhodes* (15).

The appellant's contention is that she conducted the affairs of the business and properties of the deceased until after the expiry of the period applicable for the presumption in terms of section 108 and thereafter filed the testamentary action. Her submission was that the estate of the deceased came into existence on the day where the period of 7 years is expired. Therefore although the deceased was not seen after 13.02.1983, the appellant had dealt with his property as if he was alive or living elsewhere. According to Coomaraswamy (Supra, Pg. 429-430) there is no presumption of law in favour of or against the continuance of life for any given period unless contained in a particular enactment.

The respondents have continued to state that the deceased was last seen or heard on 13.02.1983. The appellant has not disputed this fact nor has she taken any steps to prove anything to the contrary. Therefore there could not be any dispute between the parties that the deceased was last seen or heard on 13.02.1983.

Considering sections 107 and 108 of the Evidence Ordinance, it is abundantly clear that in terms of section 108 if a person has not been heard of for seven years (presently one year) by those who would normally have heard of him, had he been alive, the presumption of continuance would cease and the burden of proving the person to be alive shifts to the person who asserts the said presumption by denying death. This position was taken in *Re Phene's Trusts* (Supra) where it was stated that,

"If a person has not been heard of for seven years, there is a presumption of law that he is dead, but at what time within that period he died is not a matter of presumption, but of evidence and the onus of proving that the death took place at any particular time within the seven

years lies upon the person who claims a right to the establishment of which that fact is essential.".

The question that arises at this juncture is whether it is necessary to ascertain the exact date of death of the deceased. The answer to this question is that the need would depend on the circumstances of each instance and therefore it would vary from case to case. For instance in a case where the court has to adjudicate a claim of prescription by a third party, the date of death may become important. Similarly, in an instance where letters of administration or probate is granted the need to know the exact date of the death of the deceased could arise. In fact it appears that one of the most important situations that could arise along with the circumstances under consideration would be with regard to matters pertaining to the deceased person's estate.

In *Hamy Vel Muladeniya* v. *Siyatu* (16) the Court held that when a person is presumed to be dead in accordance with the provisions of section 108, his property has to be divided among his heirs. Further, it is to be borne in mind that there cannot be an interval between the death of a person and passing of his property to the heirs. In fact in *Silva* v. *Silva* (Supra) a full Bench held that on the death of a person, his estate, in the absence of a will, passes at once by operation of law to his heirs, and that the *dominium* vests in them. This has been an accepted principle and that in *Tikiri Banda* v. *Ratwatte* (17) a case decided in 1894, Lawrie, J. and Withers, J. had held that the succession of the estate of an intestate, devolved immediately upon his death. Accordingly as a safeguard and chiefly to prevent any injury occurring to the deceased person's estate, the English Courts have adopted the doctrine of relation back in testamentary proceedings.

Halsbury's Laws of England (4th Edition, Vol. 17(2), Pg. 26 Para. 35) refers to the doctrine of relation back. With regard to the relation back of administrator's title, it is stated that,

"In order to prevent injury being done to deceased person's estate without remedy, the courts have adopted the doctrine that on the grant being made the administrator's title relates back to the time of death. This doctrine has been consistently applied in aid of an administrator seeking to recover against a person who has dealt wrongfully with the deceased's chatties or chattles real. It is also applicable against a person dealing wrongfully with the deceased's real estate .".

Wharton's Law of Lexicon (Supra, at Pg. 858) also refers to the doctrine of relation back and defines the said doctrine in the following terms:

> "Relation, where two different times or other things are accounted as one, and by some act done the thing subsequent is said to take effect 'by relation' from the time preceding. **Thus letters of administration relate back to the intestate's death, and not to the time when they were granted** (See *Re Pryse* 1904 Pg. 301. *Foster* v. *Bates* (1843) 12 M & W 226) (emphasis added)".

As referred to earlier there is no such presumption as to the date or time of a person's death. If the question in issue is the date and/or the time of the death that is to be taken up as a matter that has to be proved by evidence. The respondents had contended that the deceased died on 13.02.1983 and this has not been challenged by the appellant. In fact the appellant concedes that she had last heard from him on 13.02.1983.

In such circumstances, the estate of the deceased, in the absence of a will, have to pass at once by operation of law to his heirs and no one other than the executor or an administrator could intermeddle with such property. Infact N. E. Mustoe (Executors and Administrators, 4th Edition, Pg. 6) observed that,

> "Any person, who is not an executor or an administrator, but who intermeddles with the deceased's property, may make himself liable to the obligations of an executor *de son tort* (by his own wrong). Very slight acts of intermeddling will make a person an executor *de son tort, e.g.*— advertising for claim, paying or receiving payment of debts' or carrying on the deceased's business.".

Actions based on the English Law as to an executor *de son tort,* has been recognised by our Courts, as Bonser, C. J., as far back as in 1901 had stated in *Prins* v. *Peiris* (18) that —

> "Then, Mr. Walter Pereira argued, as I understand him, that the English Law as to an executor *de son tort* was not in force in this island. It seems to me rather late in the day to argue that : there have been numerous cases in which such actions have been recognized by this Court."

This position is applicable to the estate of a spouse. In *Silva* v. *Salman* (19) Wood Renton, C. J., had clearly stated that,

> "Had she applied for administration of her husband's estate, she was the natural person to have obtained it; not having and done so and having intermeddled with the estate by paying off the debts, she is in the position of an executrix *de son tort*,".

There are two other matters I wish to consider in connection with the matter in issue. Firstly, it was the contention of the learned President's Counsel for the appellant that the appellant is liable to account on the basis of an Administratrix only from the date on which the estate came into being, namely 21.04.1988. The significance of the date is that the amendment to the Evidence Ordinance, which amended section 108 of the Evidence Ordinance came into force on that day. Therefore the date suggested is not a date, which was arrived at, either according to the provisions of the Evidence Ordinance, or in terms of the provisions of the amended section. It is also important to be borne in mind that, the appellant did not wait for a period of one year from the date of the amendment, but filed her action seven days after the amendment Act came into operation. In the circumstances, I cannot see any basis for the date of the amended section 108, which came into force to be regarded as the date of the death of the deceased and in my view the contention that the death is to be presumed as at on 21.04.1988, is not only contradictory and untenable, but also is an attempt to give an artificial and baseless interpretation to the amended section.

Secondly, seeking the advantage of the presumption in terms of sections 107 and 108 could be for a variety of reasons. A sudden disappearance of a person may bring in numerous kinds of issues that would have to be looked into. The complexities could be on the basis of marriage, retirement benefits, payments on an insurance policy or as in this appeal the question of administering the estate, which includes the accounting and inventing. As has been stated earlier, there is no presumption as to the time of a person's death, which has to be proved by evidence and clearly the presumption of death does not extend to the date of death. In English Law, as Coomaraswamy points out (Supra Pg. 431) the presumption of death has been used to repel a charge of bigamy, to justify remarriage and to justify a divorce.

Considering the totality of the aforementioned circumstances and the legality of the situation, it would appear that in a situation where as in the present case, the following aspects would have to be taken into account :

a. when there is a situation arising out of a disappearance of a person, there is no presumption as to the date or the time of the death of a person;

b. on the death of a person, who had died intestate, his estate passes at once, by operation of law, to his heirs;

c. any person who is not an executor or an administrator, but intermeddles with the deceased's property, may make himself liable to the obligations of an executor *de son tort* ;

d. as has been referred to in Halsbury's Laws of England (Volume 17(2), 4th Edition, Pg. 38) referring to the effects of acts of executor *de son tort,* the lawful acts done in the professed administration of the estate by a person purporting to act as personal representative which a rightful executor would have been bound to perform in due course of administration would bind the estate; and

e. considering the injuries that could be done to a deceased person's estate without remedy, the English Law recognizes the doctrine of relation back that would apply to testamentary proceedings. Thereby when the grant is made, the administrator's title relates back to the time of death.

In a series of cases (*Lal Chand Marwari* v. *Mahant Ramrup Gir and another* (20) Re Green's Settlement (21) *Dowley v. Winfield* (22) *Wing v. Angrave* (23) the courts have taken the view that if a person has not been heard of for a term of not less than seven years, there is a presumption of law that he is dead, but the onus of proving the death of a person at any particular date must rest with the person to whose title that fact is essential.

On the question of the time of the death based on the presumption an example was cited in *Hickman v. Upsall* (24) where circumstantial evidence of the time of the death was taken into consideration. The example was as follows:

"Suppose a person intending to return home at ten o'clock at night does not appear, there is no presumption that he is dead. But if after a week he is found with his skull broken in a wood, you can then conclude that he was killed before ten o'clock on the night on which he disappeared.".

The respondent's position was that the aircraft in which the deceased was a passenger disappeared after it left Kuala Lumpur at 21.09 Hrs. on 13.02.1983. Later it was reported that some fishermen in Indonesia had found a wheel of an aircraft and a part of a plane, which could be related to the ill-fated aircraft. None of these had been challenged by the appellant and she had not taken any steps to discharge the burden of establishing any other date other than 13.02.1983, the date suggested by the respondents on which the death of the deceased to have occurred. In fact the appellant contended that the deceased was in Malaysia on 13.02.1983 and he boarded his aircraft to fly back to Sri Lanka; but he never arrived in the country.

It is therefore not disputed that the deceased was expected to return to Sri Lanka after 21.09 Hrs. on 13.02.1983 and considering the aforementioned circumstances on the basis of the example given in *Hickman* v. *Upsall* (supra) the conclusion should be that the deceased met his death in or around the said time en route from Kuala Lumpur to Sri Lanka.

For the aforementioned reasons, I am of the view that 21.04.1988 cannot be taken as the date on which the estate of the deceased came into being as on the disappearance and the death of the deceased which apparently had occurred on 13.02.1983, in the absence of a will, the deceased person's estate passed at once by operation of law to his heirs on 13.02.1983, and such date should be taken into consideration as the date for the inventory and the accounting.

This appeal is accordingly dismissed and the order of the District Court dated 28.11.1997 and the judgment of the Court of Appeal dated 11.01.1999 are affirmed. The appellant being the administratrix of the estate is directed to file the inventory and final account on the basis of that the estate of the deceased came into being on 13.02.1983, within three months from today. There would be no costs.

Appeal dismissed.

By majority decision appeal allowed.