1958 *Present :* **Basnayake, C.J., and de Silva, J.**

MENDIS and others, Appellants, *and* PARAMASWAMI, Respondent

S. C. 139—D. C. Colombo, 35730

Evidence—Statements made by a deceased person—Admissibility—Evidence Ordinance, ss. 5, 6, 7, 8 (2), 9, 14, 32 (2)—Trusts Ordinance—Section 84—Transfer of property to one person for consideration paid by another—Evidence of intention of purchaser.

(i) A statement of relevant facts made by a person who is dead cannot be admitted under section 32 of the Evidence Ordinance unless the statement consists of the very words of the deceased person and comes within any of the cases (1) to (8) of that section.

Where a firm of Proctors sent a letter to P containing a narration of what they had gathered from a communication or communications made to them by S—

Held, that, after the death of S, the letter sent by the Proctors to P was not admissible under section 32 of the Evidence Ordinance as containing a statement made by S. Further, the statement in the letter did not fall within any of the eight cases in section 32.

(ii) Where property is transferred to one person for a consideration paid by another person, statements made by the purchaser long after the transaction (about four and a half years in the present case), and not contemporaneously, are not relevant under section 84 of the Trusts Ordinance to show that the consideration was not paid for the benefit of the transferee.

APPEAL from a judgment of the District Court, Colombo.

C. Thiagalingam, Q.C., with *N. Kumarasingham* and *V. Arulambalam*, for Executors-Defendants-Appellants.

H. V. Perera, Q.C., with *S. Sharvananda* and *Miss Maureen Seneviratne*, for Plaintiff-Respondent.

Cur. adv. vult.

March 13, 1958. BASNAYAKE, C.J.—

The only question for decision on this appeal is whether a letter (in these proceedings the original is referred to as D1a and the office copy as D1) sent by Messrs. Julius & Creasy, a firm of Proctors, to the plaintiff's wife on 28th November 1951 can be admitted in evidence for the purpose of proving the fact that when the deceased Arumugam Sangarapillai (hereinafter referred to as the deceased) paid the consideration of one hundred thousand rupees for Times of Ceylon shares numbered 118,581

to 127,960 transferred to the plaintiff's wife, he did not intend to pay such consideration for her benefit. The document produced is an office copy of the letter and reads as follows :—

28th November 1951

Mrs. P. Paramasamy,
c/o Dr. P. Paramasamy, M/L/NT. 1019
D. M. O., Rambodde.

Dear Madam,

Times of Ceylon Ltd

We understand from Mr. A. Sangarapillai that you hold shares numbered 118,581 to 127,960 of the Times of Ceylon Ltd in Trust for him and that two Dividends paid to you in respect of these shares have not been paid to him. We shall be glad if you will please forward these warrants either to us on Mr. Sangarapillai's behalf or to him direct. If the warrants have already been cashed kindly send us a cheque for the equivalent thereof without delay as Mr. Sangarapillai requires moneys urgently.

The matter arises for decision in this way. In the course of the cross-examination of the plaintiff, counsel for the defendants put to him the following questions :—

Q. You know that in the Times of Ceylon Ltd there are shares worth a lakh of rupees registered in your wife's name ?

A. Yes.

Q. Who paid for these shares ?

A. Mr. Sangarapillai.

Q. When ?

A. I do not know the exact date, it was somewhere in 1946 or 1947. He did not tell me about it.

Q. When did you come to know about it ?

A. When my wife was given a certificate, she brought it and when she was putting it in her wardrobe she told me that it was given to her as a present.

Q. Were you asked any question as to what your wife told you ?

A. I was asked when it was given.

Q. Did I ask you as to what she told you ?

A. That was a connected answer.

Q. Did I ask you what your wife told you ?

A. No.

Cross-examining counsel at this stage made an application that the portion of the witness's answer in which he states that his wife mentioned it was a gift should be deleted. The learned District Judge refused to

allow this application. The trial was then adjourned for the next day. Before commencing his cross-examination on that day counsel showed the witness document D1 and asked him whether he had seen the original of it. The witness said he had. The plaintiff's counsel then objected to its production on the ground that its contents were inadmissible. He maintained that it was not admissible under section 32 of the Evidence Ordinance and the defendants' counsel maintained that it was admissible under section 32(2) of that Ordinance. The plaintiff's counsel also submitted that subsequent conduct or statements made by the deceased (in November 1951) are not admissible to prove the nature of a transaction that took place in June 1947. The defendants' counsel maintained that the Evidence Ordinance did not exclude evidence of subsequent conduct.

The learned District Judge held that the document was not admissible under section 32(2) of the Evidence Ordinance. He also held that—

> " the conduct and statement of Sangarapillai evidenced by the document D1 and D1*a* are so far separated as to be inadmissible in his favour to rebut the presumption of a gift. They are also for the same reason inadmissible in favour of the defendants his Executors for the said purpose. I therefore reject the documents D1 and D1a."

The present appeal is from that decision. Before examining the question for decision I shall set out the facts briefly. The defendants are the Executors of the deceased who died on the 18th of September 1954. The plaintiff is his son-in-law. He has instituted this action to recover a sum of Rs. 57,400 which he alleges that the deceased owed him at the time of his death. It is common ground that shares to the value of Rs. 100,000 in the Times of Ceylon Company Ltd were in June 1947 registered in the name of the plaintiff's wife and that the deceased paid the consideration for them. The defendants claim that the deceased did not intend to benefit the plaintiff's wife when he paid for the shares and that she held the shares in trust for him till his death. The plaintiff claims that the shares were gifted to his wife by the deceased. By his last will which has been admitted to probate the deceased left these shares to the plaintiff's wife.

It would be sufficient for the purpose of this judgment to refer to issues 23 and 24 which are as follows :—

> " 23. Did the late Mr Sangaralingam Pillai pay the Times of Ceylon Ltd a sum of Rs. 100,000 for shares in the Times of Ceylon Ltd registered in the name of the plaintiff's wife ?
>
> 24. (*a*) Did the plaintiff's wife hold such shares in trust for Sangaralingam Pillai until an adjustment of accounts between plaintiff and plaintiff's wife on the one hand and Mr. Sangaralingam Pillai on the other, or
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> (*b*) Was the allotment of such shares to plaintiff's wife in the nature of gift to plaintiff and his wife ?"

To succeed in their claim that the plaintiff's wife held the shares in trust for the deceased during his lifetime the defendants must prove that the transaction falls within the ambit of section 84 of the Trusts Ordinance. In the instant case they must prove—

(*a*) that Times of Ceylon shares to the value of Rs. 100,000 were transferred to the plaintiff's wife in or about June 1947,

(*b*) that the consideration was paid by the deceased, and

(*c*) that he did not intend to pay such consideration for the benefit of the plaintiff's wife.

(*a*) and (*b*) are admitted, but (*c*) is denied. The burden of establishing (*c*) is on the defendants. In order to discharge this burden they propose to produce D1 as evidence of a statement made by the deceased that he did not intend to benefit the transferee when he paid the consideration for the shares.

It would appear from D1—

(*a*) that the deceased communicated with the firm of Julius & Creasy orally or in writing before D1 was written.

(*b*) that in the communication or communications made by the deceased he created in the mind of the person or persons who received them the impression—

(i) that the plaintiff's wife held Times of Ceylon shares numbered 118,581 to 127,960,

(ii) that she held those shares in trust for the deceased,

(iii) that two dividends had been paid to the plaintiff's wife,

(iv) that she had not paid them to the deceased,

(v) that the deceased wanted the dividend warrants or if they had been realised the amount of such dividends paid to him.

As learned counsel for the defendants contended both in the Court below and here that D1 is admissible under section 32 of the Evidence Ordinance it is necessary in the first place to examine that contention. In the instant case the defendants are seeking to establish the truth of the facts stated in D1 by producing it in evidence. The document does not contain the *ipsissima verba* of the deceased but as stated above a narration by its writer of what he had gathered from a communication or communications made to his firm by the deceased.

Now section 32 is the only section of the Evidence Ordinance which permits the proof of relevant facts contained in statements made by deceased persons. The type of evidence permitted by the section is known as hearsay evidence. A statement of relevant facts cannot be admitted under the section unless the statement consists of the very words of the deceased person and comes within any one of the cases (1) to (8) of that section. Now D1 cannot be admitted in evidence for the

reason that it does not contain a statement made by the deceased. Apart from that, the statements in the letter do not fall within any one of the eight cases in section 32.

Learned counsel for the defendants also contended that D1 was relevant under sections 6, 7, 8(2), 9 and 14 of the Evidence Ordinance. The facts declared to be relevant by those sections must be proved by direct evidence. They do not permit the admission of hearsay evidence which can be admitted only under section 32. Now clearly the writer does not claim that he personally knows the matters referred to in D1. They are matters communicated to his firm by the deceased. Their truth cannot therefore be proved by the writer's evidence.

The further question whether declarations made by the deceased in November 1951 were relevant for the purpose of establishing the fact that the deceased did not, in June 1947, intend to benefit the plaintiff's wife when he paid the consideration for the shares in question was argued in the Court below and decided by the learned District Judge against the defendants. I agree with the conclusion of the learned District Judge, but not for the reasons given by him. It would appear from the language of section 84 of the Trusts Ordinance that the state of mind that is relevant for the purposes of that section is the state of mind the person paying the consideration had at the time he paid it. That state of mind must be established by contemporaneous statements or declarations. Statements made long after the transaction are not relevant. Under our Evidence Ordinance evidence may be given in any suit of the existence or non-existence of every fact in issue, and of such other facts as are declared to be relevant by that Ordinance and of *no others*. (Section 5). Unless a fact is declared to be relevant by a section of the Evidence Ordinance, no evidence of it can be given and there is no section which declares D1 to be relevant.

Before I part with this judgment there is one other matter to which I wish to refer, and that is the fact that D1 had not been filed of record but was tendered to us for reference at the hearing by learned counsel for the appellants. The procedure regarding the tendering of documents in evidence is prescribed in section 154 of the Civil Procedure Code, the Explanation of which is relevant to the matter under consideration. The relevant portion of it reads—

> " If, however, on the document being tendered the opposing party objects to its being admitted in evidence, then commonly two questions arise for the court—
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> " Firstly, whether the document is authentic—in other words, is what the party tendering it represents it to be ; and
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> " Secondly, whether, supposing it to be authentic, it constitutes legally admissible evidence as against the party who is sought to be affected by it.

"The latter question in general is matter of argument only, but the first must be supported by such testimony as the party can adduce. If the Court is of opinion that the testimony adduced for this purpose, developed and tested by cross-examination, makes out a prima facie case of authenticity, and is further of opinion that the authentic document is evidence admissible against the opposing party, then it should admit the document as before.

"If, however, the court is satisfied that either of those questions must be answered in the negative, then it should refuse to admit the document. Whether the document is admitted or not, it should be marked as soon as any witness makes a statement with regard to it; and if not earlier marked on this account, it must, at latest, be marked when the court decides upon admitting it."

I would commend section 154 and more especially its Explanation to all Judges of first instance in civil proceedings.

The appeal is dismissed with costs.

DE SILVA, J.—I agree.

Appeal dismissed.