
(1901) 10 MAD CK 0026
In the Madras High Court

Oriental Government Security Life Assurance Company,
Limited

APPELLANT

Vs

Narasimha Chari

RESPONDENT

Date of Decision : 17-10-1901

Acts Referred:

Evidence Act, 1872 — Section 32(5)

Citation : (1902) ILR (Mad) 183

Hon'ble Judges : Arnold White, C.J.;Bhashyam Ayyangar, J

Bench : Division Bench

Judgement

Arnold White, C.J.—This is an appeal from a judgment for the plaintiff in an action on a policy of life insurance. The defendants raised various defences in the Court of First Instance. Before this Court the defence relied upon was that the policy had been obtained by means of misrepresentation as to the age, health, means or circumstances of the assured.

2. The policy is for a sum of Rs. 6,000, and is dated 28th September 1898. The assured died on 27th September 1899. The policy recited that the assured had signed a statement in writing declaring that his age on his next birth-day would not exceed fifty-eight years and setting forth the past and present state of his health and other circumstances touching his habits and life and that the assured had agreed that this declaration and relative personal statement made to the medical refers of the defendants should be the basis of the contract between the assured and the defendants. The policy contained a condition that in case any statement or allegation contained in the declaration were untrue, or if the assurance had been made through any misrepresentation, concealment or untrue averment whatsoever, the policy should be void, and provided that the assurance should be subject to the regulations and conditions comprised in the defendants' prospectus. With reference to age the prospectus contained the following regulation or condition: "The Directors do not withhold the issue of a policy until age has been proved, but recommend assurers to provide evidence of age as

soon as possible, as it is required on settlement of claims if not previously produced."

3. In his proposal for assurance, dated 6th August 1898, the assured stated the date of his birth to be 25th of Adi, Sarvari, (7th August 1840), and his age next birth-day to be fifty-eight.

4. In his personal statement the assured stated his age next birthday to be fifty-eight and in the declaration annexed to his personal statement, dated 6th August, though apparently not signed till 8th August, the assured solemnly declared that according to the best of his knowledge and belief he was then in good health and had had the small-pox and had not had certain specified diseases, and that his age did not exceed fifty-eight years, and that he had fully and faithfully answered all such questions as had been put to him in the form of proposal and by the medical referee relative to his habits, constitution and general state of health without concealment or reservation of any kind. It is a question whether this declaration so far as it relates to the age of the assured amounts to a warranty that all the statements made and referred to therein are true to the best of the knowledge and belief of the assured, or whether the words with reference to knowledge and belief only govern the earlier portion of the declaration, and the declaration in so far as it relates to the age of the assured would be construed as a warranty that the age of the assured did not in fact exceed fifty-eight years. Upon the principle which has been often laid down in cases of this class, (see, for instance, the judgment of Lord Watson in *Thompson v. Weems* L.R. 9 App. Cas. 671 if the words are ambiguous they must be construed contraproferentes and in favour of the assured, I think the declaration should be construed as amounting to a warranty that the age of the assured was fifty-eight to the best of his knowledge and belief.

5. With regard to this question of age it was contended on behalf of the defendants that the onus was on the plaintiff to show that his age was in fact fifty-eight, or, adopting the construction of the warranty which I am prepared to adopt, that it was fifty-eight to the best of his knowledge and belief. On behalf of the plaintiff it was contended that the onus was on the defendants to show that the age of the assured was not fifty-eight, or not fifty-eight to the best of his knowledge and belief. Apart from the special condition contained in the prospectus I should have felt no doubt that the burden of proof was on the defendants. Apart from this condition the present case, so far as this question is concerned, seems indistinguishable from the case of *Thompson v. Weems* L.R. 9 App. Cas. 671 (see the judgment of Lord Blackburn on page 684). The condition in the prospectus is to the effect that the directors require evidence of age on settlement of claim if such evidence has not been previously produced. In *The Oriental Government Security Life Assurance Company, Limited v. Sarat Chandra Ghatteerji* ILR 20 Bom. 99 a suit brought in 1895 on a life policy issued by the present defendants--the policy was in the same terms as that now in use by the defendants, and their policy contained a condition with reference to evidence of

age substantially the same as that contained in the present prospectus. The prospectus in use in 1895, however, contained a provision which does not appear in the present prospectus--"policies held by parties on their own lives are indisputable on any ground whatever except fraud." This was clearly a provision in favour of the assured. In the Bombay case it was held that the condition in the prospectus had the effect of imposing on the assured the obligation of giving proof of age before the company could be called upon to pay. With reference to the further terms in the prospectus--"policies held by parties on their own lives are indisputable on any ground whatever except fraud"---it was held that this did not relieve those claiming on the policy from the burden of giving proof of age, and that its effect was merely to relieve the assured from the legal effect which an innocent misrepresentation as to age would otherwise have under the strict terms of the contract. If the view of the Bombay High Court that the burden lay on the plaintiff is right, it seems to me this would be so a fortiori in the present case, since the present prospectus does not contain the provision with reference to policies being indisputable on any ground excepting fraud. If it were necessary to decide the point in the present case, one might have to consider the legal effect of a general reference being made to the prospectus in the policy without evidence being forthcoming that the prospectus had been read by the assured or brought to his knowledge in any way except by a reference to it in the policy itself.

6. For the purposes of my judgment, however, I am prepared to assume that it was for the defendants to show that the statement made by the assured with reference to his age was not true to the best of his knowledge and belief.

7. In his proposal for assurance the assured stated the precise date of his birth, giving the name (Sarvari) of the year during the Hindu cycle of sixty years. The corresponding English date is August 7th, 1840. The proposal is signed on August 6th, the day before, according to his statement, the anniversary of his birthday. According to this statement, the age of the assured at the time of his death would have been fifty-nine years and some seven weeks.

8. No doubt the oral testimony adduced on behalf of the defendants with reference to the question of the age of the assured is vague and inconclusive.

9. One A. Venkata Chari (defendants' sixth witness) a Sapinda of the assured, stated at the trial that he (the witness) was seventy-one and that the assured was five or six years younger and would have been sixty-four or sixty-five at the time of his death.

10. One Venkatarama Nayadu, a Village Munsif (defendants' seventh witness) who said he had known the assured since childhood, stated that he was over sixty when he died. A relation, one M. Ranga Chari, the Village Munsif of Mamandur,--the village in which the assured lived--(defendants' seventeenth witness) who gave his own age as eighty-one, gave evidence to the same effect.

11. Sundara Chariar (defendants' nineteenth witness) another relative, stated he

had known the assured since childhood, and that he (the witness) was his junior by a year. This witness, who gave his own age as sixty-five, said that the assured was treated by the villagers on ceremonial occasions as the elder man of the two. One Kuppiah Pillai (defendants' tenth witness) said he was a Census enumerator in 1891 and stated that in that year, for the purpose of the Census, the assured told him he was fifty-four. Evidence of this sort would carry very little weight if it stood alone. It does not, however, stand alone but is supported by documentary evidence. I will deal first with certain documents which were tendered in evidence by the defendants and were not admitted by the learned Judge. A document relied upon by the defendants was the so-called original of the document exhibit G which was put in evidence by the plaintiff. Exhibit G purports to be a true extract signed by the karnam of Mamandur from the death and birth register of the village. In the entry relating to the assured under the heading "remarks" appear the words "about sixty years old." Exhibit G was put in evidence in the cross-examination of one of the defendants' witnesses--Kuppiah Pillai, the village conicopillai of Mamandur. This witness had stated in chief that he had been a Census enumerator in 1891 and that the assured had given his age then as fifty-four. In cross-examination he stated it was his duty to make a return of deaths--the document, exhibit G, was put to the witness and he admitted that it had been signed by him. In re-examination a document which was described as the original from which exhibit G was an extract was put to the witness who admitted it was also signed by him. The suggestion on behalf of the defence was that in the so-called original it would appear that the words "above sixty years of age" had been written in the first instance and that an alteration had been subsequently made. The objection was taken on behalf of the plaintiff that this document was inadmissible and the learned Judge excluded it. I think the document ought to have been admitted in evidence. It seems to me, however, that the evidence as to the circumstances in which the so called original and the so-called extract were written are not sufficiently clear to justify us in attaching any weight to either of these documents as supporting the case of one side or the other. The defendants also sought to put in evidence a book kept at the hospital at Arkonam containing certain entries said to have been made in the year 1894. The book was produced by a hospital assistant who stated that the entries were made by one Kumarasami Mudaliar and that this man was alive. The learned Judge held that these entries had not been proved and declined to admit them in evidence. I think he was right.

12. I now come to the documentary evidence relied upon by the defendants as to which no question of admissibility has been raised. Exhibit XXI is deposition made by the assured before a Magistrate on May 5th, 1894. In the heading to the deposition he is described as fifty-seven years of age. Assuming--in favour of the assured--this to mean he was in his fifty-seventh year or that his age next birthday would be fifty-seven, this would make him fifty-seven on August 7th, 1894 (the anniversary of his birthday according to the statement in the proposal) and sixty-one and not fifty-eight on August 7th, 1898. Exhibit II is a deposition

by the assured in a suit before the District Munsif of Sholinghur, dated October 22nd, 1894. In the heading the age is given as fifty-eight. Assuming this means in his fifty-eighth year, this would make him fifty-eight on the 7th August 1895 and sixty-one on August 7th, 1898.

13. Exhibit III is another deposition before the same Munsif in another suit dated 7th February 1896. The age is given as sixty. Assuming this means in his sixtieth year this would make him sixty on August 7th, 1896, and sixty-two on August 7th, 1898. Exhibit IV is a deposition before a Magistrate dated 18th December 1895. His age is given as sixty. Assuming again this means in his sixtieth year, this would make him sixty on August 7th, 1896, and sixty-two on August 7th, 1898. Thus, according to two of the depositions he would have been sixty-one and according to two of them he would have been sixty-two on August 7th, 1898. It is true that the statements as to the age form no part of the sworn statement of the witness. The statements form part of the heading to the deposition which contains the description of the witness. The description consists of his father's name, his caste, his calling, his age and his residence, This is necessarily made out from information supplied by the witness. The learned Judge in the Court of First Instance did not attach much importance to these statements. He observed "We all know very well that when a witness comes into the witness box it really does not matter what his age was. The age is given in a most perfunctory manner for no purpose whatever except for the purpose of identity." This may be quite true, but the statement as to age is no more perfunctory than the statement as to residence or calling, but the presumption is that the statement is true to the best of the witness's knowledge and belief. The statement is made at a time when the witness had nothing to gain by making a false statement. The evidence afforded by the statements connected with these depositions is to my mind sufficient to shift the onus which I have assumed rests upon the defendants and make it incumbent on the plaintiff to displace this evidence. I now turn to the evidence in support of the plaintiff's case with reference to the question of age. I take the oral evidence first, Srinivasa Chari (the plaintiff's second witness) the son-in-law of the assured said nothing about the age in his examination-in-chief, but in cross-examination he said that he knew the age of his father-in-law from what his father-in-law had told him. "When he was confined to his bed he said that he was sixty and that his relatives never lived beyond sixty. He died three days afterwards." There is a curious inconsistency between this statement, if it was ever made, and the particulars given in the personal statement of the assured with regard to the age at death of his near relations. According to the personal statement his father died at the age of eighty-two and his mother at the age of seventy-six and his brother at the age of seventy. He also stated in his personal statement that his sister who was alive in 1897, was aged 88. The plaintiff also spoke to a ceremony which takes place on the completion of the sixtieth year, and he said that this ceremony had not been performed in the case of the assured. He said in cross-examination that this ceremony was optional and in re-examination that it was more often performed

than not. The plaintiff's third witness (a Brahman purohit) when asked as to age said it might be fifty-six, fifty-seven or fifty-eight. In cross-examination he said he had never been told and his statement as to age was a guess. This is all the oral testimony and it is quite as unsatisfactory and inconclusive as that of the defendants' witnesses.

14. The documentary evidence on which the plaintiff relies consists of a series of written statements forwarded by the plaintiff to the defendants after the death of the assured. These statements were with one exception, made out on printed forms which were supplied by the defendants at the request of the plaintiff. According to the plaintiff's evidence they were filled up by a man of the name of Viraraghava Chari in the presence of the plaintiff. Viraraghava Chari was the son-in-law of one Desika Chari, Desika Chari, at the time the assurance was effected, being a sub-agent of the company. The first of the documents (exhibit VII (a)) purports to be a certificate of death. The form requires the age at the time of death to be stated and the age is given as 57. The certificate is signed by one Bangari Maistri, who describes himself in the certificate as a medical practitioner at Mamandur. This man was called as a witness for the defence (defendants' ninth witness). At the trial he described himself as a dhobie. He says he signed the certificate at the request of the Ayyar who wrote it. He said he signed the certificate on the pial of a house and then went before a Magistrate. The next document exhibit VII (b) is a certificate of burial or cremation. The form requires the age to be stated and the age is given as fifty-nine years two months. This certificate purports to be signed by P. Venkatarama Nayadu, Village Munsif of Venkatapuram. This man was called as a witness for the defence (defendants' eighth witness). He says he signed the certificate because the plaintiff said he was the heir but that he did not know what its contents were. The next document (exhibit VII (c)) is a certificate of identity. The age is stated as about fifty-nine. It is signed by one O. Srinivasa Chari, a landholder of Mamandur village. He was called as a witness for the plaintiff but merely said that he made a statement after the assured died. The next document (exhibit VII (d)) is a certificate by employer. The age is stated as fifty-nine. It is signed by Kumarasami Reddiar, Village Munsif of Arungulam village. He was called by defence (defendants' twenty-third C witness). He says he signed the certificate at the request of the plaintiff and Srinivasa Chari and the certificate was not read out. Of course these documents are valueless as evidence of age. The persons who signed them had no special knowledge as to the age of the deceased and the evidence shows that they signed the forms after they had been filled up and in ignorance of their contents. The documents, at the highest, even if the persons had certified to the statements as of their own knowledge could only have been corroborative of any oral testimony the persons who signed them might have given at the trial. The last document of the series (exhibit VII (a)), however, stands upon a different footing. It purports to be a declaration with regard to the age of the deceased made by his sister who was alive at the time but who died before the trial. It is not made on a printed form, as is the case

with certificates above referred to, but follows a form of declaration by a relative or friend which is given in defendants' prospectus. It is as follows:

Declaration of age of Chelrama Venkatachariar under Policy No. 38,273.

I, Ammalammal, do solemnly and sincerely declare that M. Chelrama Venkatachariar was born on or about the end of the month of Adi, Tamil year Sarwari, which corresponds to the month of August 1840. I remember the date of his birth, since he was a child three days old when my mother's younger sister died of fever, having been bed-ridden for about three months, and I make this solemn declaration conscientiously believing the same to be true."

15. Now this statement would appear to be admissible in evidence u/s 32 (5) of the Evidence Act as a declaration made by a deceased person, provided of course that the evidence establishes that the declaration was in fact made. In my opinion the evidence in the present case does not establish this. It appears from the declaration itself that the sister was a marks woman. The statement was drawn up in English. The woman was ignorant of English and there is no evidence that the statement was interpreted to her. The certificate of the Magistrate, whatever it may be worth simply says "declared." The evidence shows the same procedure was adopted with reference to this statement as with regard to the certificates. They were first drawn up, then the necessary signatures were obtained, then they were declared" before a Magistrate. The plaintiff said that exhibit VII (c) was marked in his presence before a Magistrate. He also said that the deceased woman volunteered the statement herself. It is perfectly clear that she cannot have "volunteered" the whole statement since it refers to the English month of August 1840. In my judgment the plaintiff's evidence merely shows that the deceased sister put her mark to a statement which was "declared" before a Magistrate. It does not establish that the declaration upon which the plaintiff relies was, in anything more than form, a declaration made by the deceased woman.

16. There is thus no evidence to displace the evidence of the defendants except the oral testimony of the two witnesses called on behalf of the plaintiff to which I have referred. In my judgment, therefore, assuming the onus to be on the defendants, the defendants have discharged that onus. The inference which I draw from the evidence of the statements made in connection with the depositions is that the assured's statement with reference to his age was in fact an untrue statement and that it was untrue to the knowledge and belief of the assured.

17. With regard to the other alleged mis-statements upon which the defendants have relied in connection with the answers given by the assured in his personal statement, viz., the answers to questions 5 (a), 10 (6), 10 (c), 12 (a), 1-2 (b) and 14, it is enough for me to say that, in my opinion, upon the evidence, these alleged mis-statements are not of such a character as would entitle the defendants to say that the policy is avoided thereby. In the view which I take

with regard to the misrepresentation as to age it is not necessary for me to discuss the various authorities which were cited in connection with the alleged misrepresentation as to health and medical attendance and the alleged suppression very conveyed in answer to the questions--"How many brothers and sisters are now living?" "If any died at what ages did they die?" With regard to the question of the sisters I think the Judge was right in declining to frame an additional issue as to whether the policy was obtained by means of misrepresentation, by suppression of the fact of the deaths of two sisters, their ages and the diseases they died of.

18. In the case before us the assured made a statement which was untrue in fact and which was, as I am prepared to hold on the evidence, untrue to his knowledge and belief. The statement was in the nature of a warranty and formed part of the basis of the contract. For this reason I think the suit ought to have been dismissed and I think this appeal ought to be allowed with costs. The respondent must pay the costs of the appellants in the Court of First Instance.

Bhashyam Ayyangar, J.

19. I am also of the same opinion. Before considering the questions of law and of fact raised in this appeal, it is of great importance to construe the contract of insurance on which the suit is based, by carefully comparing the several stipulations which are relevant to the present case with each other and with certain statements made in certain documents which are referred to in and incorporated with the policy.

20. The first paragraph of the policy sets forth that the assured has agreed that exhibit I (a), dated the 6th August 1898,--the latter portion of which is the declaration made by the assured before the medical referee of the defendant company after having been examined by him, and the former portion the statement delivered by the assured to the medical referee--shall be the basis of the contract between the assured and. the company.

21. In paragraph 3, the operative part of the policy, it is expressly stipulated that in case any statement or allegation contained in the declaration hereinbefore mentioned be untrue or if the assurance hereby made shall have been made through any misrepresentation, concealment or untrue averment whatsoever...this policy shall be void and all moneys paid in respect thereof shall be forfeited to the company." It is also stipulated that "the assurance hereby made shall at all times and under all circumstances be subject to the regulations and conditions comprised in the company's prospectus, dated 1st July 1896" (exhibit XVII).

22. It will thus be seen that while the recital is that the whole of exhibit I (a) is made the basis of the contract, the operative part declares that if any statement or allegation contained in the latter part of exhibit I (a), i.e., the declaration before the medical referee, be untrue or if the assurance had been obtained through any misrepresentation, concealment or untrue averment whatsoever, the

policy shall be void. And the regulations and conditions comprised in the company's prospectus are also made the basis of the contract in that the policy of assurance is subject to such regulations and conditions.

23. In my opinion the assured has given a warranty, which, in cases of insurance, operates as a condition precedent to the attaching of any risk under the policy, that every statement and allegation contained in the declaration (the latter part of exhibit I (a)) is substantially and in fact true; and according to authorities now well established, the question for the consideration of the Court is, not the materiality or otherwise of such statement or allegation, but its truth.

24. The additional stipulation that if the assurance had been obtained through any concealment or through any misrepresentation or untrue averment whatsoever, the policy shall be void, must be taken to refer to the personal statement (the former portion of exhibit I (a)), to the additional answers, if any, made to the medical referee and to the answers to the questions in the proposal, exhibit I, also dated the 6th August, at the foot of which the proposer certified that his answers were correct. In my opinion, this additional stipulation cannot operate as a warranty and unless the misrepresentation, concealment or untrue averment to which it refers be material, in the sense that it is likely to have influenced the insurers in determining whether to accept the risk at all and, if so, at what premium, the authorities are equally clear that it will not affect the validity of the contract and discharge the company from performing its part of the contract.

25. The only portion of the company's prospectus (exhibit XVII) which is relevant to the present case is that relating to the proof of age, which provides that the company does not "withhold the issue of the policy until age has been proved but recommends assured to produce evidence of age as soon as possible as it is required on settlement of claim if not previously produced."

26. For the purpose of ascertaining the extent of the warranty given by the assured, reference has to be made to the declaration contained in exhibit I (a). It is clear that in regard to the health of the assured the warranty is only that "to the best of the assured's knowledge and belief, he was at the time in good health, had had the small-pox, did not labour under insanity, etc." The warranty then extends to the age of the assured and his residence in India. It is contended on behalf of the respondent that this warranty is not an absolute warranty, but as in the case of the assured's health, only a warranty that "to the best of the knowledge and belief of the assured his age did not exceed fifty-eight years and that he passed .fifty-eight years or thereabout in India," The assured then gives a warranty that he has fully and faithfully answered, without concealment or reservation of any kind, all such questions as have been put to him in exhibit I--the proposal form--and also such as have been put by the medical referee in the personal statement (first part of exhibit I (a)) relative to "his habits, constitution and general state of health." It should be noted here that the warranty last referred to does not extend to all questions in the proposal form and in the

personal statement, but only to such as relate to the habits, constitution and general state of health of the assured.

27. I am unable to accede to the contention that the warranty as to age is not an absolute warranty. It is undoubted that in construing contracts of insurance which are prepared by the insurers the language must be taken more strongly against them and that, if by reason of any ambiguity in it is susceptible of two meanings, that which is more favourable to the assured should be adopted. But there should be a real and not apparent ambiguity. In deciding whether the language of the policy is ambiguous or not, we should not be influenced by considerations of the position in life of the individual assured, his literary capacity or his mother-tongue. The warranty as to age is no doubt contained in an involved sentence and on superficial reading one may receive the impression that the phrase according to the best of my knowledge and belief" occurring in the first clause also qualifies the second clause relating to age. But a careful and close perusal of the whole sentence clearly shows that the above phrase does not qualify the second clause, it having advisedly been inserted after and not before the word "that" occurring in the first clause. The introduction of the word "faithfully" in the third clause would be quite unnecessary if the said phrase governed the second clause and consequently the third also. But it has been advisedly inserted in the third clause as it was not qualified by the said phrase. There being therefore no real ambiguity the policy must be construed as a warranty of the assured's age in truth and fact and not simply as a warranty of his belief as to his age. Considering the importance of the age of the assured in a contract of life insurance it is only reasonable that the warranty as to age should be absolute--at any rate in the sense that it does not exceed a certain figure, and not simply as to the belief of the assured, a belief which in the majority of cases the company cannot be in a position to disprove, though in reality such belief may not be bona fide or may even be dishonest.

28. If the warranty was only as to the belief of the assured as to his age, the onus will no doubt be upon the company to prove a breach of warranty by establishing that the assured could not have believed that his age did not exceed fifty-eight years. And even if the warranty be an absolute one, as I hold it to be in this case, the onus will probably be on the company, as in other cases of breach of warranty as to the assured's habits, health, medical attendance, etc. per Lord Blackburn, J., in *Thomson v. Weems* L.R. 9 App. Cas. 671 to disprove the correctness of the age as given by the assured. But as held by Farran, J., in *The Oriental Government Security Life Assurance Company, Limited v. Sarat Chandra Chatterji* ILR 20 Bom. 99 the effect of incorporating into the policy the prospectus of the company (exhibit XVII) is, I think, to throw upon the assured or his representatives the onus of proving the correctness of the age as warranted by the assured. By reason of such incorporation the policy has to be construed as containing a stipulation that the policy is issued subject to the assured proving the correctness of his age as early as he may find it convenient during his life time, or in default thereof his legal representative proving the

same on the settlement of his claim under the policy. If the assured, subsequent to the issue of the policy, produces before the company any proof of his age and the company, being satisfied with the proof, admits in writing the correctness of the age, the legal representative of the assured need not prove the same in an action upon the policy against the company. u/s 58 of the Indian Evidence Act such an admission will dispense with proof of the fact admitted. With all deference to Farran, J., I am unable to concur in the view taken by him in the above case that the effect of such admission will only be "that the onus of disputing (disproving) the age will be thrown on the company" (page 102). Nor am I able to agree in the view taken by that learned Judge that, notwithstanding the saving Clause (contained in the prospectus which was incorporated in the policy on which the said case was based) to the effect that policies held by parties on their own life are indisputable on any ground whatsoever except fraud--a clause which has been deleted from a later prospectus of the same company, which is the one incorporated into the policy on which the present suit is brought--a person claiming under such policy is not relieved from the burden of giving proof of the age of the assured, but that the legal effect of such saving clause would only be to relieve the assured from the consequences of an innocent misrepresentation as to his age which would other-wise ensue under the strict terms of the contract. If age had been admitted in writing by the company after being satisfied with the proof furnished by the assured, not only would the person claiming under the policy be relieved from the necessity of proving the age in an action brought on the policy, but the company also would be precluded from producing, as of right, evidence to disprove the age as admitted. If, however, the Court is satisfied that the admission has been obtained by fraud or that there is other good and sufficient cause, it will be in its discretion, under the proviso to Section 58 of the Evidence Act, to require the fact to be proved otherwise than by such admission. As regards the saving clause in the prospectus, it will have the same effect as though it were a proviso contained in the policy itself and preclude the company from disputing its liability under the policy on any ground whatsoever except fraud, the onus of establishing which will of course be on the company and I do not see how, in the face of such proviso, it can call upon the person suing upon the policy to prove in the first instance that the age was correctly stated or at least that it was innocently and honestly mis-stated or misrepresented by the assured. This question however does not arise in the present cases inasmuch as the said clause does not find a place in the prospectus with reference to which the policy in question has been issued.

29. As regards the effect to be given to the prospectus as a part of the contract of insurance, I think it will have the same effect as if it had been reproduced in the policy itself and it is quite unnecessary to prove that the prospectus had been read by the assured or that it was specially brought to his notice by the company apart from the reference made to it in the policy itself. A policy of insurance being a contract entered into between the insurers and the assured, and the

terms of such contract resting entirely upon the contract itself and not in the main or even in part upon the common law or upon the Statute, the assured, who makes the proposal, enters into the contract and signs the policy, has in the very nature of things notice that the policy contains all the terms and conditions of the contract. In the leading case on the subject, *Watkins v. Rymil* L.R. 10 Q.B.P. 178 the test laid down by Stephen, J., in delivering the judgment of the Court is "can it be said that the nature of the transaction was such that the plaintiff might suppose, not unreasonably, that the documents (handed to him) contained no terms at all, but be was a mere acknowledgment of an agreement not intended varied by special terms?"

30. Applying this principle to the case before him--which was the acceptance of a carriage for sale on commission--it was held that the terms of such a contract not being established by the common law in the absence of any special agreement of the parties, they must from the nature of the case, be as special as those of a contract of lease or a bill of lading and that such consideration alone was sufficient to establish the conclusion that the receipt and the conditions to which it referred constituted the contract between the parties and that "the learned common sergeant misdirected the jury when he told them that the question was whether the defendant had given reasonable notice to the plaintiff of the conditions." The result of the authorities which were all reviewed in that case is stated as follows: (at page 188) "A great number of contracts are in the present state of society made by the delivery, by one of the contracting parties to the other, of a document in a common form stating the terms by which the person delivering it will enter into the proposed contract. Such a form constitutes the offer of the party who tenders it. If the form is accepted without objection by the person to whom it is tendered, this person is as a general rule bound by its contents and his act amounts to an acceptance of the offer made to him whether he reads the document or otherwise informs himself of its contents or not." To this general rule four exceptions are specified which it is unnecessary to refer to here as none of them are in any way applicable to the present case. The decision of the House of Lords in *Richardson, Spence & Co., and "Lord Gough" Steamship Company v. Rowntree* [1894] A.C. 217 In which the question was as to the effect of a ticket containing various conditions received from a carrier by sea, by a passenger who did not read it, which ticket when issued was folded up so that no writing was visible unless the passenger opened it, in no way departed from the principles laid down in the leading case above referred to.

31. The onus of proving the correctness of the age given by the assured being, as above stated, on the plaintiff who claims under the policy, has he discharged it? In my opinion he has entirely failed, and a stipulation which has the effect of throwing the onus on the assured or his legal representative is perfectly reasonable in a country where it is only very recently that a system of registration of births under the sanction of law has been established.

32. The oral evidence of the witnesses examined by the plaintiff as to the age of

the assured is altogether valueless. Even assuming such evidence to be legally admissible, it is mostly opinion evidence, more or less conjectural. In a case in which the difference between the contending parties as to the age of a deceased person is not more than three or four years, such evidence, even if it be the evidence of an expert medical witness, can hardly carry sufficient weight to be relied upon in deciding the question. The evidence of the only witness on behalf of the plaintiff who speaks to a conversation which his father-in-law the deceased had with him shortly before his death, as to his own age and the ages of other deceased members of the family, is, so far as it goes, against the plaintiff. The statement of the deceased himself as to his age contained in the proposal form (exhibit I) and in the declaration exhibit I (a) is legally admissible in favour of the plaintiff u/s 32, Clause (5) and Section 21, clauses (1) and (3) of the Evidence Act. But it can carry but little weight when it is opposed to prior statements made by the assured himself in respect of his age, in exhibits XXI, II, IV and III. Even according to his own statement in the proposal form the assured was bordering upon sixty and, if it be true, as was sought to be elicited from Mr. Corlett (the joint secretary of the local agent of the company) who was examined as a witness on behalf of the defendant, that according to the practice of the company no life at all is accepted for insurance beyond the age of sixty, the assured would have had a strong motive to understate his age below sixty though he was really sixty-two or sixty-three years of age at the time of the proposal. In my opinion the learned Judge ought not to have disallowed such evidence on the ground that it would be inadmissible "unless it be shown that the assured was informed of it." Even if such evidence may not directly establish that the assured had knowledge of such practice, such knowledge may be reasonably inferred from the evidence which was excluded, coupled with other evidence in the case, It is clearly established that the assured was in communication with the sub-agent of the company in the matter of effecting the insurance and that he was assisted by the sub-agent's son-in-law who filled up the proposal form and who shortly thereafter became a sub-agent himself. If according to the practice of the company a life is not insured after the age of sixty, the agents and sub-agents of the company would know of such practice and it may reasonably be inferred that the assured would have learnt of the same from the sub-agent just as he learnt that, after the payments of premia for some time, he could raise a loan from the company itself on the security of the policy to enable him to continue the payment of premia. Whether such inference can be safely drawn or not will in no small degree depend upon the nature of the evidence which might have been given by Mr. Corlett if the same had not been excluded. If such be not the practice of the company or if at any rate the assured had no knowledge that such was the practice of the company the only motive which the assured could have had in understating his age would be to insure his life at a lower premium than he would have had to pay if his age had been truly stated. But considering that even according to the defendant the assured did not understate his age by more than three or four years, I do not know if the difference in the premium would be considerable; and if the difference be small I should not be disposed to

accept the theory that he understated his age by three or four years simply for securing the advantage of a slightly reduced rate of premium at the risk of forfeiting the policy but for his own prior statement as to his age made on four different occasions when he appeared as a witness in certain cases. He could possibly have had no motive in overstating his age on any one of those occasions and the statements made as to his age on those different occasions substantially tally. The fact that those statements as to age were made by him not on oath is perfectly immaterial in determining, for the purposes of the present; suit, the weight to be attached thereto as against the later statement as to his age made in the proposal form (exhibit I).

33. The next document exhibited on behalf of the plaintiff which requires to be noticed is exhibit 13, the confidential medical report sent to the company by Dr. Giffard after he examined the assured.

34. Assuming that there was no false personation and that the person examined by the medical referee was the assured himself, it is difficult to see on what principle his report to the company could be admitted in evidence without examining Dr. Giffard himself as a witness. If he were examined as a witness he could no doubt refresh his memory by referring to his report. The medical report is a record of certain facts observed by the referee and of the opinions formed by him, as an expert, as to the health, age, etc., of the assured. Such of those facts and opinions as may be relevant to the enquiry in the present suit cannot be proved by the production of the report, but only by the evidence of Dr. Giffard (Section 60 of the Evidence Act). It is impossible to accede to the contention that the statement made by the medical referee in his report to the company should be treated as statements made by the company's agent and therefore admissible against the company as admissions under Sections 18 and 21 of the Evidence Act, and in my opinion, it will make no difference whether the medical referee is specially employed in individual cases or is the standing medical referee of the company. A medical man is selected and employed by the company to examine the applicants for insurance and report confidentially the conclusions to which he may come, as an expert, as to the various questions referred to him for observation and opinion as to the health of the applicants. The very nature of the employment and the purpose for which the medical referee is employed preclude the notion that the record of the observations made and of the opinions formed by him ought to be treated as admissions made by the insurance company. One of the questions referred to Dr. Giffard is "Does he (the applicant) look older or younger than the avowed age (58 years)? This question is answered no." Is this to be treated as an admission by the company that the age given by the assured was correct? It is simply the opinion of an expert on the question and if the plaintiff wants to rely upon it he can only do so by examining the doctor as a witness as to the opinion formed by him and the grounds on which that opinion was formed (Section 60 of the Evidence Act). As stated already even expert opinion in the matter of age cannot be safely accepted and acted upon when the difference between the contending parties as

to the age is only about three years.

35. The next piece of evidence on behalf of the plaintiff, which is strongly relied upon and on which the judgment of the learned Judge is chiefly based is exhibit VII (e), dated 29th October 1899, purporting to be a declaration made by the sister of the assured that "he was born on or about the end of the month of Adi, Tamil year Sarvari, corresponding to August 1840." The evidence that it is a statement made by the sister since deceased is very meager. It is in the English language and she affixes her mark to it in the presence of the Magistrate. A statement as to the age of a member of a family, made by his sister is no doubt admissible after her death u/s 32, Clause (5) of the Evidence Act, illustration (e) and *Ram Chandra Dutt v. Jogeswar Narain Deo* ILR 20 Calc. 758. The principle of the decision in my opinion is that the time of one's birth relates to the commencement of one's relationship by blood and a statement, therefore, of one's age made by a deceased person having special means of knowledge relates to the existence of such relationship within the meaning of Section 32, Clause (5). Even assuming that the statement can be regarded as one made by the sister, it can hardly carry any weight though technically it may be admissible in evidence. It is true it was not made after the question in dispute was raised, but it was made at the instance of the plaintiff by his paternal aunt for the express purpose of furnishing the company with proof that the age as given by the assured was correct, thereby securing to her nephew, the plaintiff, the payment of the amount. There is also internal evidence in the statement casting great suspicion on the declaration. She states that she remembers the date of her brother's birth since he was a child three days old when her mother's younger sister died. Her mother's sister must have been married into a different family and it is strange that she fixes the almost exact time of her younger brother's birth by associating it with her aunt's death without at all disclosing how she remembers that her aunt died in the year Sarvari, at the end of the month of Adi. Another circumstance which casts grave suspicion is the non-production of the assured's horoscope. If, as the assured stated in the proposal form, he knew the exact date of his birth, it is improbable that he would have had no horoscope.

36. The so-called solemn declarations made by certain other persons also, at the same time as the sister's, as to the age of the assured and which also have been marked as exhibits in the case are of no value whatever and are clearly inadmissible in evidence as the declarants are alive and some of them in fact have been examined as witnesses in the case. They can only be used in cross-examination (under Section 145 of the Evidence Act) for the purpose of contradicting the witness, but they cannot be used to corroborate the testimony of the witness as the statements were not made before any authority legally competent to investigate the fact declared (see Section 156 of the Evidence Act).

37. Turning now to the evidence adduced on behalf of the defendants as to the age of the assured, I have already adverted to exhibits XXI, II, IV and III, There

is no reason whatever to distrust the statements therein made by the assured as to his age and according to those statements he understated his age to the company by about 3 years. The oral evidence adduced on behalf of the defendants, except that of one witness, is not entitled to any weight. But I attach some weight to the evidence of Sundarachari. He is the assured's first cousin and he swears that his age is 65 and that the assured was his senior in age by one year. He deposes that the deceased was treated and respected as his senior in age, and that on occasions of ceremonies the villagers "treated me as the younger." If the witness was 65 when he was examined as a witness in this case in November 1900, he must have been about 62 years of age in August 1898 and the assured therefore, according to the evidence of this witness, must have been about 63 at that time.

38. For the foregoing reasons I am clearly of opinion that the plaintiff has not proved that the age given by the assured was correct, but that on the contrary the defendant has established by reliable evidence that the assured understated his age by about 3 or 4 years. Even if the warranty as to age were not an absolute one, but only a warranty as to the assured's belief of his age, I agree that there has been a breach of even this qualified warranty.

39. I shall now briefly advert to two other contentions raised on behalf of the appellant. It was strenuously argued that the policy was rendered void by reason of the assured not having alluded in the personal statement to the fact of two of his sisters having predeceased him. No allusion whatever was made to this either in the original or in the supplemental written statement. During the trial of the suit the plaintiff as his first witness stated in his examination-in-chief that the assured had three sisters. Several days after the plaintiff gave his evidence and closed his case, the defendants' counsel, after he had examined 16 witnesses for the defence, applied to the learned Judge to raise an additional issue as to "whether the policy was obtained by means of misrepresentation by the suppression of the facts of the deaths of two sisters, their ages and the diseases they died of." The learned Judge declined to frame this additional issue. The learned Counsel for the appellant urges that the additional issue applied for ought to have been framed and that he should now be allowed to raise the same as it only raises a pure question of law. The argument that the issue applied for is a pure question of law is, in my opinion, based upon a misapprehension. It essentially raises an issue of fact or at any rate a mixed issue of law and fact. The matter stands thus; the tenth question in the personal statement has reference to this. The first part (a) of the question is have your brothers and sisters been healthy? Answer "yes"; the second part (b) How many are now living and at what ages? Answer one sister at 88 years of age; the third part (c) if any died, of what diseases and at what ages did they die? Answer "Brother died at 77 years of age." The plaintiff at the very outset of his examination-in-chief stated that the assured had three sisters, two of whom, therefore, must have been dead at the date of the personal statement. It is contended that the non-disclosure of the death of these two sisters in the answer to the tenth

question is a breach of the warranty contained in the third clause of the declaration exhibit I (a). I am clearly of opinion that the answers to this question, which does not relate to the assured's "habits, constitution and general state of health", are not within the purview of the third clause. The learned Counsel says that as the question concerns the health of the assured's sisters, the longevity and the diseases they died of, it relates to the constitution and general state of health of the assured himself. This is placing a strained and rather fanciful interpretation upon the expression, "the constitution and general state of health" of the assured. Even if the clause had been differently worded so as to admit of the above interpretation, I should not, having regard to the use of the word "faithfully" in the clause and to the rather confused manner in which the three parts of question 10 are framed, be prepared to hold that there was a breach of warranty unless the assured intentionally concealed the existence and death of the two sisters. It is clear that neither in the first nor in the second clause of the declaration is there any warranty in respect of this and, in my opinion, if the issue applied for be framed, the finding thereon will depend upon the second portion of the proviso in the operative part of the policy, viz., that the policy shall be void if the assurance shall have been obtained through any misrepresentation, concealment or untrue averment whatsoever. Whether the answer to question 10 in so far as it relates to the two sisters is to be regarded as a misrepresentation, or a concealment or an untrue averment, is immaterial; for the contract of insurance would have been vitiated only if the misrepresentation, concealment or untrue averment was such as to have influenced the insurers in accepting the risk or at any rate in accepting it at the premium agreed upon. There is a marked difference between the first part of the proviso which operates as a warranty of the statements and allegations contained in the declaration and the second part of the proviso which relates to any misrepresentation, concealment or untrue averment by means whereof the assurance has been obtained. Unless therefore the misrepresentation, concealment or untrue averment was in respect of a material particular, the policy will not be vitiated *London Assurance v. Mansel* L.R. 11 Ch.D. 363. If neither of the two sisters, therefore, died very young or of any disease which may be regarded as hereditary, the concealment will be perfectly immaterial as it would not have affected either the acceptance of the risk or the rate of premium. The issue applied for, if framed, will necessarily involve an investigation into the ages of the two sisters at the time of their death and the diseases they died of. The learned Judge therefore rightly declined to frame the additional issue, especially as the application was made at a very late stage during the trial of the suit.

40. The last contention was that the learned Judge excluded from evidence certain copies of medical prescriptions which would go to establish that Dr. Varadappa was the medical attendant of the assured and that the assured had suffered for some years from various diseases including dropsy. The original prescriptions not having been produced, though all possible steps were taken by

the defendants for their production in Court, secondary evidence of the same was admissible. Dr. Varadappa Nayadu when examined as a witness for the defence stated that he did not remember the assured and that he did not know if he had ever attended upon him. Exhibits XI (d), XI (e) and XI (f) which extend from the 13th to the 18th February 1894, were originally admitted in evidence under the impression that they were originals; but they were subsequently rejected when it was found that they were only copies. They have not been proved as copies, nor has it been proved that the signature on the originals from which they were copied was the signature of Dr. Varadappa. Even if the defendants were now to be allowed to adduce such evidence, it will only go to show that for less than a week in 1894 the assured consulted Dr. Varadappa and obtained prescriptions from him. Exhibits XXXI (a), XXXI (6), XXXI (o), XXXI (d) place it beyond reasonable doubt that the Venkatachari referred to in the prescriptions XI (d) to XI (f) is the assured. Judging from the contents of these prescriptions, the ailment for which they were given does not seem to be a serious one. The fact that the assured thus consulted Dr. Varadappa would not make him his medical attendant within the meaning of the question put to the assured in the proposal form and in the personal statement.

41. Our attention was also drawn to copies of several other prescriptions which stand in the name of one Venkatachari in 1894, 1896, 1897, 1898 and 1899, and particularly to a prescription dated 23rd November 1897, which it is alleged is a prescription for dropsy. There is nothing whatever to identify the Venkatachari mentioned in these prescriptions with the assured. On the contrary the omission in these prescriptions to associate the name of the plaintiff with that of the assured, as is done in the prescriptions XI (d) to XI (f), and to debit the plaintiff with the costs of these prescriptions is significant. I may also observe that prescriptions in themselves will not prove that the person for whom they were given suffered from diseases for which such prescriptions are usually given. If the fact to be proved is not simply that the assured had a medical attendant but that he was suffering from any disease, that will have to be proved by examining the medical attendant who gave the prescriptions, which he may of course use for the purpose of refreshing his memory.

42. The only breach of warranty therefore which has been established in the case is the statement of the assured as to his age, and the plaintiff's suit fails only on that ground.

43. I do not think he is entitled u/s 65 of the Contract Act to a refund of the premia paid on the policy during the lifetime of the assured. Section 65 can apply only to cases in which the agreement is discovered to be void or the contract becomes void at law for any of the reasons specified in the Contract Act. Neither that section nor Section 64 applies to cases in which there is a stipulation that, by reason of a breach of warranty by one of the parties to the contract, the other party shall be discharged from the performance of his part of the contract.

Sir Arnold White, C.J.

44. I agree that the plaintiff is not entitled to a refund of the premia.