

1945

Present: Jayetilleke J.

HAMY VEL MULADENIYA Appellant, and SIYATU
Respondent.

236—C. R. Teldeniya, 514.

Evidence—Person not heard or for seven years—Presumption of death—Inheritance to property—Evidence Ordinance, s. 108.

Where a person is presumed to be dead in accordance with the provisions of section 108 of the Evidence Ordinance, his property may be divided among his heirs.

A PPEAL from a judgment of the Commissioner of Requests, Teldeniya.

L. A. Rajapakse, K.C. (with him *S. R. Wijeyatilake* and *T. B. Dissanayake*), for plaintiff, appellant.

C. E. S. Perera for defendant, appellant.

15th February, 1945, JAYETILLEKE J.—

This is an action for a declaration of title to an undivided half share of a field called Kongahakumbura. It is common ground that the field belonged originally to one Appu and that he died leaving six children, Punchirala *alias* Unnanse, Kiri Menika, Punchi Menika, Mudalihamy and the 1st and 2nd defendants. Ukku Menika and Mudalihamy died leaving as their heirs their brothers and sister. The contest is with regard to the shares of Kiri Menika and Punchirala *alias* Unnanse. The plaintiff alleges that Kiri Menika married in diga and thereby forfeited her rights to paternal inheritance, and that Punchirala left the village about 25 years ago and has not been heard of since. The learned Commissioner has held that Kiri Menika was not married in diga. That finding is supported by the evidence. With regard to Punchirala it seems to me that the finding of the learned Commissioner is wrong. He has overlooked the statement made by the 1st defendant in an answer (P 6) filed by him in the year 1943 in action No. 433 of the Court of Requests of Teldeniya that he has not heard of Punchirala for many years. That statement supports the evidence of the plaintiff and of Ukkurala that Punchirala left the village about 20 or 25 years ago and has not been heard of since. Under section 108 of the Evidence Ordinance 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 presumption of life ceases, and the burden is shifted to the person who denies the death. The burden of proving that Punchirala is alive would therefore, be upon the 1st defendant. That burden has not in my opinion been discharged. Counsel for the 1st defendant contended that even if Punchirala may, upon the evidence, be presumed to be dead his property cannot be divided among the heirs. I do not think this contention is well-founded. In *Willyams v. Scottish Widows' Fund*¹

where a person whose life was insured had not been heard of for seven years those who effected the insurance were held to be entitled to have it paid at the end of that period. In *Doe v. Deakin*² where the lessor of the plaintiff, to prove his title in an action of ejectment, put in a settlement 130 years old, by which it appeared that the party through whom he claimed had four elder brothers, the jury were allowed to presume that those persons were dead.

The shares should, in my opinion, be allotted on the basis that Punchirala's rights have devolved on Punchi Menika, the 1st defendant, and the 2nd defendant. The plaintiff has purchased the interests of the 2nd defendant. I would set aside the judgment appealed from and direct that judgment be entered declaring the plaintiff entitled to a 1/3rd share of the land. The parties will bear their own costs here and in the court below.

Appeal allowed.