1959 *Present :* **Basnayake, C.J., and Pulle, J.**

DAVOODBHOY, Appellant, *and* FAROOK and others, Respondents

S. C. 402—D. C. Colombo, 6,419

Evidence—Burden of proving that a person who has not been heard of for seven years is dead—Evidence Ordinance, ss. 101, 107, 108, 114.

Fideicommissum—Presumption against inference of perpetual fideicommissum—Last will of 1850—Requirement of registration under Ordinance No. 35 of 1947—Probate of will—Proof—Evidence Ordinance, ss. 64, 65, 91—Prescription Ordinance, proviso to s. 13—" Disability ".

(i) Section 108 of the Evidence Ordinance enacts a rule governing burden of proof and does not enact a presumption of law or fact. 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.

The plaintiffs, claiming to be fideicommissaries under a last will, instituted a *rei vindicatio* action in respect of property of which the defendant was already in possession by virtue of a deed of sale in his favour. The question that arose for decision was whether J, the fiduciary, was dead. On this question the burden of proof, according to the pleadings and issues, was on the plaintiffs. The only evidence that was led on this point was that of the 1st plaintiff (one of J's sons), who stated that J. had not been heard of for seven years.

Held, that the evidence was not sufficient to discharge the burden that lay on the plaintiffs to prove that J. was dead.

(ii) A fideicommissum will not be construed as a perpetual fideicommissum in a case of doubt.

(iii) Considered also by BASNAYAKE, C.J. : (*a*) Scope of section 2 (1) (*b*) o Ordinance No. 35 of 1947 in regard to registration of a fideicommissary will executed prior to 1st January, 1864, (*b*) Applicability of sections 64, 65 and 91 of the Evidence Ordinance in relation to the mode of proving whether a will was admitted to probate, (*c*) Inapplicability of the word " disability ", in the proviso to section 13 of the Prescription Ordinance, to a fideicommissary whose right to possession has not accrued.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *Walter Jayawardene* and *Nimal Senanayake*, for Defendant-Appellant.

Sir Lalita Rajapakse, Q.C., with *D. C. W. Wickremasekera*, for Plaintiffs-Respondents.

Cur. adv. vult.

2—J. N. B 18749—2,033 (8/61)

October 23, 1959. BASNAYAKE, C.J.—

The first and second plaintiffs are the children of one Samsudeen Mohamed Jaleel and the third and fourth plaintiffs are the minor children of Jaleel's deceased daughter Quraisha. The case for the plaintiffs is—

(*a*) that Hamidu Lebbe Samsudeen *alias* Colenda Marikar Samsudeen was by virtue of Deed No. 663 of 5th June 1902 attested by Notary F. A. Prins the owner of the land in dispute, subject to a fideicommissum created by Last Will No. 418 dated 22nd July 1850.

(*b*) that Hameedu Lebbe died leaving two children Samsudeen Mohamed Jaleel and Samsudeen Zubaida Umma.

(*c*) that Zubaida Umma died leaving an only child who also died without issue.

(*d*) that Jaleel became the sole owner of the land subject to the fideicommissum.

(*e*) that Jaleel has not been heard of since the early part of the year 1942.

(*f*) that Jaleel should be presumed to be dead from the early part of 1949.

(*g*) that the first and second plaintiffs were each entitled to 2/5 share and the third and fourth plaintiffs to 1/10 share each.

(*h*) that the first and second plaintiffs by deed No. 1570 of 4th October 1951 attested by Notary K. Rasanathan transferred a half of their respective shares to the sixth plaintiff who is entitled to 2/5 share.

They ask that they be declared entitled to the land described in the Schedule to the plaint subject to the fideicommissum pleaded by them, that the defendant be ejected therefrom and for damages.

The defendant denies that Colenda Marikar Samsudeen held the land subject to a fideicommissum. He challenges the claim of the plaintiffs that the Last Will No. 418 of 22nd July 1850 created a fideicommissum and that it was admitted to probate. The defendant further pleads that Jaleel was the absolute owner of the land in dispute and claims it by right of purchase from him on 8th November 1917, from which date he undoubtedly has been in possession.

The learned District Judge has held—

(*a*) that Mohideen Natchchia executed the Last Will No. 418 of 22nd July 1850, a certified copy of the duplicate of which is produced marked P2, and that it was admitted to probate in D. C. Colombo Case No. 1734.

(*b*) that P2 creates a fideicommissum in perpetuity.

(*c*) that there is no proof that Jaleel is alive and should be presumed to be dead.

Learned counsel for the defendant-appellant submitted—

(*a*) that there is no proof that Jaleel is dead.

(*b*) that the Last Will P2 is not registered as required by Ordinance No. 35 of 1947.

(*c*) that there is no proof that P2 was admitted to probate.

(*d*) that the Last Will P2 does not create a perpetual fideicommissum.

(*e*) that the defendant has possessed the land for thirty years and was under the second proviso to section 13 of the Prescription Ordinance entitled to it.

The first of the above points was strenuously pressed. In dealing with it sections 107 and 108 of the Evidence Ordinance were discussed at great length by both counsel. These two sections occur in a group of sections in the Part of the Evidence Ordinance entitled " Production and Effect of Evidence " and under the heading " Of the Burden of Proof ". The first rule enacted under this heading is in section 101 which reads—

" Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

" When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. "

It is not necessary for the purposes of this case to refer to any of the other rules which occur between sections 101 and 107. It will be convenient at this point to quote sections 107 and 108. They are 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 ".

It is essential to bear in mind that these two sections 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. Section 107 enacts the rule and section 108 enacts the proviso to it. In one case it is sufficient to " show " that the person about whom the question has arisen was alive within thirty years, in the other it must be " 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. These sections regulate the burden of proof in a case in which one party affirms that a person is dead and the other party that the same person is alive, and the question for decision is whether the person is dead or alive.

In the instant case the plaintiffs state in paragraphs 6 and 7 of the plaint that—

" 6. The said Samsudeen Mohamed Jaleel has not been heard of since the early part of the year 1942 and the plaintiffs plead that the said Samsudeen Mohamed Jaleel should be presumed to be dead as from the early part of 1949.

" 7. The said Samsudeen Mohamed Jaleel left as his heirs his children the first and second plaintiffs and a daughter Quraisha, who became entitled to the said land and premises as at early 1949 subject to the same entail and fidei commissum ".

The above allegations in the plaint are answered by the defendant as follows :—

" 6. Answering to paragraph 6 of the plaint the defendant puts the plaintiff to the proof of the death of the said Jaleel.

" 7. Answering to paragraph 7 of the plaint the defendant states that he is unaware that the 1st and 2nd plaintiffs and Quraisha are the heirs of the said Jaleel and therefore puts the plaintiffs to the proof thereof. The defendant denies that the 1st and 2nd plaintiffs and Quraisha became entitled to the said land and premises ".

It would appear from the foregoing that the question that arises for decision is not whether Jaleel is alive or dead but whether he is dead. Doubtless if a man is not dead he must be alive ; but in a civil trial it is for the party on whom the burden rests to discharge it and failure of the party on whom the burden does not rest to disprove any fact the burden of proof of which lies on the other does not enable him to succeed. Now in the instant case the plaintiffs cannot maintain this action unless they prove that Jaleel is dead, for if he is not dead, on their own showing they have no right to be declared entitled to the land or to be placed in possession of it. The burden of proof in a case such as this would be governed by section 101 and not sections 107 and 108, for the legal right of the plaintiffs is dependent on the fact of Jaleel's death which the plaintiffs ask the court to presume without proving by affirmative evidence. They do not indicate that they have in mind section 114 of the Evidence Ordinance and there is no other section under which the court may be invited to presume the existence of a fact. The best form of proof of a person's death is the production of his death certificate with evidence as to the identity of the person to whose death it relates. In the absence of such a certificate it is open to a person to produce evidence of those who knew the deceased and were present at his death and attended his funeral. Where proof of death cannot be furnished by direct evidence a party on whom the burden lies may seek to discharge the burden by proving such facts and circumstances as would enable the court to presume that the person is dead.

In a case where one party affirms that a person is dead and another that he is alive, if a party produces evidence to the effect that he was alive within thirty years then the person who affirms that he is dead

must prove that he is dead ; but if the person who affirms that he is dead instead of proving that he is dead leads evidence which proves that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive then the person who affirms that he is alive must prove that he is alive. So that in a case where the question is whether a person is alive or dead and one party affirms that he is dead and the other that he is alive and it is in evidence that he was alive within thirty years the burden that lies on the party that affirms that he is dead by virtue of section 107 to prove that he is dead shifts by operation of section 108 to the party that affirms that he is alive if 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 instant case is not such a one. Here the plaintiffs *invite* the court to presume that Jaleel is dead. They do not even affirm that he is dead.

So much for the provisions governing the burden of proof. I shall now examine the evidence. Giving evidence on the 29th November 1956 the first plaintiff said—

(*a*) that his father, who was a gem merchant left Ceylon in August 1942 by Talaimannar train for Madras in India.

(*b*) that he had not heard of him up to the date on which he gave evidence.

(*c*) that he wrote to some people in India inquiring about his father but got no replies.

(*d*) that he wrote to a Company with which his father had business dealings in Singapore and he was informed that he had not come there.

(*e*) that his father was 65 years of age when he left for India.

(*f*) that his father had friends in Ceylon.

(*g*) that he has not paid any estate duty on the footing that his father is dead.

The witness Mohamed Muktar who gave evidence on behalf of the first plaintiff said that he made inquiries from his children about a year or two after Jaleel left for India and was informed that he was getting on well. Neither Jaleel's wife who was alive nor his other son the second plaintiff gave evidence. The evidence tendered by the plaintiffs does not establish that Jaleel is dead nor may a court presume upon the material offered by them regard being had to the common course of natural events, that Jaleel is dead. The best evidence of Jaleel's age, his birth certificate, is not produced. But even accepting the first plaintiff's statement, which is hearsay and not proof of his age, that Jaleel was 65 years of age when he left for India in 1942, on 17th October 1951, the date on which this action was instituted, he would be 74 years of age. There are many persons of that age alive today and the court may not presume on the evidentiary material before it that a man of 74 is dead. The plaintiffs have therefore not established either by

affirmative or by presumptive proof that Jaleel is dead and their action must fail. The learned District Judge's approach to the burden that lay on the plaintiffs is wrong. He had addressed to himself the question—"Is Jaleel alive?" The defendant did not affirm that he was alive. He put the plaintiffs to the proof of the fact on which they relied, namely, that he is dead, a fact on the proof of which the success of their case depended. The burden was on them throughout to prove that fact. It never shifted to the defendant. As explained above, for sections 107 and 108 to come into operation and the burden of proof to get shifted from one to the other there must be one person who affirms that a person is dead and another who affirms that that person is alive.

The following issues were suggested by counsel for the defendant on the subject of Jaleel's death :—

"9. Has the said Samsudeen Mohamed Jaleel not been heard of since the first part of 1942?

"10. If so does the presumption arise that the said Jaleel is dead?"

The learned trial Judge adopted these issues and answered them in the affirmative. They do not show precisely whether learned counsel had in mind section 114 of the Evidence Ordinance or sections 107 and 108. It would appear that both Judge and counsel were not clear as to the provisions governing the burden of proof in a case such as this. The learned Judge's answers are wrong. The evidence is that up to about 1944 his children heard from Jaleel, and the evidence produced does not support a presumption under section 114 of the Evidence Ordinance.

I now come to the second point urged by learned counsel. The trial Judge has held that neither the Will (P2) nor the probate of that Will was duly registered and it is therefore not necessary to discuss it further as there is no proof that they were registered. The issue on this point is as follows : "Was the alleged Last Will and/or Probate if any thereof duly registered?" The learned Judge has answered it thus—"No proof of this, but the registration of deed 663 of 1902 (P6) which refers to the Will is sufficient." There is no evidence that P2 and the Probate thereof were registered either under the enactment relating to the registration of documents now in force or any of the enactments on the subject in force at the time of the execution of the Will or the grant of Probate or thereafter.

P6 undoubtedly refers to a Will of Mohideen Natchia. The only question is whether P2—Will No 418—is referred to therein.

Section 2 of Ordinance No. 35 of 1947 reads—

"(1) On and after the first day of January, 1948, no instrument affecting any land, which was executed or made at any time prior to the first day of January, 1864, shall unless—

(*a*) it was, at the date of the commencement of this Ordinance, duly registered under any of the Ordinances specified in sub-section (3); or

(*b*) it is referred to in any other instrument which was, at the date of the commencement of this Ordinance, registered under any of the Ordinances specified in sub-section (3) as an instrument affecting that land ; or

(*c*) it is registered in accordance with the provisions of this Ordinance,

be of any force or avail or be received in evidence in any Court as against any person claiming any interest in such land upon valuable consideration or any other person claiming under any such person, for the purpose of proving the land to be subject to a trust or *fidei-commissum.*

" In this sub-section ' interest ' means an interest created or arising whether before or after the date of the commencement of this Ordinance.

(2) The provisions of sub-section (1) shall apply to any instrument executed or made prior to the second day of February, 1840, notwithstanding that such instrument may have been registered under the Sannases and Old Deeds Ordinance.

(3) The Ordinances referred to in paragraphs (*a*) and (*b*) of sub-section (1) are—

The Registration of Documents Ordinance (Cap. 101)

The Land Registration Ordinance, No. 14 of 1891

The Land Registration Ordinance, No. 5 of 1877

The Land Registration Ordinance, No. 8 of 1863. "

The expression " referred to " does not mean " incorporated in ". It is therefore not necessary that the subsequently registered instrument should contain a reproduction of the terms of the old unregistered instrument. Is mere mention of the unregistered instrument sufficient or should the registered instrument refer to it in such terms that anyone reading it can if he is so minded ascertain the contents of the unregistered instrument by search at a Land Registry or a Court where records of deeds and documents are preserved ? I am inclined to think that the reference in the registered instrument should be such as to give to its reader sufficient information regarding the unregistered instrument to enable him to trace it and refer to it in order to ascertain its purport.

The references in P6 to the Last Will are as follows :—

" Whereas Mohideen Natchia widow of Amidol Lebbe Samsee Lebbe by her Last Will and Testament dated twenty-second July 1850 executed before me Coonje Marikar Mohamado Lebbe, Notary Public of Colombo, the original whereof is in Tamil and is filed of record in the District Court of Colombo in Case No. 1734 declared that she was in the possession of the premises described in the Schedule A hereto and which premises she declared to bequeath to her eldest son Samsee Lebbe Amidol (Hamidu) Lebbe with intent and meaning

that it shall be under the bond of fideicommissum for ever and the said premises and the profits arising therefrom she willed that the said Samsee Lebbe Hamidu Lebbe should enjoy, but the same could not be sold or mortgaged for any debts or be otherwise ruined wasted or damaged but that her descendants should inherit the same with the intent and meaning that if it be found necessary that the said premises should be bestowed for dowry the same should be given with the same intent and meaning and that if there should be no heirs to the said property it should devolve upon the mosque as is morefully stated in the fifth clause of the said Last Will.

"And whereas the said Mohideen Natchia died on or about the twenty-fourth December 1855 and the said Last Will and Testament of the twenty-second July 1850 was duly proved in suit No. 1734 of the District Court of Colombo and Probate thereof granted to Samsy Lebbe Ahamadu Lebbe the Executor in the said Last Will and Testament named".

This is not only a reference to a Last Will but is also an incorporation of the substance of that Will and in my opinion more than satisfied the requirements of section 2 (1) (*b*) ; but this does not answer learned counsel's contention that Will No. 418 (P2) is not referred to. There is no evidence that the Will referred to in P6 and Will No. 418 (P2) are the same. It cannot therefore be said that P2 is referred to in P6.

In regard to the third point there is no proof that Will No. 418 (P2) was proved. Neither the Probate nor the testamentary proceedings in which the Will was proved are produced. The first plaintiff has produced a letter dated 30th September 1952 (P3) from the Secretary of the District Court of Colombo to the effect that the Probate and Inventory in D. C. Colombo 1734T dated 15th September 1852 are missing according to an Inventory prepared some years ago. This letter does not prove that Will No. 418 (P2) has been admitted to Probate in the case mentioned therein.

He also produces a document (P4) which is as follows :—

"IN THE DISTRICT COURT OF COLOMBO

Testamentary Index

×××	×××	×××	×××
			Number
Mohedin Natchie of Colombo	..	..	1734
×××	×××	×××	×××

'True copy' of extract from Testamentary Index Register page 197 in D. C. Colombo.

(Sgd.) E. SANGARAPILLAI
Asst. Secretary, D. C. Colombo.

Certified this 10th day of December, 1953."

Even this document does not prove that the Will No. 418 (P2) has been admitted to Probate. Another document on which the first plaintiff relied for the purpose of establishing that the Will P2 has been proved is P5 which is the copy of a deed No. 8744 executed on 4th April 1856 by Samsu Lebbe Ahamadu Lebbe one of the sons of Mohideen Nachchia. The recitals relied on are as follows :—

> "And whereas the said Mohideen Natchchi heretofrom to wit at Colombo on or about the 24th day of December One thousand eight hundred and fifty-five departed her life having previously made and published her last will and testament bearing date the twenty-second day of July One thousand eight hundred and fifty and thereby appointing one of her two sons namely Samsu Lebbe Ahamadu Lebbe sole executor of the said Last Will who proved the said last will before the District Court of Colombo in the case No. 1734 and obtained probate thereof a copy of which said probate bearing date the thirty-first day of March One thousand eight hundred and fifty-six is hereunto annexed."

The same deed also refers to an extract of the Last Will which is annexed to it in these terms—"as is morefully stated in the fifth clause of the said Last Will an extract from which is hereto annexed." The copy of the Probate is not annexed to the certified copy of the deed produced in this case nor is there an extract of the Last Will. He also relies on the copy of a deed (P6) of 27th May 1902 executed by Colenda Marikar which refers to a Last Will of 22nd July 1850 which was proved in suit No. 1734 of the District Court of Colombo and Probate thereof was granted to Samsy Lebbe Ahamadu Lebbe the executor of the said Last Will and Testament.

Do the documents on which the first plaintiff relies prove that the Will produced in the instant case has been proved as the Last Will of Mohideen Natchchia ? I think not. The granting of Probate is a matter which is required by law to be reduced to the form of a document. Section 91 of the Evidence Ordinance provides that in such a case no evidence shall be given in proof of the terms of such matter except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible. The Probate has not been produced although it would appear from the documents produced that a Probate was in existence in 1856. There is no legal evidence that the Probate which was in existence in 1856 has been destroyed or lost. The Probate is a document given by the court to the executor. P4 establishes only that the entry Mohedin Natchie of Colombo . . .Number $\frac{\text{1734}}{\text{}}$ occurs in the Testamentary Index. That is not enough to bring section 65 of the Evidence Ordinance into operation and to permit of secondary evidence of the Probate being given, if such evidence were in fact available.

The evidence that has been produced by the first plaintiff to prove the Probate of the Will in question is not even secondary evidence though

that evidence has been allowed. Now the rule is that documents must be proved by primary evidence (s. 64 Evidence Ordinance). The exceptions are to be found in section 65 which reads—

" Secondary evidence may be given of the existence, condition, or contents of a document in the following cases :—

(1) When the original is shown or appears to be in the possession or power—

(i) of the person against whom the document is sought to be proved, or

(ii) of any person out of reach of, or not subject to, the process of the court, or

(iii) of any person legally bound to produce it,
and when, after the notice mentioned in section 66, such person does not produce it ;

(2) When the existence, condition, or contents of the original have been proved to be admitted in writing by the person against whom it is sought to be proved, or by his representative in interest ;

(3) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time ;

(4) when the original is of such a nature as not to be easily movable ;

(5) when the original is a public document within the meaning of section 74 ;

(6) when the original is a document of which certified copy is permitted by this Ordinance or by any other law in force in this Island to be given in evidence ;

(7) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.

In cases (1), (3), and (4), any secondary evidence of the contents of the document is admissible.

In case (2), the written admission is admissible.

In case (5) or (6), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (7), evidence may be given as to the general result of the document by any person who has examined them, and who is skilled in the examination of such documents. "

In the instant case even if the plaintiffs had a certified copy of the Probate they would not have been entitled to produce it without bringing themselves within the ambit of section 65. There being no proof that the Will No. 418 (P2) has been admitted to Probate it cannot be acted on as the Last Will of the deceased. It is therefore unnecessary to decide whether the Will No. 418 (P2) creates a perpetual fideicommissum. But as a great deal of time appears to have been devoted at the trial to a discussion of the effect of this Will (P2) and as the learned District Judge has referred to it at length and formed the conclusion that it creates a perpetual fideicommissum, I think I should express my opinion. The effective part of the document " X ", which is the translation of Will No. 418 made by the plaintiffs' expert, reads—

> " I give unto my first son Samsi Lebbe Hameedu Levvai subject to the condition of fidei commissum in perpetuity over the entirety of the property. He shall only enjoy the income from the said three houses and the garden appurtenant thereto but shall not sell or mortgage the same for any debts or in any other manner alienate the same or do any kind of damage and even the successive progeny will only possess the same subject to the condition and if it became necessary to give the said properties as dowries even then the said condition of fidei commissum shall be attached to the whole of the said property and the said property shall be continued to be possessed and in the event of there being no persons at any time who shall be entitled to the said properties then the same shall be given over to the Mosque. "

At the trial a dispute arose as to the true rendering into English of the Will, which is in Tamil. Expert evidence was called by both sides. The dispute centred round the words " even the successive progeny " in the above extract. The defendant's expert gives the following version : " even their respective children shall possess the properties ". The learned District Judge has preferred the version of the plaintiffs' expert. The contentious words are " Thangal Thangaludaiya ". The defendant's expert restricts the meaning to " their children ". He is certain it never means " generation " or " progeny ". Of the two meanings I prefer the meaning which tends to support the view that the instrument does not create a perpetual fideicommissum. My view finds support in the following passage in Van Leeuwen's Censura Forensis, Bk. III Ch. VII s. 14 (Foord's translation) : —

> " It has been received as a general rule, that a fideicommissum of this or a similar kind in a case of doubt and when the prohibition is difficult to be understood, is not perpetual, but only extends to the fourth degree of succession, counting from him to whom after the death of the first heir the inheritance has come saddled with such a burden, up to the fourth degree beyond him inclusive, for the person who has been burdened expressly and by name does not form a degree, but his successor is the first to do so. "

The last point of learned counsel is that the defendant is entitled to a decree in his favour by virtue of his possession of the land for thirty years. He relies on the following proviso to section 13 of the Prescription Ordinance : —

> " Provided also that the adverse and undisturbed possession for thirty years of any immovable property by any person claiming the same, or by those under whom he claims, shall be taken as conclusive proof of title in manner provided by section 3 of this Ordinance, notwithstanding the disability of any adverse claimant. "

It has been held by a Bench of three Judges in the case of *Cassim v. Dingihamy*[1] that in the proviso " disability " means incapacity to do legal acts, and that a fideicommissary whose right to possession has not accrued cannot be said to be under " disability ". With that decision I am in respectful agreement.

For the above reasons I set aside the decree of the District Court and direct that a decree be entered dismissing plaintiffs' action with costs.

In view of the order I have made the cross objections are also dismissed.

The plaintiffs are ordered to pay the costs of appeal to the defendant.

PULLE, J.—

In expressing my concurrence in the result reached by my Lord, the Chief Justice, I wish to add a few observations of my own. By deed D1 of 8th November, 1917, the defendant obtained from one Mohamed Jaleel for valuable consideration a conveyance of the property in suit and since then he has been in undisturbed possession and improved it as his own. The plaintiffs of whom two are minor grandchildren of Jaleel and the 6th plaintiff a purchaser by deed P10 of 4th October, 1951, of a part of the joint interests of the 1st and 2nd plaintiffs, who are the sons of Jaleel, commenced the present action on the 17th October, 1951, to have the defendant ejected from the property and to recover Rs. 9,000 as damages on account of mesne profits and continuing damages at the rate of Rs. 450 per mensem. The contention of the plaintiffs was that the interests of Jaleel in the property were of a fiduciary character which terminated on his death and that defendant's possession thereafter was unlawful. Assuming that Jaleel had only a fiduciary interest it was essential to the success of the case for the plaintiffs that they should establish the fact of his death. It was not essential to the defence to affirm that Jaleel was alive. First, he was in possession and it was left entirely to the plaintiffs to prove, if such was the fact, that Jaleel was dead. Secondly, he bought the property on the basis that Jaleel was the absolute owner, so that from his own point of view it was a matter of indifference whether Jaleel was dead or alive. The strange result for which the plaintiffs, in these circumstances, contended was that, as Jaleel

[1] *(1906) 9 N. L. R. 257.*

had not been heard of since 1942, by operation of section 108 of the Evidence Ordinance they had discharged the burden of proving that he was dead in 1951 when the 1st and 2nd plaintiffs purported to convey a share of their interests to the 6th plaintiff. In regard to the application of section 108 of the Evidence Ordinance I cannot do better than repeat the words of learned counsel for the defendant that a rule of evidence as to burden of proof does not generate a presumption of fact. 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.

It is clear from the instrument D1 of 1917, read with P6 of 1902, conveying the property to the defendant that the title of Jaleel depended on the terms of a Will dated 22nd July, 1850, executed by Mohideen Nachchia and admitted to Probate in D. C. Colombo case No. 1734. Again assuming that the Will referred to in P6 is identical with the document P2, namely, the last will No. 418, the question arises for determination not whether it created a fideicommissum but a fideicommissum in perpetuity.

The immediate devisee of the property under the last will is Samsi Lebbe Hameed Lebbe. One of Hameed Lebbe's children is Samsudeen to whom the property was allotted by the deed of partition P6. This Samsudeen is the father of Jaleel. That the prohibition against alienation bound the immediate devisee and their children is not contested but the plaintiffs' claim that the prohibition bound Jaleel as well is disputed. The learned District Judge had before him as many as five translations of will No. 418. These were P2 (a), produced by the plaintiffs at the trial, D11 and D2 produced by the plaintiffs at an earlier abortive hearing, X1 a translation prepared by the interpreter of the court and D10 a translation by a teacher of Jaffna College who possesses an M.A. degree in Tamil conferred by the Annamalai University. The variants in the translations of the crucial passage are striking and they turn on the proper meaning to be given to the Tamil expression, " Thangal thangaludaya ". According to the translation X1 the prohibition against alienation is imposed also on the " successive progeny " of the devisees while, according to D10, the devisees and their children alone are prohibited from alienating.

The difficulty in this case is much more than one of interpretation. When experts disagree as to the meaning and significance of words used by the testatrix a real doubt arises whether she intended by those words to create a fideicommissum in perpetuity. Such a doubt would militate against the party contending that the will created a fideicommissum in perpetuity.

Appeal allowed.