1946 *Present :* **Cannon and Canekeratne JJ.**

AIYASATHUMMA *et al.*, Appellants, *and* RETNASINGHAM, Respondent.

351—D. C. Batticaloa, 184.

Fidei commissum by act *inter vivos*—Death of *fideicommissarius* before *fiduciarius*—*Spes successionis* passes to heirs of *fideicommissarius.*

In the case of a *fidei commissum* created by deed of gift, if a *fideicommissarius* predeceases the *fiduciarius* the former transmits the *spes successionis* to his heirs.

APPEAL from a judgment of the District Judge of Batticaloa.

M. I. M. Haniffa (with him *M. Abdulla*), for the plaintiffs, appellants.

C. E. S. Perera (with him *S. A. Marikar*), for the defendant, respondent.

Cur. adv. vult.

April 1, 1946. CANNON J.—

This appeal relates to a question of a *fideicommissum.* By a deed of gift one P. P. Marikar transferred paddy land to his younger son, subject to certain conditions, namely, that the donee " shall possess and take the produce thereof from the date of my death until his lifetime without usufructing, mortgaging or transferring them, that after his death the said properties shall devolve on my daughters only, that I the donor and my heirs will have no right whatever to the said properties ".

[1] *(1929) 31 N. L. R. 55.*

There were seven daughters then living, but one of them Maimoonathummah predeceased the donee. The six surviving daughters sold the land in its entirety to the defendant, against whom this action was brought by the appellants, of whom the 1st, 2nd, 3rd and 5th are the children of Maimoonathummah, and the 4th a nominal party, he being the husband of the 3rd appellant. The appellants claimed a declaration of title that all of them, except the 4th, were entitled to an undivided one-seventh share of the land jointly. The District Judge held that only the surviving daughters were entitled to it because P 1 does not say " my daughters or their heirs ".

This interpretation does not seem to me to be capable of support. The matter must, as the District Judge says, be governed by the terms of the deed, but when the donor executed the deed and made provision for his daughters, he obviously had in mind the daughters who were then living, and by using the word " only " he was not excluding the heirs of the daughters but merely his sons. To introduce the word " surviving " is to restrict the meaning of the word " daughters " to an extent justified by neither the paragraph in question nor the context of the deed. In my opinion, Maimoonathummah obtained a *spes successionis* when the deed of gift was executed, and therefore on her death her right passed to her heirs, namely, the 1st, 2nd, 3rd and 5th appellants—*vide Mohamad Bhai et. al. v. Silva et. al.* [1]

The order of the District Judge must be set aside. The appeal is allowed with costs, and the respondent will also pay the costs of the action and damages Rs. 75, which sum was agreed upon at the trial.

CANEKERATNE J.—I agree.

Appeal allowed.