

1965 Present : H. N. G. Fernando, S.P.J., and T. S. Fernando, J.

A. U. NASHEEN and others, Appellants, and M. S. SITHY
and others, Respondents

S. C. 229/64— D. C. Colombo, 9560/P

Fideicommissum created by Will—Designation of devisees' children and grandchildren as fideicommissaries—Death of a devisee's son before the devisee—Rights of the children of the deceased.

Where, in a fideicommissum created by Last Will, the designated fideicommissaries are not only the children of the devisees but include also the grandchildren of the devisees, the rights of a devisee's grandchildren whose father predeceases his mother (the devisee) are not affected.

APPEAL from a judgment of the District Court, Colombo.

J. M. Jayamanne, for plaintiffs-appellants.

M. T. M. Sivardeen, for defendants-respondents.

October 13, 1965. H. N. G. FERNANDO, S.P.J.—

We are in entire agreement with the conclusion of the learned District Judge that the fideicommissum created by the Last Will 2D3 in favour of the lawful issues of the devisees in that Will has the effect that the designated fideicommissaries are not only the children of the devisees but include also the grandchildren of the devisees.

The learned District Judge has based his decision on the assumption that because of the application made in the Entail case, the terms of the Last Will 2D3 became applicable to the lot ' I ', which is the subject of this action. In fact, this is the only basis on which the defence would be entitled to succeed in their claim. Although the learned District Judge construed the term " lawful issues " to include the grandchildren, he nevertheless held that the 2nd to 7th plaintiffs have no right in the property because their father Abdul Gaffoor predeceased their grandmother Thangatchi Umma. This view of the learned District Judge was formed because of the decisions referred to in his judgment which held that where one of several fideicommissaries predeceased the fiduciary, no rights are transmitted to the heirs of the dying fideicommissary. But those decisions relate to bequests in which the designated fideicommissaries were *children* of the fiduciary. In the present case, however, the designated fideicommissaries include grandchildren. The grandchildren whose father died before Thangatchi Umma are themselves fideicommissaries in their own right as being ' issue ' of Thangatchi Umma and their claim does not depend on transmission of their father's rights.

The decree dismissing the plaintiffs' action is set aside and the case will be remitted to the District Court for a decree of partition to be entered on the basis that the 2nd to 7th plaintiffs are entitled to a one-fourth share of the property. The plaintiffs will be entitled to the costs of this appeal and to the costs of contest.

T. S. FERNANDO, J.—I agree.

Appeal allowed.