# WIJEYERATNE

v.

# WIJEYERATNE AND OTHERS

SUPREME COURT
WEERARATNE J., SHARVANANDA J.,
AND WANASUNDERA J.,
S. C. NO. 32/80
C. A. (SC) 70/73 Inty.
D. C. GAMPAHA 16253/P
MARCH 26, 1981.

*Last Will — Fideicommissum — Power to disinherit — Is deed necessary for gift-over ?*

Held (Sharvananda J. dissenting) The Last Will clearly created a valid *fideicommissum,* as the property was not to vest in the fiduciary absolutely. The *fideicommissary* was clearly indicated and the power to disinherit was otiose and redundant.

The *fideicommissum* being valid the gift-over to the named *fideicommissaries* (sons of the testator) takes effect automatically although the fiduciary (widow of the testator) had failed to comply with the testator's direction to "devise and bequeath" the inheritance to them as directed. The properties vest automatically on the *fideicommissaries* on the termination of the fiduciary interest.

Per Weeraratne J: The Last Will carried the direction that the fiduciary should devise and bequeath the properties to the *fideicommissaries* "if in her (fiduciary) opinion they (the *fideicommissaries)* had merited it by the kind of treatment they had accorded to her" but as the fiduciary had not declared otherwise it would not be unreasonable to presume that she had no objection to the *fideicommissaries* succeeding to the properties as *fideicommissaries.*

Per Wanasundera J: The condition that the fiduciary should make the bequest "if in her opinion they had merited it by the kind of treatment they had accorded to her is in effect otiose and redundant" and does not confer "a positive power of disinheritance."

Cases referred to:

*(1) Edirisuriya v. Wijedoru (1965) 68 NLR 325, 328, 330.*
*(2) Bibile v. Mahaduraya (1926) 28 NLR 253.*
*(3) Kiri Banda v. Punchiappuhamy (1951) 53 NLR 361, 363.*
*(4) Seneviratne v. Seneviratne (1950) 51 NLR 553, 559, 560.*
*(5) Van Niekerk v. Van Niekerk's Estate (1935) C.P.D. 359.*
*(6) Jewish Colonial Trust Ltd. v. Estate Nathan (1940) AD 163.*

*APPEAL* from judgment of the Court of Appeal.

*C. Thiagalingam Q.C. with H. L. de Silva, N. K. Choksy, Mark Fernando and H. Jayamaha for 6th defendant-respondent-appellant.*

*Nimal Senanayake with K. Gunaratne, P. A. D. Samarasekera, Miss S. M. Senaratne and Mrs. A. S. Dissanayake for 2nd plaintiff-appellant-respondent.*

May 29, 1981
**WEERARATNE, J.**

By his last Will No. 2314(15) dated 17th June 1958, T. A. de S. Wijeyeratne devised and bequeathed to his wife Rose Charlotte Helen de Silva Wijeyeratne two lands named Pelahela Estate and Etheraliyagahawatte subject to the following conditions and restrictions to wit:—

> "My wife shall not sell, mortgage, encumber or otherwise alienate the said lands or any of them hereby bequeathed to her, but shall take and enjoy the rents, profits and income thereof during her lifetime and shall devise and bequeath the first-named called Pelahela Estate unto our son Lindon and the second-named land called Etheraliyagahawatte unto our son Dalton if in her opinion they had merited it by the kind treatment they had accorded to her."

The sole question that arises for decision in this appeal in which all parties are brothers and sisters, turns on the construction of the clause in the said last Will set out above. Mr. C. Thiagalingam Q.C. appearing on behalf of the 6th Defendant-Respondent-Appellant (hereinafter referred to as the Appellant), submitted that the Court of Appeal judgment is in error in holding that there was no *fideicommissum* created in favour of the Appellant. Learned Counsel contended that on the contrary the words in the clause referred to above, constituted an indefeasible *fideicommissum* with power to the fiduciary to make over the gifts of the said lands to the Appellant, Lindon Marimus and also to his brother Dalton respectively, *inter vivos.* The finding of the Court of Appeal is that the phrase, 'If in her opinion they had merited it,' clearly controls the whole paragraph and that the bequest is made subject to her discretion and that consequently it is in her absolute discretion whether or not to bequeath the land to the Appellant.

Mr. Nimal Senanayake, in submitting that there is no *fideicommissum* created, supported the finding in the Court of Appeal judgment and stated that if the widow wanted to do what her husband had indicated in the relevant clause, then even if the Appellant had not behaved in the way stipulated by the Testator, he would nevertheless get a share as one of the intestate heirs. In regard to the Appellant and his brother Dalton, Counsel submitted that if there was any doubt, preference must be given to the larger class on the basis that there is no *fideicommissum.*

In construing this Will, a close examination of the relevant

clause reveals that the gift to the Appellant and his brother is subject to restrictions.

In the judgment of the Court of Appeal it is stated:—

"The phrase, 'if in her opinion they had merited it,' clearly controls the whole paragraph. The bequest is made subject to her discretion. She is put under no obligation to bequeath the land to him." The Court held that there was no *fideicommissum* created as the widow was left with a discretion whether to give the property or not and that accordingly the property devolved on her absolutely, and on her death on all her heirs equally. But there is a clear prohibition against alienation imposed on his wife by the Testator, thus ensuring that his wife cannot regard it as her absolute property, but could only enjoy the rents and profits and income during her lifetime. The Testator then goes on to state emphatically, ". . . and shall devise and bequeath the first named estate unto our son Lindon. . ." There is here, a clear indication that Lindon, and Lindon alone is to be the *fideicommissary.*

A fiduciary cannot defeat the Testator's intention (which in this instance is that this land must go to the *fideicommissary,* Lindon) except where the *fideicommissum* is a *Fideicommissum Simplex* (*vide* 68 N.L.R. 325 at pp. 328 and 330 in *Edirisuriya v. Wijedoru*[1]). But in this case there is no such exceptional *Fideicommissum Simplex* because the fiduciary has not been expressly given a power of alienation. Having regard to the language used in this clause of the Will, it seems clear that the Testator had the intention of creating an ordinary *fideicommissum* in favour of the Appellant.

There is in law a presumption against a *fideicommissum* in a case of doubt as to the Testator's intention, but in this case there is no reasonable doubt.

In view of all that I have discussed above, the question arises as to what significance should be attached to the omission on the part of the widow to declare expressly that Lindon and his brother had merited the said lands by the treatment accorded to her. When the fiduciary is empowered to disinherit any of the *fideicommissaries* named by the Testator, the power of disinheritance must be determined by rules which are akin to those governing a power of appointment, which requires that the Will and intention of the Testator must be gathered from the different terms employed. However in this instance one does not need to go far to infer that an implied power of disinheritance is given to the fiduciary in the said clause, since the words used are quite clear and explicit.

". . .if in her opinion they had merited it by the kind of treatment they had accorded to her."

Since the fiduciary has not declared otherwise it would not be unreasonable to presume that she had no objection to Lindon and his brother succeeding to the properties as *fideicommissaries.* Consequently the *fideicommissa* created by the Testator continues to be operative. In this case however, there has been an omission on the part of the widow to exercise the discretion given to her to make a declaration so required of her.

It will be noticed that the relevant clause also requires the widow "to devise and bequeath" the said lands to Lindon and Dalton. The fact that the lands were not devised and bequeathed would not however invalidate the *fideicommissum.* In the case of *Bibile v. Mahaduraya* reported in 28 N.L.R. page 253(2) Justice Garvin stated :—

"As to the contention that the *fideicommissum* did not become effective by reason of the absence of a deed of gift in favour of Bandu Menike and Muthu Menike, I think the answer is that if a valid *fideicommissum* has in point of fact been created, then the *fideicommissary* became vested with the property immediately the *fideicommissum* matured by the happening of the contingency, the death of the donor."

In the case of *Kiri Banda v. Punchiappuhamy* 53 N.L.R. page 351(3) Gratiaen J. stated at p. 361.

"The law was finally settled by Garvin J and Lyall Grant J in *Bibile v. Mahaduraya* which held that a valid *fideicommissum* was created, and that no express deed from the donee was necessary to render it effective, where a conveyance contained 'not a mere request but a direction and an imperative order' requiring the first institute to pass the land to the next set of institutes."

Gratiaen J stated that the principles of law to which Garvin J and Lyall Grant J had referred are now clearly set out in a passage at page 143 of Professor Nadaraja's Treatise on the Roman-Dutch Law of *Fideicommissa* in the following terms:—

"In the pre Justinian Roman Law, the *fideicommissary* did not acquire ownership in the property until 'restitution' of it had been made by him to the fiduciary at the time prescribed by the testator. But after Justinian had enacted that there was to be no difference between the different kinds of legacies and

between legacies and *fideicommissum* and that *fideicommissaries* and legatees equally should have not merely a personal action but also the real action which had formerly been open to legatees per *vindicationem,* ownership (at any rate in the case of singular *fideicommissum)* passed from fiduciary to *fideicommissary,* even without any express restitution, as soon as the gift-over to the latter was expressed to take effect. *In the modern law it would seem that in all cases the transfer of ownership takes place automatically at the time prescribed by the testator for the vesting of the fideicommissary's interest, and the fideicommissary is entitled from that time to the use and enjoyment of the property and to enforce his claims to the property against the fiduciary, his representatives, or other possessor."*

Having regard to what has been cited above, Gratiaen J stated that the failure of either daughter to obey the direction that she should "make over" her share to the *fideicommissaries* did not have the effect of defeating the donor's intention.

For the reasons given I am of opinion that the appeal of the Appellant must be allowed with costs in this Court.

SHARVANANDA, J.

I regret being unable to agree with the reasoning or with the conclusions of Weeraratne J. or of Wanasundera J.

The basic issue in this case is whether the 6th defendant-appellant had become entitled to the sole proprietorship of the land called "Pelahela Estate,' the subject matter of this action, by virtue of the last Will No. 2314 dated 14.6.58(P5), or whether he was only entitled to a share as co-owner of the said land along with his brothers and sisters on the basis of his being an intestate heir of his mother.

By his last Will No. 2314, the late T. A. de S. Wijeyeratne devised and bequeathed to his wife Rose Charlotte Wijeyeratne this land and another land called 'Etheraliyagahawatte' subject to the following conditions and restrictions:

"My wife shall not sell, mortgage, encumber or otherwise alienate the said lands or any of them hereby bequeathed to her but shall take and enjoy the rents, profits and income thereof during her life-time and shall devise and bequeath the first-named land called 'Pelahela Estate' unto their son Lindon, and the second-named land called 'Etheraliyagahawatte' unto their

son Dalton if in her opinion they had merited it by the kind of treatment they had accorded to her."

Wijeyeratne died on 15.12.58 and in terms of the aforesaid last Will, title to Pelahela Estate became vested in the widow, subject to the aforesaid conditions and restrictions.

The widow, Rose Charlotte Wijeyeratne, died intestate on 16.12.70. The question in issue is whether, on the widow dying intestate, the land devolved on all her children in equal shares, or whether, in terms of the aforesaid last Will No. 2314, Lindon, the 6th defendant-appellant, became solely entitled to it even though the deceased widow had not devised and bequeathed the said land to him in terms of the said last Will.

The position of Lindon, the 6th defendant-appellant, is that the said last Will created a *fideicommissum* in his favour and that on the death of his mother, the fiduciary, the property devolved in its entirety on him. The District Judge who heard the case upheld the appellant's contention and dismissed the plaintiff's action for partition of the land. On appeal by the plaintiff, the Court of Appeal held that the last Will did not create a *fideicommissium* in favour of the 6th defendant-appellant and that the property, therefore, devolved in equal shares on the intestate heirs of the widow and could be partitioned. From the judgment of the Court of Appeal, the 6th defendant-appellant has preferred this appeal.

The contention advanced on behalf of the appellant was that there was a prohibition on alienation by the legatee and that there was a clear indication of the persons for whose benefit it was imposed and that the last Will thus created a *fideicommissum* in favour of the appellant and his brother Dalton. It was submitted that the last two lines, "if in her opinion they had merited it by the kind of treatment they had accorded to her," conferred a power of disinheritance on the widow by implication and that the appellant and his brother Dalton remained the instituted *fidei-commissary* heirs of the testator because of the non-exercise of the implied power of disinheritance by their mother.

A *'fideicommissum'* is a disposition of property in favour of a person called a 'fiduciary' with an obligation imposed upon him on his death, or in the happening of a certain event, or on the fulfilment of a condition, to hand the same over to or allow the property to devolve on a third person called a *'fideicommissary.'* For the existence of a valid *fideicommissum,* it is essential that:—

(1) the testator should have shown that the subject matter should not be the absolute property of the first taker of it but that it should go over on the fulfilment of some condition from the fiduciary *to the fideicommissary;*

(2) there should be certainty about the property; and

(3) there should be certainty about the persons who as *fideicommissaries* are to benefit by it and about the time at which the rights vest in the *fideicommissaries.*

The obligation resting on the fiduciary to hand over and transmit the property in question to the *fideicommissary* should be contained in a positive direction or command in the will. No particular form of words is necessary to create a *fideicommissum.* But the intention to substitute another *(fideicommissary)* for the taker (fiduciary) should be express or is to be gathered by necessary implication from the language of the Will for a *fideicommissum* to be constituted. However, there should be clearness of language and certainty both as regards the intention of the maker and the person to be benefited. The mere prohibition against alienation does not constitute a *fideicommissum,* unless the persons are indicated in whose favour the prohibition is made. *(Voet* 36.1.27) For the constitution of a valid *fideicommissum,* it is absolutely essential that the person should be indicated to whom the burdened property must go. Where the *fideicommissary* is not expressly designated, he must by implication be clearly indicated. No *fideicommissum* is created unless someone is indicated by the Will who should take the property after the death of the person to whom the life interest had been bequeathed. In the absence of such an indication, the fiduciary heir or legatee takes the estate absolutely. Any curtailment of the rights of ownership appearing in the Will, such as a prohibition against alienation, is of no legal effect unless a third party is indicated in whose favour such curtailment is to operate. The *fideicommissary* is generally to be ascertained at the time specified for the gift-over or restitution; so that if members of the class designated die before that date, they do not generally transmit to their heirs any right to the *fideicommissum.* (Voet 36.1.26) It is however open to the testator to leave to the fiduciary the task of deciding who are to be the *fideicommissaries* by giving the fiduciary what in English Law would be called "power of appointment." As pointed out by Maasdorp (6th Edition, Vol. I, at page 201):

"A testator may confer upon the fiduciary the power of selecting the person upon whom such property shall devolve

at the expiration of the life interest, in which case the due exercise of such power has the same effect as if the testator had himself made the selection in his Will."

But it is a necessary condition to the validity of such a disposition that it must not be left to the fiduciary whether or not he will pass on that property. The obligation to pass on should be present. The exercise of a power of appointment has the same effect as if the testator had himself made the selection in his Will and the person nominated under the appointment is therefore the heir or the legatee of the testator and not of the person who exercises that power. If the grantee is given the choice of certain persons and fails to exercise that choice, all will be entitled to inheritance or bequest, namely, those living when the time for distribution arises. *(Voet* 36.1.29) The grantee must exercise his powers within the limits of those powers conferred upon him. If he exceeds or executes them improperly, the result is the same as if he had not executed them at all. In *Seneviratne v. Seneviratne* (51 N.L.R. at 559, 560) (4), Dias SPJ. quotes with approval the following passage from Nadarajah on *Fideicommissa*, page 59:

"But for the exercise of the power of appointment to be valid, the fiduciary must act within the limits imposed upon him. For example, if the mode of exercise of the power is restricted to appointment by Will, an appointment by deed will be invalid and *vice versa;* or where the fiduciary appoints from outside the class designated by the testator, the appointment would be invalid; as will also be the case where a condition is attached to the exercise of the power and the power is exercised without the condition being satisfied.. . . . . If there has been no exercise of the power at all, or it has not been properly exercised, those persons whom the testator designated as beneficiaries in the event of non-exercise of the power will succeed. If no such substitution has been made by the testator, all the persons from whose number the selection was to be made by the fiduciary becomes entitled to succeed where the power is special and the fiduciary's intestate heirs will be entitled to succeed where the power is general."

Professor Nadarajah in his book on *Fidei-Commissa* states at pages 80 – 81.

"Where there is a disposition to A for life and on his death to such person as he may appoint, A is not absolute owner because there is a clear indication that he should take only a

life interest – he is not a fiduciary to whose discretion it is left whether or not to pass on the property and it is not a case where there is no gift-over, or where the gift-over has failed .... In such a disposition, the *fideicommissaries* are ascertainable on A's death, according as A has or has not exercised his power of appointment. If A has exercised his power, the appointees are the *fideicommissaries* under the original testator's disposition. Where he has not exercised his power of appointment, a gift-over on default of appointment to the intestate heirs is implied."

If there is failure of the person entitled to claim restitution, the *fideicommissum* fails. On the failure of the *fideicommissary,* the fiduciary's interest gets enlarged into full ownership. Where property is left to an heir or legatee who is restricted by the terms of the Will to take in the income merely of the inheritance or bequest for life and there is no gift of the corpus to anybody else and no indication of anybody in whose favour the restriction on the heir or legatee was imposed, the restrictive provision will be treated as merely *nudum praeceptum* without binding effect; and the heir or legatee is entitled to claim the corpus of the property. "In the constitution of a valid *fideicommissum,* it is absolutely essential that the person or persons should be indicated to whom the burdened property must go. There must be a gift-over. If no person or class of persons is mentioned to whom the fiduciary is to hand the property, no *fideicommissum* is created even though the testator may have purported to burden the inheritance or bequest with the entail of *fideicommissum* as the *fideicommissum* is *nudum* and inoperative." (Steyn on Wills – 2nd Edition, at page 286). The burden of *fideicommissum* is extinguished where there is a failure of the person on whom the burdened property is to devolve. Upon such failure, the fiduciary becomes the absolute owner of the burdened property, unless alternate *fideicommissaries* are substituted in the Will.

It is in the background of the above principles that one has to test the claim of Lindon, the 6th defendant-appellant, to be the sole *fideicommissary* entitled under the said last Will to succeed to the entirety of the property on the death of his mother.

By his last Will, the testator had directed the legatee to devise and bequeath Pelahela Estate to Lindon *"if in her opinion he had merited it by the kind of treatment he had accorded to her."* This condition, "if in her opinion he had merited it," controls the legatee's obligation to bequeath the property to Lindon and is condition precedent to Lindon's entitlement to be devisee. If in her opinion Lindon did not merit it, there was no obligation on

the legatee to devise and bequeath the property to him. The testator's object is quite manifest. The testator appears to have had confidence in the judgment of the legatee and had provided for a gift-over to the 6th defendant-appellant only "if in her opinion he had merited it;" impliedly if in her opinion he had not merited it, there was to be no obligation to make a gift-over to Lindon. In my view it is not legitimate for this Court to depart from the terms of the Will and to ignore this vital condition on which Lindon's entitlement rested and to treat the gift-over to Lindon as absolute and automatic when, *ex-facie,* it was conditional. This condition, however, had not the effect of giving absolute discretion to the legatee to say whether she is willing to give as held by the Court of Appeal — nor did it import a power of disinheritance. The power conferred by the testator on the legatee was not power of disinheritance but power of appointment. If in her opinion he merited the legacy by the kind of treatment he accorded to her, the legatee was obliged to appoint Lindon as *fideicommissary* to succeed her. It logically follows that, if in her opinion he did not merit it by the kind of treatment he had accorded to her, she was not obliged to bequeath the property to him; in that event, the power of appointment need not be exercised. In view of the fact that the legatee, Mrs. Rose Charlotte Wijeyeratne, did not devise and bequeath to Lindon the property though she had survived the testator for twelve years, it is to be presumed that in her opinion Lindon did not merit the legacy by the kind of treatment he had accorded to her. The condition precedent for Lindon's appointment had not been satisfied and Lindon did not become entitled to be appointed *fideicommissary.* It was not a question of disinheritance, but a case of Lindon failing to satisfy the condition of entitlement to be appointed *fideicommissary.* Disinheritance involves the idea of divesting a beneficiary of a benefit which is already vested in him. Lindon was never vested with any right to the property. That right would stem only from an appointment by his mother, Mrs. Wijeyeratne.

The contention that "the clause that Mrs. Rose Charlotte Wijeyeratne 'shall devise and bequeath Pelahela Estate unto Lindon if in her opinion he had merited it by the kind of treatment he had accorded to her' can be considered otiose and redundant and that the 6th defendant-appellant must be considered under the law to possess the right of having the property passed to him automatically on the determination of the mother's fiduciary interest" is against all canons of interpretation. A Will should, if possible, be construed so as to give effect to every word or clause therein and the Court is not at liberty to disregard any word or clause if some meaning can be given to it. It is not to be assumed that additional

words or conditions are used without a purpose. One cardinal rule of construction is that effect must be given to the intention of the testator. The Court cannot re-write the testator's Will. A clause which spells the testator's intention cannot be rejected as otiose or redundant. In its context, that clause discloses the testator's purpose, viz. to see that Lindon treated his mother well to oblige her to bequeath the property to him. If the mother was of opinion that Lindon was not treating her well, he would not merit being appointed *fideicommissary.* There is sense in the provision; it means what it says. But in the submission of Lindon's Counsel, it serves no purpose and has no function to perfom in identifying the destination of the property. This facile explanation carries no persuasion.

Mr. Thiagalingam for the appellant relied on the case of *Kiribanda v. Punchiappuhamy* (53 N.L.R. 361)[3]. I agree with the principle of the judgment in that case. In that case, the deed of gift by which one Ukkurala donated certain lands to his daughters T. M. and D. M. provided as follows:

> "I hereby . . . . . grant and make as a gift unto. . . . . my daughters T.M. and D.M. . . . the lands to be possessed by them during their life-time. . . . . .
>
> Further, the said T.M. and D.M. shall only possess the said lands and premises allotted to them during their life-time and shall not transfer or mortgage the same outside and the said T. M. and D. M. shall at their death make over their shares and lands allotted to them to no other person than to P or to P's heirs and shall not alienate the same to any other person whomsoever."

The Court rightly held that "the gift created a valid *fideicommissum* in favour of P, or in the event of P's death of his heirs and that no express deed from the fiduciary was necessary to render it effective." In that case, the *fideicommissaries,* or the persons benefiting under the *fideicommissum,* were specifically named or nominated. There was no condition precedent, such as we have here in this case, of a potential *fideicommissary* becoming entitled to the property only if the fiduciary, being of the opinion that he merited it by the kind of treatment he accorded to her, devised or bequeathed the property to him. The fundamental difference between that case and the present case is the condition stipulated by the testator that the potential beneficiary should become entitled to the property only if the legatee should determine that he deserved it. The omission of the mother in the exer-

cise of the power bestowed on her by the testator to nominate Lindon as *fideicommissary* has the significance and relevance which it did not have in the deed of gift referred to in the case reported in 53 N.L.R. 361(3) viz. that Lindon acquired the status and rights of a *fideicommissary* only on appointment by the party so charged by the testator. In that case the *fideicommissary* was already appointed by the testator and could have been ascertained at the time of gift-over. In the instant case, Lindon had never been appointed *fideicommissary* and hence could not claim to succeed as such.

In my view the appellate's claim that he was the sole *fideicommissary* under his father's last Will and was thus entitled to the sole ownership of the subject matter of this action cannot be sustained. His appeal therefore fails and I dismiss it with costs.

**WANASUNDERA, J.**

I am in agreement with the judgment of my brother Weeraratne, J. and the order he has proposed. Since my brother Sharvananda, J. has taken a different view, I would like to set down my own reasons for allowing this appeal.

The Last Will of Mr. T. A. de S. Wijeyeratne, P5 of 1958, devising the bequeathing this land and another land called Etheraliyagahawatte to his wife Rose Charlotte Helen de Silva Wijeyeratne, contained the following condition:—

> "My wife shall not sell, mortgage, encumber or otherwise alienate the said lands or any of them hereby bequeathed to her but shall take and enjoy the rents, profits and income thereof during her lifetime and shall devise and bequeath the first-named land called Pelahela Estate unto our son Lindon and the second-named land called Etheraliyagahawatte unto our son Dalton, if in her opinion they had merited it by the kind of treatment they had accorded to her."

It was plaintiff's case that the Last Will left the mother with a discretion whether or not to devise and bequeath this property to her son Lindon the 6th defendant-appellant and accordingly it has not created a *fideicommissum* in favour of the 6th defendant-appellant. Mrs. Wijeyeratne died on 6th December 1970 intestate and without making any bequest of this property to the 6th defendant-appellant. Upon her death, the plaintiff's claim that all her children succeeded to the property in equal shares — each being entitled to a 1/9th share. On this basis the two plaintiffs

came into court claiming a 1/9th share each and conceded to the other brothers and sisters similar shares. The 1st to 6th defendants took up a common and united stand supporting the 6th defendant-appellant and averred that the Last Will created a *fideicommissum* in favour of the 6th defendant-appellant and that, upon their mother's death, the entirety of the property passed solely to the 6th defendant-appellant and not to the other brothers and sisters. The 7th defendant did not participate in the proceedings.

Originally, the testator by Deed No. 202 dated 15th November 1951 had gifted this property to the 6th defendant-appellant who was at that time a minor, reserving a life interest to himself and his wife Rose Charlotte Helen de Silva Wijeyeratne. This gift was a revocable one, the donor reserving "the full right and liberty to revoke, cancel and annul this deed of gift or donation at any time without notice to the said donee and without assigning any reasons." The gift was revoked by the donor, as he lawfully may, by instrument No. 2282 dated 7th March 1957. Thereafter, on 1st June 1958, Mr. T. A. de S. Wijeyeratne executed the Last Will P5. Mr. Wijeyeratne died on 15th December 1958. The material before us does not show that any untoward act on the part of the 6th defendant-appellant had led to these developments. On the other hand, Mr. Thiagalingam relied on these circumstances and stated that it showed a clear intention and a consistent desire on the part of the testator to single out the 6th defendant-appellant for favoured treatment.

In the District Court, the contention of the 1st to 6th defendants was upheld and the learned District Judge dismissed the plaintiff's action. The Court of Appeal, however, has reversed that decision holding that the Last Will has not created a *fideicommissum* in favour of the 6th defendant-appellant. In coming to this conclusion, the Court of Appeal said that "the phrase 'if in her opinion they had merited it' clearly controls the whole paragraph. The bequest is made subject to her discretion. She is put under no obligation to bequeath the land to the 6th respondent. It is in her absolute discretion, whether or not to bequeath the land to him." The Court of Appeal also added that in view of this discretion vested in her by the testator, "it must be presumed that he intended to vest the dominium in her."

The Court of Appeal relied on a statement by Voet contained in Book 36 Tit. 1 Section 29 (Commentary on the Pandects translated by Gane), and a comment on this passage made by Steyn on The Law of Wills in South Africa (1st Edn.) page 237. Voet says:

". . . it cannot indeed be said to be a *fideicommissum,* when it is left in the discretion of him whom the testator thinks to put under obligation to say whether he is willing to give, that is to say hand it over. But nevertheless it is a proper *fideicommissum* when it is not put into the discretion of him of whom the request was made to say whether he is willing to hand over at all, but, after the need to hand over has been laid upon him, a discretion is vouchsafed merely to allot the property and to choose the person to whom it shall be handed over."

As I understand the law, I do not think that it is necessary for the testator himself to indicate the *fideicommissaries.* It is open to a testator to leave to the fiduciary the task of deciding on who should be the *fideicommissaries.* This is tantamount to the giving of a power of appointment. Thus in a disposition "to A for life and on his death to such persons as he may appoint." A is not the absolute owner because he "is not a fiduciary to whose discretion it is left whether or not he will pass on the property." *Van Niekerk v. Van Niekerk's Estate,* 1935 C.P.D. 359(5). *Vide* also Nadaraja – Roman-Dutch Law of *Fideicommissa,* page 80.

A power of appointment conferred on a fiduciary may be general or special. It is special where the power can be exercised in favour of certain persons or a class. A general power is one in which the fiduciary is given an unlimited choice. Steyn appears inclined to the view that where the power is general, there could be no *fideicommissum* and the fiduciary's interest is enlarged and he becomes the absolute owner of the property. This view has not been accepted by the courts and finds no support in the old texts *(vide* Nadaraja, p. 78).

The Last Will in the present case contains in explicit terms a clear prohibition against alienation by the widow. This condition is reinforced by the words that she "shall take and enjoy the rents, profits and income thereof during her life-time." We also find here an indication of the person in whose interest this prohibition was imposed. The 6th defendant-appellant is expressly indicated by name as a *fideicommissary* and he would be entitled to his rights upon the fulfilment of the condition set out in the Will. A general power of appointment is often confused with words which are precatory in nature where "the testator's wishes are expressed merely in the form of a desire or a direction, without giving a right to someone to insist on such desire or direction being carried out, then the court will regard such desire or direction as *nudum praeceptum* and not enforce it." *Jewish Colonial Trust, Ltd. v. Estate Nathan,* 1940 A.D. 163(6). The latter would be a clear case where

a discretion is given to a person "whether he is willing to give or restore" mentioned by Voet.

Incidentally, though the discretion given to the widow appears at first sight to be unlimited, it is in fact not so. It has certain characteristics of a special power of appointment. In the present case the widow is enjoined to transfer the property to the 6th defendant-appellant on the fulfilment of the condition that the 6th defendant-appellant had merited it by the kind of treatment he had accorded her.

This discretion is, no doubt, cast in subjective terms and made a matter of personal judgment of the widow. Nevertheless this does not constitute it an absolute discretion. Here we have a discretion which has to operate in the context of a stipulated condition. As regards the decision, however subjective it may be, it is legitimate to expect, having regard to the ordinary course of affairs, that the widow would exercise her discretion not perversely but upon a proper self direction. Since the discretion reposed in her has to be exercised in the context of the stipulated condition, it is in that sense a controlled discretion and not an absolute one. That a court may be unwilling to interfere with a decision made by her is not to the point. There is undoubtedly a freedom of choice – a certain latitude given to the widow – but the freedom of choice here is only in respect of the subjective assessment of the condition prescribed by the testator and operates only within that context. In any event it is clear that it was the testator's intention to provide for a gift over to the 6th defendant-appellant upon the happening of a condition.

This becomes evident when we understand the full import of the condition laid down in the Last Will. It contains two interlocking obligations which conjointly go to serve the wishes and intentions of the testator. The widow is on the one hand given a life interest in the property and enjoined to transfer it to Lindon, provided he had looked after her in the manner expected of a son, and the son for his part is given the right of getting this property provided he were to look after his mother as is expected of a dutiful son. It has been the testator's intention to make provision for the welfare of both the widow and his son, the 6th defendant-appellant. These mutually supporting clauses appear to constitute the core of this testamentary disposition.

I therefore incline to the view that the wording in the Last Will is sufficient to create a *fideicommissum.* If so, there are a number of legal principles that could be availed of by the 6th

defendant-appellant to enable him to succeed in this action. The following examples given by Voet at page 377 are of some relevance in this context :—

> "Nay again the discretion of choosing was at times restricted by the founder to the deserts of the persons to be chosen, if for instance he said 'I ask you, my daughter, to some day allot the goods to your children, as each one shall have deserved of you'. In such a case the jurist lays down in the passage cited below to what extent the discretion of choice was free or was not free to the daughter. He says, that is to say, that the *fideicommissum* was left to all the children, though they had not equally earned it by merit. But if the mother failed to make a choice it would be enough for them that they had not done anything to displease her. Those however whom the mother had chosen would be in the stronger position if they alone had earned it by merit. And if she should have chosen no one, only those who had given cause for displeasure would not be let in. This can also be gathered from the passage next cited below."

Mr. Thiagalingam relied on the judgment in *Kiribanda v. Punchiappuhamy* (53 N.L.R. 361)[3] which illustrates some of these principles. This judgment and the decisions discussed in this judgment show that where the other indications in an instrument or deed point to the intention to create a *fideicommissum,* any specific direction that the first institute shall by another act of transfer pass the property to the next set of institutes cannot have the effect of defeating the donor's intention, in the event that such a transfer is not effected. The transfer of ownership to the second set of institutes takes place automatically at the time prescribed for vesting of the *fideicommissary* interest.

In the present case, since there exists a clear indication of the testator's intention to create a *fideicommissum,* the 6th defendant-appellant has a right to succeed to the property as a *fideicommissary*. This can only be defeated by a positive power of disinheritance. This Will gives the widow no such power. The wording in the Last Will to bequeath the property to the 6th defendant-appellant is not a power to disinherit. In so far as its effect is concerned, it can be considered as otiose and redundant in view of the fact that the 6th defendant-appellant must be considered under the law to possess the right of having the property passed to him automatically on the determination of the mother's fiduciary interest.

For the above reasons, I would allow the appeal and restore the judgment of the District Court. The 6th defendant-appellant would be entitled to costs in this Court.

*Appeal allowed.*