1950 *Present:* **Dias S.P.J. and Swan J.**

SENEVIRATNE, Appellant, *and* SENEVIRATNE *et al.*, Respondents

S. C. 15—D. C. (Inty.) Colombo, 531

Fideicommissum created by will—Power of appointment of fideicommissary conferred on fiduciary—Such power must be exercised within the limits imposed by testator.

In a fideicommissum created by will the testator may empower the fiduciary to nominate the fideicommissary, but the exercise of such power of appointment must be closely examined to ascertain whether the fiduciary has acted within the strict limits of the mandate imposed on him.

APPEAL from a judgment of the District Court, Colombo.

In a fideicommissum created by will (P1) the testator devised certain property to his six children as fiduciaries. One of the clauses in the will provided that if a fiduciary died without leaving children his (or her) share should devolve equally upon his surviving brothers and sisters, but he was, in such a case, given the power to appoint by will "any one or more of my other children upon the same conditions and restrictions as are herein contained or to any one or more of the issue of any deceased child of mine upon such conditions and restrictions as he or she shall deem fit and proper, or without any condition or restriction whatsoever".

Florence, one of the fiduciaries, died without issue in 1930. By her last will (P2) she devised to her sister Adeline and brother Granville her $\frac{1}{6}$th share *absolutely* and not subject to "the same conditions and restrictions" as were contained in the will P1. One of the questions for decision in this appeal was whether, by the exercise of the power of appointment in this way, Florence acted *ultra vires* and whether her appointment was therefore void and of no effect.

H. V. Perera, K.C., with *P. Navaratnarajah* and *A. Nagendra*, for petitioner appellant.—Hendrick Seneviratne by last will P1 devised to his six children, *inter alia*, the property in question subject to a fideicommissuam in favour of his grandchildren. The last will P1 further provided that if any child of the testator died issueless, the share of such child should devolve equally on the testator's other children and issue of any deceased child, the latter taking *per stirpes*. A child of the testator was also given a power of appointment by which such child could exercise that power of appointment by last will and give such child's share to any one or more of the other children "subject to the same terms and conditions" as contained in the testator's will or to any issue of a deceased child absolutely. The last will P1 also provided that any shares bequeathed to the children under the ordinary clause of the will or which the children might inherit in any other manner under will should be held by the children under the conditions and restrictions mentioned in the will P1. Florence, one of the children of the testator, died without issue, leaving a last will, P2, by which she bequeathed one half of the property in question to her brother Granville absolutely. Granville

1—J. N. B 1223-1,040 (9/50).

in his own right possessed one-sixth of the said property under P1. He died intestate without issue, and his interests devolved on his brothers Irwin and Vincent and his sister Adeline. The petitioner-appellant's case is that the shares which Vincent inherited through Granville are free of any fideicommissum. The share which Vincent obtained through Granville can be classified under two heads. Granville got ½ of ⅙ under Florence's will P 2 and Vincent thus got ½ of this ½ of ⅙, namely, 1/36. Granville's own ⅙ also devolved on Adeline, Irwin and Vincent, and Vincent thus got ⅓ of ⅙. As regards what devolved on Granville under the will P2, it did not devolve under the father's will P1. When a power of appointment is exercised by last will the person appointed takes under the will of the donee of the power and not under the will of the creator of the power. See *Jackson v. Commissioner of Stamps* [1] and *Madras and Southern Mahratta Rly. Co. v. Bezwada Municipality* [2]. As regards the ½ of ⅙ which Vincent obtained from Granville directly, this is not a share bequeathed to Vincent under the will P 1 and therefore is not subject to any conditions and restrictions created by P 1. Both shares in Vincent's hands are thus free of any fideicommissum.

Kingsley Herat, for respondents.—Under the Roman Dutch law a power of appointment can be created only by way of a fideicommissum. The donee of the power is the fiduciary, and the persons selected by the donee of the power are the fideicommissaries under the will of the original testator or creator of the fideicommissum. The persons taking under the power and selected by the donee of the power are the fideicommissary heirs of the original testator—Steyn on Wills (1935 ed.), p. 237 ; Nadaraja on Law of Fideicommissa, p. 57 ; *Union Government v. Olivier* [3]. Thus, what Granville obtained under Florence's will P 2, he obtained as an heir of the original testator under P1. A power of appointment must be strictly exercised. Florence exceeded the content of the power given her and acted *ultra vires* in giving her share absolutely under P2. This amounts to a non-exercise of the power—*Nadaraja*, op. cit., p 59 and *Steyn*, p. 240. The result is that the conditional fideicommissum created by P1 operates, and as Florence died issueless her share devolved on Granville and the other surviving brothers and sisters. On Granville's death issueless, his shares devolved in terms of the last will P 1 on Vincent and Irwin and Adeline. Thus, the share devolving on Vincent in either case devolves on him by virtue of the provisions of P1 and, therefore, is subject to the conditions and restrictions created by P1. See also *Lindsay's Estate v. McBride's curator* [4] and *Westminster Bank, Ltd. N. O. v. Zinn N. O.* [5].

H. V. Perera, K.C., in reply.—There is a distinction between a *modus* and a condition. *Modus* is a limitation of estate and not a true condition. P1 deals with a *modus* and not a condition. The will P2 does not infringe any condition. See Perezius on Donations (Wikramanayake's Translation), p. 24, and Nadarajah on Fideicommissa, pp. 50–51.

Cur. adv. vult.

[1] *(1903) A. C. 350.*
[2] *A. I. R. (1944) P. C. 71.*
[3] *(1916) A. D. at p. 89.*
[4] *(1939) A. D. at p. 435.*
[5] *(1935) C. P. D. 157.*

July 13, 1950. DIAS S.P.J.—

One G. A. Don Hendrick Seneviratne died leaving six children Adeline, Granville, Irwin, Edmund, Florence and Vincent. The last named is the petitioner-appellant. The 1st respondent is the son of the appellant while the 2nd respondent is his wife.

By his last will P1, G. A. Don Hendrick Seneviratne (hereafter referred to as "the testator"), having made certain specific devises and bequests to his six children, dealt with the rest and residue of his property in the following terms :—

> "I hereby give devise and bequeath all the rest and residue of my property and estate, real and immovable and personal and movable whatsoever and wheresoever of every kind and description, whether in possession expectancy reversion remainder or otherwise, to my six children Adeline, Granville, Irwin, Edmund, Florence and Vincent share and share alike".

He then gave certain directions regarding a mortgaged property and proceeded to provide as follows :—

> "I hereby will and direct that my six children Adeline, Granville, Irwin, Edmund, Florence and Vincent shall have and hold all the immovable properties and the shares in the immovable properties hereby specifically bequeathed to them, and the shares in the immovable properties bequeathed to them and under the residuary clause hereof, and which they or anyone of them may inherit in any other manner under this my will, subject expressly to the conditions and restrictions following, that is to say—
>
> 1. That no child of mine shall mortgage, sell, or otherwise alienate or encumber save as hereinafter provided any one or more of the immovable properties or any part or portion thereof or any share in such immovable properties, but such child shall only be entitled to take receive and enjoy the rents and profits and income thereof during his or her life. Any such mortgage or other alienation shall be absolutely null and void, but this restriction shall not prevent such child of mine from leasing to any person or persons any of the said immovable properties for a period not exceeding two years at a time, and I hereby direct that a lease executed by a majority of my said children of any immovable properties held by them in common shall be good and valid and shall be binding on any of the children who shall refuse or neglect to execute the same when requested thereto by the majority of them, without prejudice however to the right of the dissenting minority to their respective shares of the rent reserved by such lease. Provided however that any lease executed during the continuance of a lease shall be absolutely null and void.
>
> 2. On the death of any child of mine the immovable properties and all properties and all shares therein devised to him or her hereunder shall devolve on his or her issue or any one or more of them as such child by last will appoint, and subject to such conditions and restrictions as such child shall deem fit and proper or without any

condition or restriction whatsoever, and in the event of any child of mine dying intestate without such appointment as aforesaid, then, the same shall devolve absolutely on his or her issue, equally between them of more than one, subject expressly to the rights of the spouse of such deceased child of mine as hereinafter provided.

3. In the event of the death of any child of mine without leaving issue living at the time of his or her death, such immovable properties and shares therein devised to him or her hereunder shall devolve equally on any of my other children and the issue of any other deceased child of mine, such issue taking by substitution *per stirpes* and equally between them if more than one the share which his or her or their parent would have taken had such a parent been alive at the time of the death of any such child of mine. Provided however that any child of mine dying without issue shall have the right to give and grant any such immovable properties and shares therein or any of them by last will only to any one or more of my other children upon the same conditions and restrictions as are herein contained or to any one or more of the issue of any deceased child of mine upon such conditions and restrictions as he or she shall deem fit and proper or without any conditions or restrictions whatsoever, but subject expressly to the rights of the surviving spouse of such deceased child of mine as hereinafter provided."

Florence died without issue in 1930. By her last will P2 she devised *inter alia* her $\frac{1}{8}$th share of certain properties she inherited under the will P1—half to her sister Adeline and half to her brother Granville *absolutely*. Granville died in 1944 intestate and without issue. Edmund died in 1943 without issue and leaving no spouse. Adeline is also dead, but nothing flows from that. The only children of the testator surviving at the material dates are Irwin and Vincent the appellant. In this appeal we are only concerned with Vincent.

Vincent claims from three sources. (*a*) He inherited $\frac{1}{8}$th under the will P1 of his father the testator. There is no dispute about that share. (*b*) He claims $\frac{1}{3}$rd of the half of $\frac{1}{8}$th which Florence by her will P2 purported to devise to her brother Granville. (*c*) He also obtained $\frac{1}{3}$rd out of the $\frac{1}{8}$th which his brother Granville inherited under the testator's will P1. A dispute has now arisen between Vincent on the one hand and his son and wife on the other in regard to (*b*) and (*c*). Does Vincent take those shares absolutely, or does he take them subject to a *fideicommissum?* The point is that the land has been sold under the Entail and Settlement Ordinance (*Chapter 54*), and is now represented by a fund of money in Court. Vincent wants to draw his share of (*b*) and (*c*). His son and wife oppose that.

It is common ground that the will P1 creates a valid *fideicommissum*. The question is as to its scope and extent. The learned District Judge has refused the application of the appellant to draw the money, holding that it is subject to a *fideicommissum*. Both sides are agreed that his judgment is not very helpful.

This *fideicommissum* is one which has been created by will. Therefore the guiding principle in construing its provisions is to ascertain the intention of the testator by a consideration of the will as a whole.

With regard to the $\frac{1}{6}$ of $\frac{1}{6}$ of Granville, Mr. H. V. Perera confessed that there are two views possible. Granville, being one of the sons of the testator, inherited $\frac{1}{6}$ under the will P1. He died issueless and left no wife. Therefore, his $\frac{1}{6}$ devolved on his surviving brothers and sisters and Vincent obtained $\frac{1}{5}$ of $\frac{1}{6}$. The question is whether Vincent takes this absolutely or subject to a fideicommissum.

The clause in the will P1 immediately preceding the three conditions deals with three kinds of property, namely, (*a*) the immovable property and the shares of immovable property thereby specially bequeathed to the six children, (*b*) the shares in the immovable property bequeathed to them under the residuary clause, and (*c*) "which they or any of them *may inherit in any other manner under this my will*". That whole clause is made expressly subject "to the conditions and restrictions following", quoted above verbatim. Those conditions and restrictions summarized are (1) a prohibition against alienation, (2) that on the death of a child of the testator the "immovable properties and all properties and all shares therein devised to him or her hereunder" are to devolve on his or her issue subject to a power of appointment to that child by last will to select which of his or her children are to get that share, and if the child of the testator should die without making such an appointment, the share is to vest equally and absolutely in his or her issue. This second condition does not apply because Granville died without issue. (3) If a child of the testator died without issue, that share is to devolve on the surviving children of the testator or the children of a deceased child of the testator in equal shares, but it is provided that such a child shall have power by last will to appoint that his share is to go to one or more of his surviving brothers and sisters "upon the same conditions and restrictions as are herein contained".

In construing this will we must pay careful attention to what the testator intended, if it is possible to do so. I agree with Mr. Perera that the law favours free inheritance, and that where there are two viewpoints which are evenly balanced, the Court will incline towards that view which gives free inheritance. I would add, however, that the Court must also pay strict regard to what it was the testator intended should happen.

Mr. Perera argues that Granville inherited this $\frac{1}{6}$ share subject to a *fideicommissum*. He died intestate and without issue. Under the terms of the will his $\frac{1}{6}$ share thereupon devolved upon his three surviving brothers and sisters including Vincent. He acquired that $\frac{1}{5}$ of $\frac{1}{6}$ under condition 3 which provides that on the death of Granville without leaving issue living at the time of his death the immovable property devised to him "hereunder", i.e., under P1, shall devolve equally on the testator's other children. The proviso to condition 3 does not apply to Granville's case. There is no condition or restriction imposed on the children who inherit under Clause 3 from a deceased child. Therefore, it is urged that Vincent got his $\frac{1}{5}$ of $\frac{1}{6}$ free and absolutely. Mr. Perera points out that, although condition 1 imposes a fetter on the right

of Vincent to alienate, there is no indication as to who is to benefit should Vincent commit a breach of that prohibition. He, therefore, submits that condition 1 so far as this $\frac{1}{3}$ of $\frac{1}{6}$ is concerned is void.

Mr. Herat argues that the intention of the testator is clearly manifested in the main clause which precedes the three conditions. Granville obtained his share under the residuary clause of P1. The clause which precedes the three conditions provides that the shares in lands bequeathed to the children under the residuary clause "hereof" *and* "which they or any of them *may inherit* in *any other manner* under this my will" are to be subject *expressly* to the conditions and restrictions *following*. Those words must be given a meaning. It cannot be denied that Vincent obtained this $\frac{1}{3}$ of $\frac{1}{6}$ by reason of the provisions of the will P1. Therefore it seems to be clear that the testator intended by his will to provide for the second generation of his progeny. I, therefore, hold that Vincent holds this $\frac{1}{3}$ of $\frac{1}{6}$ subject to the conditions and restrictions imposed by the will, and not absolutely.

With regard to the $\frac{1}{3}$ of 1/12 which came to Vincent *via* Florence and Granville, under the testator's will P1, Florence obtained $\frac{1}{6}$ burdened with a *fideicommissum* in favour of the children of Florence with power given to her to appoint one or more of them as she by last will may appoint, either with or without conditions which she may impose. Florence had no children. Therefore, that provision (condition 2) did not operate. The testator by P1 also imposed a conditional *fideicommissum* by condition 3 to the effect that if Florence died without leaving children, her $\frac{1}{6}$ share should devolve equally upon her surviving brothers and sisters, but she was, in such a case, given the power to appoint by last will "any one or more of my other children upon the same conditions and restrictions as are herein contained, or to any one or more of the issue of any deceased child of mine upon such conditions and restrictions he or she shall deem fit and proper, or without any condition or restriction whatsoever".

It will be seen that in exercising her power of appointment under the proviso to condition 3, Florence could do one of two things—(*a*) appoint by last will one or more of her brothers and sisters upon the same conditions and restrictions as are contained in the will P1, or (*b*) if she appointed a child *of a deceased child* of the testator, Florence could give the share absolutely, i.e., freed from the *fideicommissum*, to that child. The testator by that clearly intended that while the second generation would be free, the first generation, i.e., his children, should be fettered.

Florence by her will P2 purported to exercise her power of appointment in favour of her sister Adeline and brother Granville, but she devised her $\frac{1}{6}$ share *absolutely* and *not subject* "*to the same conditions and restrictions*" as are contained in the testator's will P1.

Mr. H. V. Perera for the appellant argues that that makes no difference. Mr. Herat for the respondents submits that it makes a great difference, as by the exercise of the power in this way Florence was acting *ultra vires* of her powers under P1 and her appointment is therefore void and of no effect.

Steyn in his treatise on Wills (page 237) says: "A testator may delegate, appoint or empower a third person to nominate his heir or legatee, or he may confer upon a beneficiary to whom he has bequeathed a limited interest in his estate or portion thereof, the power of selecting the person or persons on whom it shall devolve at the expiration of such limited interest, or of fixing the shares of, or of determining the manner of distribution among the beneficiaries, whether named individually or as a class. Such a power of appointment can only be exercised by way of a *fideicommissum*, the person to whom the power of appointment is given is the fiduciary, and the persons selected from those named by the testator are the fideicommissaries under the will of the testator. 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 persons nominated under the appointment are, therefore, the heirs or legatees *of the testator* and *not* of the person who exercised the power". In his helpful and illuminating work on the Law of Fideicommissa Mr. T. Nadaraja says at page 57: "Thus, it is open to the testator to leave to the fiduciary the task of deciding who are to be the fideicommissaries by giving the fiduciary what would in English Law be called a 'power of appointment'. This so-called power of appointment can under our law be created only by way of a *fideicommissum*, so that the heir or legatee to whom the power of appointment is given is the fiduciary, and the persons selected from those named by the testator are fideicommissaries under the will of the testator".

In *Westminster Bank Ltd. v. Zinn* [1] Curlwis C.J. said: "When I use the words 'power of appointment' in connection with the will . . . . I am using a phrase well known to English Law . . . . but we must guard against the use of that phrase in connection with South African wills in any other sense than as referring to the right or mandate which a fiduciary has under our law to perform an act of testamentary disposition on behalf of another person, i.e., the person who created that right or gave that mandate . . . . Our law does not make any distinction, as apparently the English Law does, between a general power of appointment and a special power of appointment". In *Union Government v. Olivier* [2] Juta J. said: "Such a power of appointment can only be exercised in our law by way of a *fideicommissum*, so that the heir or legatee to whom the power of appointment is given is the fiduciary, and the persons selected from those named by the testator are the fideicommissaries under the will of the testator"—see also *Westminster Bank Ltd. N.O v. Zinn N.O* [3].

In his work on the Law of Fideicommissa, Mr. Nadaraja says at page 59: "Where there is a valid power of appointment conferred either expressly or by implication on a fiduciary, and the latter *duly* exercises the power, the persons nominated by him become, as from the date when the instrument of appointment takes effect, the heirs or legatees of the original testator who conferred the power in just the same way as if the testator had himself nominated them in his will. *But—for the exercise of the power of appointment to be valid, the fiduciary must act within the*

[1] *(1938) A. D. 57.* [2] *(1916) A. D. at p. 89.*
[3] *(1935) C. P. D. at p. 157.*

limits imposed upon him. For example—if the mode of exercise of the power is restricted to appointment by will, an appointment by deed would be invalid, and *vice versa*[1]; 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. *Again, it must be clearly established that the fiduciary acted in pursuance of the power,* so that, for example, *a mere general devise by the fiduciary's will will not be considered as comprehending property subject to a power of appointment, unless there is some reference, express or implied, to the subject of the power itself, or some circumstance exists from which it can be inferred that an exercise of the power has taken place.* 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 ".

In *Lindsay's Estate v. McBride's curator* [2] Sutton J. said : " The grantee of a power of appointment must exercise his or her powers within the limits of those conferred upon him. According to Halsbury's Laws of England (Vol. 23, pp. 49–50) where there is a complete execution of a power and something added which is improper, the execution is good and the excess bad, where there is not a complete execution or where the borders between the excess and the execution are not distinguishable, the whole appointment fails ". It is a question whether the learned Judge was justified in importing principles from the English Law in order to construe powers of appointment under the Roman Dutch Law, in the light of what was said in *Westminster Bank v. Zinn* [3]. Even assuming that the English Law rule applies, I do not think Florence completely exercised the power and added something which is improper. Under P1 the mandate was if she had no issue, that she could by last will select one of the other children of the testator and give to them her share " upon the same conditions and restrictions as are herein contained ". That is what she did not do.

I have carefully examined the will of Florence—P2. In the clause where she devises to her sister Adeline and to her brother Granville absolutely, there is no reference whatever to her power of appointment. Furthermore, I am of opinion that Florence was not acting within the limits imposed by the testator in P1 when she purported to give the property to Granville absolutely. It was in direct defiance of the testator's directions.

Mr. H. V. Perera citing *Perezius on Donations* (Wickremanayake's translation) p. 24, argued that the relevant clause in the will P1 did not impose a *condition* but only a *modus* or *limitation*. The question is fully explained in *Nadaraja's Law of Fideicommissa* at pp. 50–51. Regarding the will P1 as a whole and having regard to the intention of the testator, I am unable to agree that this injunction was one which Florence could ignore.

[1] *See Kadija Umma v. Meera Lebbe (1903) 7 N. L. R. at pp 27-28. Anthonisz v. Barton (1903) 7 N. L. R. at p. 45.*

[2] *(1939) A. D. at p. 435.* [3] *(1938) A. D. 57.*

Therefore, in my view, there was not a complete execution of her power or mandate, and the whole appointment, in consequence, fails. Steyn says (at p. 240) "The grantee must exercise his powers within the limits of those 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 my opinion the exercise of a power of appointment must be closely examined to ascertain whether the fiduciary has acted within the strict limits of the mandate imposed on him or her. Assuming that Florence exercised her power of appointment correctly and properly, then Granville took under Florence's will P2 as the heir, not of Florence, but of his father the testator. That being so, he comes within the clause which precedes condition 1 of the will and takes "subject expressly to the conditions and restrictions following", i.e., under condition 1 he is prohibited from alienating, and under condition 3 on his death without issue the share will devolve on his surviving brothers and sisters including Vincent. I hold, however, that Florence did not validly exercise her power of appointment. Therefore, on her death without issue Vincent would inherit under P1 subject to the fideicommissum.

I therefore affirm the order appealed against with costs.

SWAN J.—I agree.

Appeal dismissed.

1949 *Present:* **Nagalingam J.**

DON PHILIP *et al.*, Petitioners, *and* T. B. ILLANGARATNE, Respondent

ELECTION PETITION NO. 1 OF 1948

Election petition—Corrupt practice—Publication of false statements regarding candidate—Burden of proof—Assistance of political party—Agency—Responsibility of candidate—Parliamentary Elections Order in Council, 1946—Section 58 (1) (c) and (d).

Where the allegation is that the respondent or his agents are guilty of making false statements of fact in relation to the personal character and conduct of a rival candidate, the falsity of the statement is *prima facie* established when there is a denial on oath. It is for the party who asserts that a statement alleged to be false is true in fact to establish beyond reasonable doubt the truth of that statement.

Where a political party of which the candidate is not a member places the services of its office and its workers at his disposal and addresses meetings on his behalf such party and its active members are constituted agents of the candidate and he is responsible for any corrupt practice committed by them.

A document does not fall within the class of publications referred to in section 58 (1) (c) of the Order in Council unless it either expressly or by implication refers to the election. If it does not, however mischievous it may be in its effect on the election itself, it is outside the scope of the section.

THIS was an election petition presented against the return of the respondent, at a bye-election, as member for the Electoral District of Kandy.

G. E. Chitty, with *T. K. Curtis*, *G. T. Samarawickrema*, *M. I. Mohamed* and *J. F. Soza*, for the petitioners.

S. Nadesan, with *N. Nadarasa*, *S. Sharvananda* and *M. L. S. Jayasekera*, for the respondent.