

Privy Council Appeal No. 1 of 1913.

**Eliza Frances Tonkin Higgs Vatcher and
others** - - - - - *Appellants,*

v.

Henry Paull and others - - - - - *Respondents.*

FROM

THE ROYAL COURT OF THE ISLAND OF JERSEY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 17TH DECEMBER 1914.

Present at the Hearing.

LORD SHAW.

LORD SUMNER.

LORD PARKER OF WADDINGTON.

SIR JOSHUA WILLIAMS.

[*Delivered by* LORD PARKER OF WADDINGTON.]

Two points arise for decision in the present case. The first is whether the appointment of the 22nd March 1882 is a valid appointment, a question which is for the most part a question of law. The second is whether the contract of the 18th August 1886 was induced by fraud and ought therefore to be set aside, a question which is for the most part a question of fact.

The late Henry Vatcher, senior, who was born in England was twice married, first to Margaret Way, who died in 1843, and secondly to Eliza Frances Tonkin Higgs. There was issue of the first marriage, two children, namely, Margaret, who married a Mr. Torkington, and Henry, who married Maria George Andrew, spinster,

and died in 1868, leaving issue the Respondents, Maria Florence Paull and Ellen Vatcher. There was issue of the second marriage of Henry Vatcher, senior, six children, namely, the Appellant, John Sidney Adolphus Vatcher, the Appellant, Edith Mary Atkinson, Bessie Gertrude, who died in 1885 without issue, the Respondent, Charles Gardner Vatcher, the Appellant, James Raynold Morley Vatcher, and the Appellant, Rose Ethel Monckton.

By an Indenture of Settlement dated the 6th April 1846 (being a settlement made in contemplation of the second marriage of Henry Vatcher, senior), certain funds of the value of 8,000*l.* or thereabouts were settled upon trusts for the payment of the income thereof during the joint lives of Henry Vatcher, senior, and his second wife in manner therein provided, and after the death of Henry Vatcher, senior, in case his second wife should survive him, to the second wife during her life or until re-marriage. And subject as aforesaid in trust for the children of Henry Vatcher, senior, whether by his first or second marriage or the issue of such children born in the life-time of Henry Vatcher, senior, and the second wife or of the survivor of them in such shares upon such conditions and in such manner as Henry Vatcher, senior, and his second wife should by writing appoint, and in default of such appointment as the survivor of them should by writing or by will appoint, and in default of any such appointment in trust for the children of the said Henry Vatcher, senior, by either marriage who being males should attain 21 years or being females should attain that age or marry and the issue of any male child who should die under 21 years of age leaving issue who should be living at the period of distribution, to be divided between them if

more than one in equal shares the issue of any deceased male taking *per stirpes* and not *per capita*.

By virtue of certain further Indentures dated respectively the 19th of October 1847 and the 19th May 1855, certain further funds were settled upon trusts similar in all respects to those declared by the settlement of the 6th April 1846, except that there was no power of appointment conferred on the survivor of Henry Vatcher, senior, and his second wife. The aggregate value of the settled property at the death of Henry Vatcher, senior, was about 27,000*l*.

In the year 1857, Henry Vatcher, senior, with his wife and family took up their abode in the island of Jersey.

In the year 1863 he and his second wife purchased jointly with benefit of survivorship a residential property in the island known as "Rosemount," and made their home there. Between the year 1865 and the time of his death, Henry Vatcher, senior, made several further purchases of real property in the island. Some of the properties purchased were conveyed to Henry Vatcher, senior, some to Henry Vatcher, senior, and the Appellant, John Sidney Adolphus Vatcher, jointly with benefit of survivorship, and some to Henry Vatcher, senior, and the appellant John Sidney Adolphus Vatcher jointly for themselves and their heirs. In every case the greater part of the purchase price was satisfied by the creation of "rentes" or incumbrances on the property then or previously purchased.

By a deed of appointment, dated the 22nd March 1882, Henry Vatcher, senior, and his second wife appointed that the funds settled by the said Indentures of the 6th April 1846, the 19th October 1847, and the 19th May 1855

should be held by the respective Trustees thereof after the decease of the survivor of them the said Henry Vatcher, senior, and his second wife, upon trusts which were declared as follows, that is to say:—

“To pay and divide the same unto between and
 “ among the child, children or other issue of the said
 “ Henry Vatcher by his said wife, Eliza Frances
 “ Tonkin Vatcher when, and if they shall attain the
 “ age of 21 years, but so that such children shall
 “ take *per stirpes* and not *per capita* it being our
 “ intention to exclude Margaret Torkington, a daughter
 “ of me, the said Henry Vatcher, and the children
 “ of Henry Vatcher, a son of me, the said Henry
 “ Vatcher, from all participation in any appointment
 “ hereby made. Provided, and we lastly declare, that
 “ this our appointment is to be revocable by us at any
 “ time, and that in case the said Margaret Torkington
 “ and the two children of the said Henry Vatcher,
 “ the son shall upon the death of me, the said Henry
 “ Vatcher, and of me, the said Eliza Frances Tonkin
 “ Vatcher, absolutely renounce, decline and abandon as
 “ tenants by their procureur or otherwise all rights
 “ and claim to which they or either of them
 “ may be entitled to or upon the real estate or free-
 “ hold and leasehold property or lauds and rents to
 “ which either of us at our death may be entitled
 “ under the Law of Jersey or otherwise the appoint-
 “ ment hereby made shall be at an end and absolutely
 “ void.”

It was suggested in the evidence of English Law before the Jersey Courts that this appointment was void as infringing the English rule against perpetuities. The suggestion, however, was not pressed before their Lordships' board: indeed it is in their Lordships' opinion reasonably clear as a matter of construction that the issue to take under the appointment are issue living at the death of the survivor of Henry Vatcher, senior, and his second wife, and all such issue must necessarily attain the age of 21 years within the period allowed by the rule. The only objection to the appointment urged

before their Lordships was that it constituted a fraud on the power.

The term fraud in connection with frauds on a power does not necessarily denote any conduct on the part of the appointor amounting to fraud in the Common Law meaning of the term or any conduct which could be properly termed dishonest or immoral.

It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power. Perhaps the most common instance of this is where the exercise is due to some bargain between the appointor and appointee, whereby the appointor or some other person not an object of the power, is to derive a benefit. But such a bargain is not essential. It is enough that the appointor's purpose and intention is to secure a benefit for himself, or some other person not an object of the power. In such a case the appointment is invalid, unless the Court can clearly distinguish between the *quantum* of the benefit *bonâ fide* intended to be conferred on the appointee, and the *quantum* of the benefit intended to be derived by the appointor or to be conferred on a stranger. (See the case of *Sadler v. Pratt*, 5 Simons 632, and *re Perkins* 1893, 1, Ch. 283.)

In the present case by the very terms of the settlement creating the power, the donee is entitled to appoint to one or more of the objects of the power exclusively of the others or other of them. He is also entitled to appoint upon condition. The mere fact, therefore, that he intended to benefit the issue of the second, to the exclusion of the issue of the first marriage cannot be alleged against the validity of the execution of the power, nor is it any

objection to the validity of such execution that the appointment is subject to a condition subsequent with a defeasance in case the condition be not performed. If, therefore, the appointment is open to any objection it must be by reason of the nature of the condition imposed.

It should be noticed that in the present case the condition is not one to be performed by the appointees; it is to be performed if at all by third parties over whose actions the appointees have no control. The case therefore is clearly distinguishable from *re Perkins* (1893, 1 Ch. 283) and also from *Stroud v. Norman* (Kay 313). It is also unlike these cases in another respect, namely, that the defeasance in case the condition is not fulfilled is not inserted with a view to an alternative appointment, but with the intention that on failure of the condition the funds are to go upon the trusts limited by the Settlement in default of appointment. In their Lordships' opinion both grounds of distinction are of importance. Apart from cases of appointments made in pursuance of a bargain under which the appointor or a person not an object of the power is to derive a benefit there is no authority for holding an appointment bad because it is made on a condition to be performed not by the appointee but a third party. The real vice of an appointment on condition that the appointee shall benefit the appointor or a third party is that the power is used not with the single purpose of benefiting its proper objects but in order to induce the appointee to confer a benefit on a stranger and obviously this vice is absent where the condition is not to be performed by the appointee. Nor is there any case in which a

bargain to allow the funds to go in default of appointment or a condition the non-performance of which will leave the funds to go in default of appointment has ever been successfully impeached. The limitations in default of appointment may be looked upon as embodying the primary intention of the donor of the power. To defeat this intention the power must be *bonâ fide* exercised for the purpose for which it was given. A bargain or condition which leads to the fund going in default of appointment can never therefore defeat the donor's primary intention. Even in the case of a condition to be performed by the appointee the condition does not necessarily invalidate the appointment. As explained by Sir William Page-Wood in *Stroud v. Norman* (Kay 313) it can only do so if the purpose of the appointor in imposing it is to benefit himself or a third person not an object of the power. It is not enough that the appointor or some person not an object of the power may conceivably derive some benefit. If this were not so no father could appoint in favour of an infant child because if such infant died under 21 the father himself would take as next of kin. In order to avoid such appointment it must be proved affirmatively, or the inference to be drawn from the circumstances must be, that the purpose of the appointment is not to benefit the infant but to benefit the appointor through the infant. This is the real answer to the powerful argument put forward by Mr. Jenkins. Though, he said, the renunciation by the first family would enure for the benefit of the second family under the state of circumstances in which the appointment was made, it was none the less possible that the second family might all of them predecease

the appointor, in which case it could enure only to the benefit of strangers. Nobody can doubt, however, that the real purpose of the condition was to ensure that the second family, all of them objects of the power, should either (1) take the whole of the settled funds or (2) if the first family renounced the real estate in their favour, their share in such funds as in default of appointment. The mere fact that in some conceivable event the renunciation might benefit a stranger could not in their Lordships' opinion invalidate the appointment even if the persons to perform the condition had been appointees.

In the courts below the question of the validity of the appointment was a question of fact to be determined on evidence. On the evidence before them these Courts could come to no other conclusion than that the appointment was void as constituting a fraud on the power. Their Lordships, however, have to determine the question as a question of law independent of the evidence which was before the Courts below, and in their opinion the appointment was in all respects a good and valid appointment within the scope and intention of the power and cannot be impeached as constituting a fraud thereon.

Their Lordships will now proceed to consider the second question which arises for decision, namely, whether the contract of 18th August 1886, whereby Mrs. Torkington and the two children of Henry Vatcher, junior, renounced their inheritance in the Jersey property in order that the marriage settlement funds might go in default of appointment, was induced by fraud and ought therefore to be set aside.

Henry Vatcher, senior, died on the 26th March 1886 having by his will dated the

4th of November 1885 bequeathed to his wife the one-third of his personal estate of which by the law of Jersey he was entitled to dispose in addition to the one-third to which she was entitled by Jersey law; the remaining one-third devolved by Jersey law on his children or their issue. He appointed his wife and his son-in-law, Mr. Atkinson, to be his executors. He also signed prior to his death a document entitled "Expression of my wishes for the guidance of my family in the division of my property." By that document he expressed the wish that in the partage of his real property in Jersey of which by Jersey law he had no power to dispose, Margaret Torkington and the children of Henry Vatcher, junior, should renounce all claim thereto, stating as his reason that the property was uncertain and heavily encumbered and would be an everlasting and unprofitable encumbrance.

On the death of Mr. Vatcher, senior, Maria Florence Vatcher, the eldest daughter of Henry Vatcher, junior, became his principal heiress and as such entitled to take possession of his real estate in Jersey subject to the liability of dividing the same with her co-heirs, and of providing for the dower of the testator's widow and of her own mother. In this division her own share would by Jersey law be considerably greater than the share of any of the co-heirs including her sister Ellen. Their Lordships will assume that the inheritance consisted of all the items set out on pp. 790 to 793 of the Record although it appears that as to the properties comprised in Schedule B. they would not form part of the inheritance until the benefit of survivorship reserved to the widow of Henry Vatcher, senior, had been set aside in appropriate legal proceedings, and although as

to the properties comprised in Schedule C. and D. they did not really form part of the inheritance at all, the only right of the co-heirs being to have the price paid for them by Henry Vatcher, senior, brought into hotchpot in the division.

Shortly after the death of Henry Vatcher, senior, negotiations took place between his widow and second family on the one hand and Mrs. Torkington and the two children of Henry Vatcher, junior, on the other hand as to whether the latter should or should not renounce their shares in the inheritance, it being assumed by all parties and in their Lordships' judgment rightly assumed that if they did not do so the appointment of the 22nd March 1882 would stand and they would therefore lose all interest in the settled funds. In these negotiations the widow of Henry Vatcher, senior, and his second family were represented by Mr. Coutanche, a Jersey lawyer of repute, and in part also by Mr. Atkinson who had married a daughter of Henry Vatcher, senior, by his second wife, and was a clergyman. Mrs. Torkington was represented by Mr. Baudains, another Jersey lawyer, and Mrs. Henry Vatcher, junior, and her two daughters, were represented by Mr. Graham, a solicitor, practising at Fowey in Cornwall, assisted at times by Mr. Baudains. It is alleged that in the course of these negotiations Mr. Coutanche and Mr. Atkinson fraudulently represented to Mr. Graham that the properties mentioned in the statement to which their Lordships have already referred were, having regard to the incumbrances thereon, of no value at all, and by means of such representation induced Mr. Graham to advise his clients to renounce their inheritance.

These proceedings were instituted on the 12th November 1910, that is to say, twenty-four years after the alleged fraud. Mr. Coutanche, Mr. Atkinson and Mr. Baudains are all dead. The attitude which the Court ought to adopt in considering charges of fraud made under such circumstances is well stated by Lord Justice Bowen in the case of *re: Postlethwaite* (60 L.T.N.S. p. 514). The general presumption which the law makes is in favour of the good faith and validity of transactions which have long stood unchallenged, and if the known facts and existing documents are, though such as to give rise to suspicion, nevertheless capable of a reasonable explanation, the Court ought not to draw inferences against the integrity of persons who have long been dead and cannot therefore defend themselves.

Approaching the question in this way and after a careful consideration of the evidence, their Lordships have come to the conclusion that no fraud has been established on the part of anyone. In order to establish fraud it must be proved (1) that a representation was made; (2) that this representation was untrue; (3) that it was untrue to the knowledge of the person making it; and (4) that it induced the contract. Under no one of these four heads is the evidence really satisfactory.

The evidence that Mr. Coutanche and Mr. Atkinson represented the property to be of no value consists entirely of the statements of Mr. Graham contained in his depositions, corroborated by the document No. 228 at p. 825 of the Record. Mr. Graham's recollections as to the precise statements made in conversations which took place nearly a quarter of a century ago cannot be very reliable, and it must be remembered that the important point was not

whether the property had any value at all but whether it was sufficiently valuable to justify Mr. Graham's clients in abandoning their share in the settled fund, the amount of which was tolerably certain. Value too is a matter of opinion rather than of fact. If the statements made by Mr. Coutanche and Mr. Atkinson were to the effect that so far as they could judge the property was not of sufficient value to justify the abandonment by Mr. Graham's clients of all interest in the settled funds, the difficulty of proving fraud would be immensely increased. The Respondents, however, attach great importance to the document at p. 825 of the Record as corroborating Mr. Graham's oral testimony. Indeed their counsel in effect admitted that without this document Mr. Graham's evidence could not after so great a lapse of time be treated as sufficient to prove that the statements relied on were made, or if made, were made dishonestly. It becomes necessary therefore to consider the history of this document in detail.

The document consists of a schedule of the real property of Henry Vatcher, senior. It appears to have formed the subject of discussion between Mr. Graham and Mr. Coutanche in one of their interviews, in the course of which Mr. Coutanche, or his clerk, made certain additions in red ink. The document shows the particulars of the real estate and of the "rentes" or incumbrances charged thereon, and also the valuation for the assessment of taxes in the various parishes where the property was situated. The red ink additions show that if the "rentes" be subtracted from the valuation for assessment there will remain an apparent bonus of 157 qrs. which is stated to represent an annual income of 117*l*. There

follows a statement of further charges consisting of parochial rates, repairs and annuities, showing that this annual value of 117*l.* is more than exhausted. It is said that these red ink additions amounted to a representation that the property was valueless and that such representation must have been false to the knowledge of Mr. Coutanche for the following reason. Both the "rentes" and the assessment values are given in quarters of wheat, but though the conventional value of a quarter for assessment purposes is 1*l.*, the conventional value of a quarter for "rente" purposes is fourteen shillings and nine pence or in some few cases fifteen shillings and elevenpence only. It is said, therefore, that Mr. Coutanche in subtracting the "rente" quarters from the assessment quarters knowingly took advantage of Mr. Graham's want of local knowledge and fraudulently brought out the annual value as 117*l.*, whereas it should have been 326*l.* On the other hand there is some evidence that the method pursued is not uncommon in Jersey when it is desired to arrive at an approximate annual value, the reason being that though the "rente" quarters are conventionally less in value than the assessment quarters the assessment valuation is always too high. On the whole although the document is one which in normal circumstances would call for some explanation their Lordships cannot treat it as conclusive evidence of fraud on the part of a deceased person.

Secondly, there is in their Lordships' opinion no satisfactory evidence of the real value of the property at the date of the death of Henry Vatcher, senior. The incumbrances amounted to 652 quarters of "rente" or thereabouts, and there is no satisfactory evidence

that the income derived from the property was anything like sufficient to defray the "rentes."

The Respondents rely mainly in this connection on the fact that Henry Vatcher, senior, was at his death, working a quarry on the property which has since developed into a paying concern. The greater part of this quarry appears to have been situated on property which did not strictly form part of the inheritance, though the price paid for it might have had to be brought into hotchpot in the division. Quite apart, however, from this consideration, their Lordships are of opinion that there is no sufficient proof of the income which was being derived therefrom at the death of Henry Vatcher, senior. The result of the evidence appears to be that the quarry was still in an experimental stage and might or might not develop into a paying concern. Moreover, at Henry Vatcher's death, Jersey was passing through a financial crisis which had depreciated the value of real estate. The evidence taken as a whole points to the conclusion that though Henry Vatcher's real property may at his death have had some value, it must as an investment, have been extremely speculative and uncertain. It should be noticed that concurrently with the renunciation of the inheritance on the part of Mrs. Torkington and the children of Henry Vatcher junior, the other co-heirs ceded their rights therein to Mrs. Vatcher, senior, apparently because the property was in the nature of a *damnosa hæreditas*, and if it could be made profitable at all could only be made profitable by a person with sufficient capital to keep down the incumbrances, and to develop the quarry on the estate.

Thirdly, in the case of Mr. Atkinson, there is no evidence at all that he believed the

property to have any value even if he stated that it was valueless. On the contrary he allowed his wife to cede her interest in the inheritance to her mother without any consideration at all which is only explicable on the footing that he thought the property had little or no value. With regard to Mr. Coutanche the only evidence that he knowingly made any misrepresentation is the document to which their Lordships have already adverted.

Lastly the evidence that Mr. Graham in advising his clients relied on the misrepresentations alleged is by no means satisfactory. It appears by the correspondence that both Mr. Graham and Mr. Baudains formed their own estimate as to the value of the property and were of opinion that it had at any rate some value. Indeed, Mr. Baudains had informed Mr. Graham that if the principal heiress could take the real estate without endangering her sister's share in the settled fund it would be worth her while so to do, but Mr. Graham did not think this was possible. He was in fact representing two persons with somewhat diverse interests and apparently treated the matter as one in which the interests of the two sisters must be considered together. Their Lordships do not blame him for this, but he was evidently aware that Mr. Baudains thought the property had some considerable value, and it is unexplained why he should attach more importance to the statement of Mr. Atkinson, a layman, and Mr. Coutanche, who was advising the other side, than to the statements of Mr. Baudains, whom he had consulted on behalf of his clients, and who was advising Mrs. Torkington. Moreover, it appears that the red ink additions in document No. 228 were made after and not before the final arrangements as to the terms in which Mr. Graham's clients should renounce the inheritance.

On the question of fraud therefore their Lordships cannot take the view adopted by the Courts below. It is true that as a general rule their Lordships' board treat questions of fact on which there have been concurrent findings in the Courts below as conclusively established, but the present case is a peculiar one. In the first place their Lordships cannot help thinking that the evidence to the effect that the appointment of the 22nd March 1882 was a fraud on the power to some extent coloured the view taken by the Courts below of other facts. The appointment seems to have been considered as in the nature of an overt act in a fraudulent conspiracy to deprive the first family of their inheritance, which could not lawfully be done according to Jersey law, and other acts of Henry Vatcher, senior, however innocent, are similarly treated. For example, the fact that so far from paying off the encumbrances on the property, he actually created new encumbrances, and the fact that he took no means to divest himself of what he stated was an onerous property, are in the judgment cited against him. Again, there is in the present proceedings less reason than is usually the case for refusing to go behind concurrent findings. There was no oral evidence at the trial. All the evidence was taken on deposition, and the courts below were in no better position to judge of its effect than is their Lordships' board. And lastly, the Respondents' counsel did not himself rely on the rule, but expressly invited their Lordships to go into the evidence and come to their own conclusions. This their Lordships have done, and though they regret to differ from the courts below, they cannot avoid some satisfaction in acquitting of all charges of fraud persons who have long been dead and against whom in their lifetime no

such charge was ever made. Their Lordships cannot help thinking on reference to the initial stages of these proceedings that no charge of fraud was originally intended to be made. It appears to have been developed in the course of the examination and cross-examination of witnesses for the purpose of the trial. And though in the present case there is no reason to suppose that the Appellants were in any way taken by surprise or deprived of the opportunity of proving relevant facts, their Lordships are of opinion that where charges of fraud are intended to be made, full particulars thereof ought to be given in the pleadings, either as originally framed or as amended for that purpose.

The Courts below in setting aside the contract of the 18th August 1886 appear to have been influenced to some extent by the fact that the Respondent, Maria Florence Paull, though of full age by Jersey law was according to English law still an infant, and that the Respondent, Ellen Vatcher, acted through Mr. Atkinson as her guardian, although his wife had an adverse interest. These points were not relied upon and were in effect abandoned before their Lordships' board. They are mentioned only to show that their Lordships express no opinion thereon.

Under the circumstances their Lordships will humbly advise His Majesty to allow the Appeal and to dismiss the action. With regard to costs their Lordships observe that the Appellants produced no evidence of English Law in the Court of first instance, and under these circumstances they think that justice will be done if the Respondents are ordered to pay the costs of this Appeal and four-fifths only of the costs incurred in the Courts below, and will humbly advise His Majesty to that effect.

In the Privy Council.

ELIZA FRANCES TONKIN HIGGS
WATCHER AND OTHERS

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