RENE JAL AUDIN and Others - - - *Appellants.* 14th February 1922.

v.

TOOTE JAYE and CARAYOL - - - *Respondents.*

"Lawful and natural children" in case of an immediate devise —Exercise of power of sale by a trustee, Sections 11 *and* 12 *of the Intestate Estates Ordinance,* 1909, *of the Gambia—Fraud on a power of sale—Absence of moral turpitude in exercising it—Sale not to meet testamentary expenses or debts due from estate.*

The facts of this case are sufficiently set out in the judgments.

Appeal from a judgment of McDonnell, Acting J., in the Supreme Court of the Colony of the Gambia.

Wright for Appellants cites:—

Clifton *v.* Goodburn, L.R., 6 Eq., p. 275.
Loveland *v.* Loveland (1906), 1 Ch., p. 542.
Re Russell, 19 Ch. D., p. 432.
Scott *v.* Tyler, Dickens Reps., p. 712.
Doe & Woodhead *v.* Fowlis, English Reps., Vol. 149, p. 204.
Carlyon v. Truscott, L.R., 20 Eq., p. 348.
Topham *v.* Duke of Portland, L.R., 5 Ch., p. 40.
Halsbury, Laws of England, Vol. 13, p. 220, para. 281.
Farwell on Powers, p. 403.

Thompson for Respondents cites:—

Maxwell on Statutes, 3rd Edition, pp. 172 & 173.
Lewin on Trusts, 9th Edition, pp. 468 and 469.

PURCELL, C.J.

This is an appeal from the judgment of Mr. Acting Justice McDonnell sitting in the Supreme Court of the Gambia dated 15th July, 1918.

The facts of the case are set out very clearly in the judgment delivered in the Court below and it will be only necessary to briefly refer to them.

August Benedict Hippolite Audin, who died on 2nd November, 1906, devised by a will executed on 18th May, 1892, *inter*

alia, a certain lot of town land "*to my lawful and natural children to be shared between them share and share alike.*" Testator had never married but had a number of children by two women with whom he lived, the six survivors of whom were Plaintiffs in the Court below and Appellants in this Court. The Respondent Jaye, the surviving executrix of the Will, sold this freehold lot of land, to which I have referred, to the other Respondent Jean Carayol. The main issue before the Court was whether the Respondent improperly exercised this power of sale, the object of this litigation being to get such sale set aside and that the Court shall order a re-conveyance of the property to the Plaintiffs on their paying the costs of administration incurred by the Executors.

The Court below decided that the Plaintiffs came within the designation "lawful and natural children" in the Will of the Testator, and in my opinion it was right in so deciding. The Will of the Testator in this instance spoke from the time of his death, the devise to the children was therefore immediate and there being no possibility of legitimate issue coming into existence who could take under the devise, the illegitimate children took. There is ample authority to support this contention and the following authorities were cited to us in the course of Mr. Wright's arguments:—

Re Loveland—Loveland *v.* Loveland (1906), 1 Ch. p. 542.
Clifton *v.* Goodburn, L.R., 6 Eq., p. 275.

Hill *v.* Crook, L.R. 6, H.L., p. 265.

The following passage occurs in the Testator's Will:—

"*It is my desire that should I have any surviving children*
"*that my house and lot in* 9, *Hagan Street, shall not be sold*
"*but remain to them or their children in perpetuity.*"

Now the question arises, was the Respondent Jaye justified in selling these premises? It is quite clear that under the provisions of sections 11 and 12 of the "Intestate Estates Ordinance, 1909," she was a trustee and had power to deal with the Testator's realty to satisfy his debts and testamentary expenses. The reason she has given for selling this property was to recover the sum of £13. 2s. 6d. which she had advanced (so she states) to defray the administration expenses of the estate.

It occurs to one that a portion of this property might have been sold or the whole or a portion mortgaged or leased. I am quite clear on the authority of Topham *v.* the Duke of Portland, L.R. 5 Ch. p. 40, that in exercising the power vested in her the

Respondent Jaye was bound to exercise it properly " with an entire and single view " to the object contemplated by the instrument giving her the power, in this case the Ordinance. I am bound to say, looking at the facts of this case, that I am quite unable to find that the Respondent Jaye exercised the power of sale from any such motive. She has in fact stated on oath in her evidence in the Court below what her reasons really were, namely:—

(1) That Harry Audin hissed at her;

(2) That she was old and unable to look after the property;

and I am quite clear from the authorities to which we have been referred that having allowed these reasons to influence her, her exercise of the power in these circumstances was what is known technically as a " fraud on the power." Fraud in this sense does not necessarily involve moral turpitude, but is consistent with the power being exercised unselfishly and with perfect honesty.

I have further come to the conclusion that very probably there has been a breach of trust here—as I cannot help feeling that the power of sale was exercised with improvidence and haste without inviting competition and without regard to the interests, if not of all the beneficiaries, at all events without regard to the interests of any but Harry Audin which might be regarded as an undue preference to him, and it should further be noted that all but two of the Appellants were infants. Lewin on Trusts may be quoted in this connection and is very clear on this point on page 468 (Ninth Edition); the learned author there said "A Trustee for sale will remember that he is bound by his office to sell the estate under every possible advantage to his cestuis que trust, and with a fair and impartial attention to the interests of all parties concerned." He goes on to say that it is a breach of trust of a trustee for sale if he fails in reasonable diligence in inviting competition, or contracts under circumstances of haste and improvidence or advances the interests of one party at the expense of another. Now that we have all the facts of this case before us, I cannot help feeling that the Respondent Toote Jaye has either done everything which Mr. Lewin says she ought not to have done or has failed to do those things which Mr. Lewin says she should have done.

Further, in my opinion it is clear that there was no independent valuation of this property whatever its real value may be, and on which I express no opinion; and lastly I cannot help feeling that, to say the least of it, it was a peculiarly ill-

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advised and unwise act that the same Solicitor should act for both the Respondents in this transaction. If ever there was a case in which two separate Solicitors should have been employed, this case was that case.

For these reasons, I think that the judgment of the Court below was erroneous and that this sale should be set aside with costs here and in the Court below.

SAWREY-COOKSON, J.

I agree.

There is no doubt that the gift to the beneficiaries under the Will being immediate the Plaintiffs, though illegitimate, could take, so that it seems to me that the whole case for the Appellants is disposed of on a determination of the two questions, viz.:—

(1) What was the true motive which induced the defendant executrix as donee of the power to sell the property concerned?

and

(2) Was that motive such as amounts to a fraud on such power?

In regard to the first of these questions, it is true that the Defendant herself assigned more than one reason, one of which is that she was an old woman and had not the strength to look after the yard, and it is noteworthy that she is brought to admit in her cross-examination in effect that she is not sure that the reason she had given in her examination-in-chief, viz., that she sold because a certain beneficiary named Harry had hissed at her, was the correct one. But I think that there can be no doubt when the evidence of another witness for the defence, that of Buguma Samba is considered on this point, that the real reason for her action was, to put it tersely, that she was tired of the whole business, it was too much trouble to her, more particularly because the inspectors worried her. Accepting this, therefore, as the true reason, was it an improper one, of a kind to justify the sale being set aside? I do not think there can be any doubt on the clear authority of Topham *v.* the Duke of Portland (L.R. 5 Ch., p. 40, and 11 H.L.C., p. 40) that the answer to this question must be in the affirmative. She clearly acted as she did, although quite probably without any idea that she was doing wrong in so acting, in such a manner as must on that authority be held to be a fraud on the power, inasmuch as she admittedly (as corroborated by one of her own witnesses) did

not sell in order to raise out of the Testator's estate funds to meet either some testamentary expense or some debt due by that estate. It is manifestly absurd and repugnant to common sense to argue that she sold an estate worth at least £380 in order to refund herself the £13. 2s. 6d. which she had found some considerable time prior to the sale, apart altogether from the fact that she herself (as corroborated) deposed that she had quite another object in selling. Since, therefore, the defendant exercised the power of sale not for the end designed but with an object in view which was sinister, in the sense of being beyond the purpose and interest of the power, she must be held to have committed a fraud on the power necessitating the setting aside of the sale. There is no doubt that had the authorities given us by Mr. Wright been before my learned brother McDonnell, he too would have come to another conclusion.

McDONNELL, Acting J.

I concur, and I do so not because I think the conclusions of fact at which I arrived in the Court of First Instance are wrong either in regard to the valuation of the property or other matters, but because in giving judgment in that Court I did not appreciate the point that there could be a fraud upon the power in the absence of moral turpitude on the part of the appointor.

It is clear from the evidence that the Respondent, as proved from her own lips and those of her son, Buguma Samba, was instigated to sell owing to her wishing to escape unwelcome attention from sanitary inspectors pressing her to clean the lot.

This being so I do not think she can be said, in the words of Campbell, L.C., in Duke of Portland *v.* Topham, to have exercised the power " with an entire and single view to the real purpose and object thereof."