

*Privy Council Appeal No. 162 of 1919.*

David Augustus Taylor and another - - - - *Appellants*

*v.*

Kate Shaw and another - - - - *Respondents.*

FROM

THE SUPREME COURT OF NIGERIA.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 25TH MARCH, 1920.

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*Present at the Hearing :*

VISCOUNT HALDANE.

LORD BUCKMASTER.

VISCOUNT CAVE.

[*Delivered by* VISCOUNT CAVE.]

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This is an appeal from the judgment of the Supreme Court of Nigeria (Full Court) dismissing an appeal from the judgment of the Acting Chief Justice. The appellants are the executors and trustees of the will of Thomas Jones, deceased, and the respondents are two children of the testator. The question raised on the appeal is whether certain property situate in Victoria Road, Lagos, was devised by the testator upon certain charitable trusts or whether the testator died intestate in respect of that property.

The testator, Thomas Jones, by his will dated the 4th October, 1913, appointed the appellants and another to be his executors and trustees and devised to his trustees certain real estate therein described (not including the property which is the subject-matter of this appeal) and bequeathed to them certain personal estate upon trust to sell such real and personal estate and pay the proceeds into the Bank of British West Africa at Lagos, and out of such proceeds to pay his debts, including all testamentary expenses and legacies. And the will proceeded as follows : -

“ And I declare that after all the purposes mentioned in the preceding clauses of this my Will shall have been satisfied out of the funds deposited

in the said Bank of British West Africa Limited Lagos Branch my said Executors and Trustees shall with the balance of the cash that shall then remain carry on and accomplish the following works that is to say :--

- “(A) On and over the spot now occupied by my property situate at Victoria Road in Lagos aforesaid and covered by an instrument dated the 23rd day of June 1887 and registered as No. 124 on page 388 of Vol. II of the Register of Deeds kept in the Registry Office at Lagos they shall cause to be erected a grand solid and substantial building two storey high the plan of which shall be designed by an architect of recognised ability which shall be and remain for the absolute use of my countrymen of the Lagos community for ever.
- “(B) The said building when completed shall bear and be known by the name of ‘Tom Jones Memorial’ for ever.
- “(C) The first floor of the said building shall include a hall made fit for public meetings in the interest of the whole or any section of the community of Lagos.
- “(D) The top floor of the said building shall be supplied with a decent library which shall be replenished from time to time with such books of approved utility as shall be decided upon by the trustees (hereinafter described) for the time being of the said building and the same shall be available for the use of the educated portion of the community of Lagos.

“ . . . . And in order to ensure the stability of the said building I hereby appoint Mr. D. A. Taylor of the Marina, Lagos, Mr. C. A. Oni of Akani Street, Lagos, Rev. S. M. Abiodun of Broad Street, Lagos, Dr. Orishadipe Obasa of Bafunni House, Bread-Fruit Street, Lagos, and J. R. Shanu of Oil Mill Street, Lagos, and Mr. Danial Akitoye of Isale Eko, Lagos, to be the trustees of the said building who shall have the controlling board of the same and I vest them with power to make such rules and regulations for carrying out the purpose of the said trust and also power to appoint a new trustee or new trustees in place of the trustee or trustees dying or from other causes becoming incapable to act. . . . And I further declare that all profits or interest accruing to my estate from the retention of the said shares in the said Fishery Company shall be treated and applied as income of my residuary estate which shall be applied entirely for the upkeep of the ‘Tom Jones Memorial.’ ”

The testator died on the 12th August, 1917, and probate of his will was granted to the appellants on the 13th October, 1917. On the 7th May, 1918, the respondents commenced the present suit, asking (among other things) to have it declared that the testator died intestate as regards his property in Victoria Road described in paragraph (A) of his will as above set out. On the 10th June, 1918, the Acting Chief Justice held (*inter alia*) that the testator died intestate in respect of the property above mentioned, and on the 17th October, 1918, his decision was affirmed by the Full Court of Nigeria. Thereupon this appeal was brought against that part of the decree.

It is to be regretted that the respondents were not represented on the appeal, and accordingly no argument has been adduced in support of the decision of the Supreme Court; but after fully considering the terms of the will their Lordships have come to the conclusion that there was an effective disposition of the property in Victoria Road. It is plain that the general trustees of the will cannot carry out the testator's direction to build a

hall upon this property unless it is devised to them for at all events an estate sufficient to enable them to erect the building; and the declaration that the building when erected (including of course the site) shall "be and remain" for the use of the Lagos community for ever, and that the library "shall be available" for the use of readers shows that the property is to be affected with a permanent trust. Further, the appointment by the testator of certain persons as "trustees of the said building" with powers of management indicates that the building when erected is to be transferred to those persons absolutely upon the trusts declared; and for this purpose the fee simple must be vested in the trustees of the will. It is true that the will contains no express and formal devise of the property to the trustees; but unless such a devise is to be collected from the terms of the will the whole of the elaborate trusts declared by the testator are upon the face of them nugatory and of no effect. In their Lordships' opinion this cannot have been the testator's intention; and having regard to the expressions above quoted, the will can and should be construed as effecting a devise of the property to the trustees.

It should be added that the decision of the Nigerian Court that the concluding clause above quoted from the will did not amount to a residuary gift, was not the subject of appeal to the Board; and also that it has not been suggested at any stage of the proceedings that, if the site is available, the trust for erecting and maintaining the building is open to any legal objection.

Their Lordships will, therefore, humbly advise His Majesty that this appeal be allowed and the orders of the Nigerian Court set aside (except as to costs), and that it may be declared that, according to the true construction of the testator's will, the property in Victoria Road was devised to the trustees upon the trust declared by the will. The costs of this appeal will be taxed and paid out of the testator's estate.

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In the Privy Council.



DAVID AUGUSTUS TAYLOR AND ANOTHER

vs.

KATE SHAW AND ANOTHER.



DELIVERED BY VISCOUNT CAVE.