

Ada Beigh - - - - - *Appellant*

v.

Colin Shaw, since deceased (now represented by A. L. Shaw
and others) - - - - - *Respondents*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 27TH MARCH, 1939.

Present at the hearing :

LORD PORTER
SIR SIDNEY ROWLATT
SIR GEORGE RANKIN

[*Delivered by* LORD PORTER]

This appeal concerns the administration of the estate of one Job Beigh, a trader of 17, Picton Street, Bathurst, in the Colony of Gambia, who died on the 19th December, 1927, leaving a will dated the 1st November, 1926, of which probate was granted on the 30th January, 1928.

That will appointed one Colin Shaw and one William Topp to be executors and contained the following provisions which are material to the questions in issue in the present case:—

“ (1) I give and devise my lot of land No. 10, Leman Street, Bathurst, to my dear wife Ada Beigh for the term of her natural life and after her death to the Father Superior of the R.C. Mission at Bathurst.

“ (2) I direct that my said dear wife be permitted to reside in my premises No. 17, Picton Street, Bathurst, for 12 months only after my death.

“ (3) I give and bequeath to my said wife the whole of the amounts due on the mortgage of 12, Hagan Street, Bathurst, that is to say both the principal and interest on it for her absolute use and benefit.

“ (4) I give and bequeath unto my said wife all the goods in my shop at 17, Picton Street, Bathurst, and all my stock in trade and other personal effects belonging to me in connection with or used for the purposes of trade and the benefit of all contracts subsisting in relation to my business.”

The two executors duly proved the will but William Topp never intermeddled with the assets and the determination of the present appeal is concerned solely with the activities of Colin Shaw in administering the estate. The appellant, Ada Beigh, the deceased man's wife, being, as

she stated, dissatisfied with the way in which the property left to her was dealt with, initiated the present action by writ issued on the 19th June, 1934, claiming as legatee under the will against both Colin Shaw and William Topp as executors to have the real and personal estate of her late husband administered and an account rendered of what was due to her under and by virtue of the said will. The defendant Topp (who was then in Europe) was not served in the first instance. On the 21st June, 1934, Colin Shaw submitted to an order that he should render a proper statement of account as executor of the estate of the deceased on or before the 28th July, 1934. During that month certain other beneficiaries under the will were added as plaintiffs in the action, but on accounts being filed expressed themselves as satisfied, and the action proceeded between the appellant as plaintiff and the two executors as defendants.

William Topp was duly served and appeared at the trial of the action, but in his case the claim was not pressed. Since none of the assets had come into his hands no order was made against him and the appellant did not appeal against that part of the decision of the learned trial Judge.

After an account had been filed by Shaw three questions alone remained requiring the decision of the Court.

(a) Whether the defendant Shaw had properly accounted for the stock in trade at 17, Picton Street, which had been specifically bequeathed to the appellant?

(b) Whether the defendant Shaw ought to be credited with any and (if any) what expenditure made by him on 10, Leman Street?

(c) Upon what basis Shaw ought to account for the mortgage debt on 12, Hagan Street?

At the trial of the action the appellant and the two defendants alone gave evidence and as, owing to illness, Topp had taken no serious part in the administration of the estate, his evidence was not very material. The learned trial Judge found the defendant Shaw a most unsatisfactory witness, and though no dishonesty was or is imputed to him, it is plain that in any case of conflict his evidence was rejected and that of the appellant was believed.

In these circumstances their Lordships think that the findings of fact of the learned trial Judge who saw the witnesses must be accepted.

From the appellant's evidence it appears that after her husband's death Shaw told her that the goods belonged to her, but he himself opened the shop and sold in it for two weeks whilst the appellant was in seclusion mourning for her husband. After that time both Shaw and the appellant sold goods in the shop. Shaw, as she said, was helping her but she could not see the use of his helping her. When the appellant sold she, on the instructions of Shaw, made an entry of whatever she sold on paper provided by him. When she sold she had the key of the shop, but all the money received was taken by Shaw and locked up in the safe, of

which he alone had the key. Indeed this key was in his possession up to the date of the trial. Some serge, forming part of the goods, was distributed as mourning by Shaw without the assent of the appellant and certain goods were taken by him to his shop to be disposed of there and were disposed of by him, only a portion being returned. No money came to the appellant's hands direct—all she received was an allowance of £1 per week, together with a bag of rice monthly, both of which Shaw gave her after asking what daily money her husband had allowed.

After April, 1929, when Shaw went to Sierra Leone, he had little more to do with the shop and by that time very few of the goods were left, but up to that date and once afterwards, certain articles were ordered by Shaw and sold with the other goods. The indents for the goods purchased were signed by Shaw for "Ada Beigh" but some were to be marked "J.B." or sent to Colin Shaw in his own name, and in one instance where the document was dated 12th September, 1928, the goods were ordered to be forwarded "a/c J.B." directed "c/o Mr. Colin Shaw, Executor." The latest of the indents was dated 12th March, 1930, and contained a note "Mark of parcel J.B." and was signed "Colin Shaw for Mrs. A. Beigh."

Meanwhile in accordance with the terms of the will the appellant had to leave Picton Street in December, 1928. She was, however, tenant for life of No. 10, Leman Street, and with the appellant's consent Shaw appears to have rebuilt the house and constructed a shop on the ground floor. He himself says that the money required for this purpose was taken from the sums received by the sale of the goods. There is no corroboration of his statement, but the money must have come from some source and their Lordships see no reason for supposing that it was obtained in any other way.

The amount which was spent in this way, however, has not been ascertained because the learned trial Judge held himself unable to deal with the amount chargeable to the appellant in the absence of a representative of the Roman Catholic Mission. That body he held, being remaindermen and liable to bear some portion of the cost of rebuilding as capital expenditure were interested in the question, and without their presence Shaw's claim to reimbursement for this expenditure could not be considered.

During all this time and indeed at the date of the hearing of the action the mortgage of Hagan Street had never been assigned to the appellant. As this was a specific gift the assignment should have taken place within a year at latest from the testator's will. Shaw was, of course, under no obligation nor would he have been entitled to call in the mortgage, but in fact he took no serious steps either to enforce the security or collect the interest, steps which the appellant could not take, but which he as legal holder of the mortgage could. It is true that Shaw could not find the mortgage deed in the safe, and he appears to have made some

application to the mortgagor for payment of interest and repayment of capital with the result that he obtained the sum of £2 5s. 10d., but no further steps were taken in spite of the fact that the appellant had asked Shaw about the mortgage after his return from Sierra Leone in 1929, that in 1933 the appellant's solicitor was pressing for the money and offered to move in conjunction with him in getting in the mortgage, and that the appellant several times complained of the delay to Topp who often went to Shaw to get the matter wound up.

In this state of facts the learned trial Judge held (i) that the goods in the shop had never been transferred to the appellant and that Shaw was liable to account with compound interest at 5 per cent. on the basis that he had himself made use of them or the money representing them, but was entitled to set off any legitimate expenditure which he could prove as against the sum so calculated, (ii) that he was liable on the basis of wilful default for the interest on the mortgage which had not been collected, (iii) that the expenditure at Lemn Street could not be taken into account, but that if Shaw desired to get credit for the sum paid he must take proceedings impleading the Roman Catholic Mission as well as the appellant. He accordingly directed:—

- (i) An inquiry into the value of the mortgaged property,
- (ii) an account of the interest due in respect of it,
- (iii) an account of any money whether capital or interest received thereunder,
- (iv) an inquiry as to the value on the 19th December, 1927, of the goods and other assets at the shop bequeathed to the appellant,
- (v) an account of such part of these goods and assets as had been employed by Shaw in trade together with all profits made by such employment or interest at 5 per cent. per annum with annual rests upon what had been so employed.

After further evidence had been taken the answers to these inquiries were either agreed by the parties as figures or found by the Court. They were:—

	£	s.	d.
(i) Value of mortgage at 19th December, 1928	130	10	0½
(ii) Interest from testator's death	115	19	5
(iii) Principal repaid	£2	0	0
Interest	5	10	
	2	5	10
(iv) A sum which is said to be made up of the value of the goods and assets at the shop less all just allowances and proper expenditure	325	17	10½
(v) Interest on £599 4s. 4d. the sum said to have been employed in trade at 5 per cent. per annum with annual rests, the date to which it is calculated not being specified but apparently being the date of the writ	226	10	7

Having ascertained these figures the trial Judge gave judgment for the appellant for £800 13s. 7d., that is 10s. less than the addition of these five sums. From this judgment Shaw appealed to the West African Court of Appeal, which gave judgment on the 26th May, 1936, allowing the appeal, finding Shaw liable in respect of goods and assets in the shop for £55 4s. only and for £2 5s. in respect of the mortgage, i.e., £57 9s. in all, ordering an inquiry as to the amounts expended by Shaw in improvements, alterations and repairs to 10, Leman Street, and that the amount so found be credited to him, and further ordering that if the amount so to be credited be less than £57 9s. the appellant have judgment for the balance, but if the amount to be credited be equal to or exceed £57 9s., judgment be entered for Shaw.

The Court of Appeal arrived at its conclusion on the following grounds. (1) That the whole of Shaw's expenditure at 10, Leman Street, must be credited to him in account. In the view of the Court the money used for this property was spent on the instructions of the appellant and Shaw was therefore entitled as of right to a full indemnity for this expenditure though the appellant might as between herself and the remaindermen be entitled to an adjustment of the account and an apportionment of the expense, (2) that as regards the mortgage (*a*) the specific bequest in the will entitled the legatee to the mortgage debt and mortgage property subject to the executors' assent. "This assent," said Webber C.J., delivering the judgment of the Court of Appeal, "has never been withheld and from the evidence can be implied"; (*b*) the executor was not liable for a failure to collect the interest—his good faith had never been impugned and he could not be made liable for negligence or wilful default when no such accusation had been made against him; (3) it had been agreed that the defendant was liable for £55 4s. cash balance up to the year 1927, but after this year Shaw had handed over the key of the shop to the appellant and ceased to function as executor with regard to this bequest.

On the first point their Lordships agree with the Court of Appeal. The appellant herself stated in evidence that she wanted to carry on her husband's business. This she could only do if she had a shop in place of 17, Picton Street, which she was obliged to leave within a year of her husband's death. It appears that a shop was provided by Shaw at 10, Leman Street, when he rebuilt the premises, that the appellant at least knew of and agreed to the rebuilding, that she removed to the new shop from Picton Street in January, 1929, and that she continued to carry on business there.

In these circumstances their Lordships think the true inference to be drawn is that the expenditure was incurred for the appellant and at her request and that the executor is entitled to an indemnity from her for the whole of this money properly so expended. What (if any) rights she may

have against the Roman Catholic Mission as remaindermen is not germane to the present inquiry and their Lordships make no pronouncement upon it.

As to the second point. The learned trial Judge presumably gave judgment for £130 on the ground that (i) that was the capital value of the property when it should have been handed over, (ii) that Shaw had in some way made it his own by failing to assign it, (iii) that the personal covenant for repayment of the capital was of no value. He also held, (iv) that with diligence the whole of the interest might have been recovered or at any rate Shaw had not discharged the onus cast upon him of showing that it was irrecoverable and (v) that he had been guilty of wilful default.

The Court of Appeal held that this decision could not be supported because no claim had ever been made against the executor on the basis of wilful default. Undoubtedly the original writ was framed only for relief on the basis of a common administration order, and if the action had been brought in England the beneficiary would not have been permitted to allege a breach of trust or wilful default without amending his claim and probably also his writ.

But the procedure in West Africa is more informal. By the rules of the Supreme Court of the Colony of Gambia (1928) O. 23, r. 1, suits are ordinarily to be heard and determined in a summary manner without pleadings, and by O. 16, r. 2, the plaintiff may obtain any such equitable relief as the facts stated and proved entitle him to, though not specifically asked.

The fact therefore that in a case like the present where no pleadings were ordered the writ makes no mention of wilful default, is not fatal to a decree based on such a claim. Had there been pleadings they could have been amended in a proper case if amendment had been applied for. Where, however, there are no pleadings no amendment is possible, but there is no reason why the plaintiff's case should not be treated as if it had been formally stated on a pleading and formally amended by a plea of wilful default. Their Lordships agree nevertheless that unless such a claim was plainly made, submitted to and dealt with at the hearing, it would not be proper to grant any relief based upon a finding of wilful default.

But in their view in the present instance wilful default was clearly charged in the course of the proceedings. Indeed, much of the cross-examination would be inadmissible on any other ground, and the legal representatives of both parties discussed Shaw's liability on this basis.

It was urged before the Board that the learned trial Judge had made a common form order at the first hearing on the 26th June, 1934, and that all future proceedings were ancillary to this order. Their Lordships do not so understand the sequence of events. In their view Shaw in the first instance merely submitted by consent in the absence of Topp to an order for an account which might or might not

satisfy the appellant and the other plaintiffs, leaving such steps to be taken and such remedies given as the disputes which should emerge in the course of taking the account and the evidence might require. They think that Shaw had ample opportunity of meeting a case of wilful default and that no injustice is done in dealing with the case on that basis.

Taking this view, as they do, they think that there was ample evidence on which the trial Judge could find Shaw guilty of a breach of trust in not assigning the mortgage to the appellant within a year of the deceased man's death and in not collecting the interest. Nor does his failure to find the mortgage deed affect the matter. The mortgage was still a legal mortgage. In a country where titles are registered there should have been no difficulty in ascertaining the terms (and indeed from the evidence given there seems to have been no such difficulty), or in assigning it to the legatee. But the quantum of loss of capital is more difficult to ascertain. Their Lordships think, however, that the true inference to be drawn from the evidence given was that the mortgage security had deteriorated and that Shaw's failure to assign had deprived the appellant of an opportunity of avoiding such loss, but that the mortgagor either had always been unable to pay anything upon the personal covenant, or at any rate was as much or as little able to pay at the time of the hearing of the action as he had been when the mortgage should have been assigned. If this view be taken the sum which the appellant was entitled to recover was the amount by which the security had deteriorated and no more. That sum, however, was not the value of the mortgage in 1927, viz., £130, but £130 less its value at the time of the trial. They find evidence in the record that the latter value was £80 and therefore consider the loss should have been assessed at £50. The appellant is, of course, also entitled to have assigned to her the mortgage security and the debt secured thereby. In the absence of knowledge as to whether Topp has or has not survived Shaw, their Lordships find themselves unable to make any order with respect to it. They can only direct an inquiry as to whether Shaw survived Topp and, if he did, direct that the respondents should assign the mortgage security and debt thereby secured to the appellant.

As to the recovery of the interest upon the mortgage, in their Lordships' view the trial Judge was right also. An executor to whom interest is due is, they think, chargeable in account with the sum he should have received unless he shows that he was unable to recover it. The onus is upon him to do so. See *Tebbs v. Carpenter*, (1816) 1 Madd. 290 at p. 297, and *Billing v. Brogden*, (1888) 38 Ch. D. 546. In the present case the mortgagor might well have succeeded in paying the interest though unable to find the capital sum. Shaw has not discharged the onus and is liable accordingly.

As to the third point it was contended on behalf of the respondents that Shaw had handed over the goods and assets of the shop to the appellant. He had, it is said, told

her that the goods were hers and had handed her the key of the shop. It was however admitted, as has been pointed out, that he had both ordered further goods and kept the proceeds of all sales under lock and key, that on his instructions the appellant furnished sales accounts to him and that he gave her no money except £1 weekly to which he added a bag of rice monthly, though he said these acts were done because she had been his wife's ward before her marriage and he felt responsible for her welfare.

Having regard to the evidence given and the findings of the learned trial Judge, their Lordships are not prepared to accept this explanation. In spite of the inference drawn by the Court of Appeal that Shaw having handed over the key had after the year 1927 assented to the bequest and ceased to function as executor, their Lordships think that Shaw continued to act as executor in respect of the bequest of the assets of the shop just as he did in rebuilding the house at 10, Leman Street, and in keeping the mortgage in his own name and accepting no assistance from the appellant's solicitor to recover the sum due. In a sense it is true that most of his duties as executor in regard to the goods in the shop had been completed early in 1929 since very few of the goods were then undisposed of, but he still required an account from the appellant of the sales she had made, he made at least one purchase in 1930, and even up to the date of the trial he retained the key of the safe and control of any money which was left.

In these circumstances their Lordships think that the trial Judge was right in holding that the executorship continued up to that date and that Shaw was accountable for the value of the goods.

Indeed even if the respondents had not to account for Shaw's actions as executor in this respect they would, in an action brought against them as executors of Shaw have had to account for his acts as agent for the appellant in receiving and expending the appellant's money, although in that case the liability would not have been against Shaw as executor but against him in his personal capacity.

But although their Lordships agree with the trial Judge that the executorship continued, there are two matters on which they are unable to accept his views.

They see no reason for imposing a liability upon Shaw upon the ground that he had used the money which he received for the purposes of his own trade or business. He had indeed continued to act as executor but he used the goods not for his own purposes or for his own trade, but for the appellant's purposes and the appellant's trade. In these circumstances their Lordships do not think he should be mulcted in compound interest upon the sum of £599 4s. 4d. This amount appears to be made up of the total value of the goods and assets at the shop existing at the testator's death together with those purchased afterwards. The true inference appears to be that the goods afterwards purchased were paid for out of the proceeds of goods previously sold, and no valid reason for adding both sums together has been shown.

But apart from this objection Shaw, as their Lordships have indicated, is entitled to be credited with all sums properly expended in rebuilding the house at 10, Leman Street.

The Court should therefore ascertain the value of the assets at the shop received by Shaw from time to time and placed in the safe or elsewhere. Against this sum Shaw is entitled to be credited with any money properly expended in rebuilding the house at 10, Leman Street, with any money used for the purchase of goods for the appellant, and with the weekly sum of £1 and the value of the monthly bag of rice allowed to the appellant.

The account should begin on the 1st February, 1928, two days after probate was obtained and at that date Shaw should be debited with £339 18s. 6d., the value of the stock in trade and other personal effects belonging to the testator in connection with or used for the purposes of trade, and the benefit of all contracts subsisting in relation to his business at his death. Against this Shaw should be credited with the money spent on 10, Leman Street, as it was paid, with any payment for goods purchased for the business and with the weekly £1 and monthly bags of rice, but he should be debited again with the value of the further purchases as and when they were made.

In some cases their Lordships might be inclined to charge the executor with simple interest on the sums held by him from time to time on the ground that he retained the property of the legatee long after he should have handed it over, but in the present case they think that there was good reason for the retention of the money. Shaw was, as their Lordships have stated, engaged in rebuilding 10, Leman Street, at the appellant's request. For that purpose it was essential that he should have ready to hand sufficient money to pay for the work as and when it was done. The amount required must be to some extent speculative and the moment of its requirement unascertained. In such circumstances their Lordships cannot say that it was unreasonable for Shaw to keep the money in his own hands uninvested instead of handing it to the appellant. No interest, therefore, on the goods and other assets at the shop received by Shaw should be charged against him. The figures supplied to the trial Judge are difficult to follow without seeing an account, but the total sum (if any be due) is not likely to be a large one, and it may be that the parties will be able to agree it without further litigation.

Having regard to the view they have expressed, their Lordships hold that the appellant is entitled to recover—

(1) in respect of the capital sum due	
on mortgage	£50 0 0
(2) interest on the mortgage debt ...	£115 19 5
	£165 19 5

The sum of £2 5s. 10d. collected by Shaw is included in these sums and is not separately recoverable.

The appellant is also entitled to an inquiry as to the value of the goods and assets at 17, Picton Street, bequeathed to her, and of the goods afterwards purchased, but against this sum there must be allowed in account all money properly expended by Shaw in respect of the work done at 10, Leman Street, in purchasing goods, and in the allowances made to the appellant.

She is also entitled to an inquiry as to whether Shaw survived Topp, and, if he did, to a direction that the respondents do assign to her the mortgage of 12 Hagan Street, Bathurst, together with the sum now secured thereby.

Both parties have partially succeeded and their Lordships think that no costs should be given to either appellant or respondents before their Lordships' Board or in the Court of Appeal.

The costs of the Court of first instance should be left in the discretion of that Court.

As Colin Shaw died during the pendency of the appeal to His Majesty in Council the judgment for the sum of £165 19s. 5d. will be and the judgment for any other sums found due should be against the present respondents (who are his executors) *de bonis testatoris* and not personally.

Their Lordships will humbly advise His Majesty accordingly.

1892

In the Privy Council

ADA BEIGH

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COLIN SHAW, SINCE DECEASED (NOW
REPRESENTED BY A. L. SHAW AND
OTHERS)

DELIVERED BY LORD PORTER

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