

*Judgment of the Lords of the Judicial Committee of  
the Privy Council in the Appeal of Smith &  
O'Grady, from Jamaica; delivered on 5th July,  
1870.*

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Present:—

LORD CAIRNS.

SIR JAMES W. COLVILLE.

THE JUDGE OF THE HIGH COURT OF ADMIRALTY.

THEIR Lordships entirely concur with the learned Judge of the Court below, that this is a suit brought after very great, and perhaps censurable delay, that if it were a question of indulgence it is entitled to no indulgence, and that the rights of the Plaintiff, and the relief which is to be given to him, ought to be carefully scrutinized, so that that which he is entitled to, and only that, should, under the circumstances of the case, be granted. But having said this, their Lordships are not prepared to assent to the view taken by the learned Judge in the Court below, that an executor, coming even after the delay which has taken place in the present case, and asking to have those accounts taken in which he has been the receiving party, is to be deprived of his right to have those accounts taken, and of having it ascertained, once for all, what his liability as an accounting party is, merely from the lapse of time that has taken place.

So far, therefore, as the personal estate is concerned, and as the position of the Appellant, as executor, or executor of an executor, is concerned, their Lordships think that, notwithstanding the delay, the Appellant is entitled, as a matter of right, to have the account of the personal estate of the testator taken, and to have it ascertained whether, upon those accounts, he is a debtor or a

creditor of the estate. Their Lordships think that to be the right of the executor upon the statements made in his own complaint, and not denied; but they think that right is strongly fortified in the present case by the fact, that the residuary legatees, the persons with whom he is to be in account, themselves admit and assert that his accounts have never been settled; and further, that if they were properly taken, a sum would be found due from him to them. So much as regards the personal estate.

As regards the real estate, their Lordships are of opinion, that it being asserted and sworn to on the part of the Appellant that Robertson, who was the executor under the Will, and who appears to have been mentioned as a guardian of the infants in respect to the devised property, although a legal guardian he could not be made by will; and it being stated that he had entered into possession of the real estate, and received the rents and profits of it, and this not being controverted by the Defendants, but, on the contrary, being insisted upon by them, and it being stated by them that he is accountable in respect to those receipts, their Lordships are of opinion that the accounts should extend to the receipts of rents and profits in respect of the real estate and to the dealings of Robertson in respect to the real estate, for the purpose of ascertaining whether upon that account also any sum is due from or to Robertson or the Appellant.

Their Lordships observe that the Petition seeks to raise the question whether Robertson or the Appellant is not entitled to a charge upon the real estate in respect of any sum that may upon one or both of these accounts be found due to him. Their Lordships do not consider that they are in a position to decide that question. The Will may have been referred to in the proceedings in the Court below; it has not been formally placed before their Lordships. But, in addition to that, their Lordships consider that that is a question which may be affected by the law of the Island; and they do not find that this point has been taken notice of specifically by the learned Judge from whose decision the Appeal proceeds.

Their Lordships will, therefore, humbly recom-

mend to Her Majesty that in place of the Order dismissing the suit in the Court below, there ought to be an account of the personal estate of the testator received by Robertson or the Appellant, and of their application thereof, and whether any and what sum is due to or from the Appellant as executor of Robertson in respect thereof, and also an account of the rents and profits of the real estate of the testator received by Robertson or the Appellant, and of their application thereof; and of the dealings of Robertson in respect of the real estate, and whether any and what sum is due to or from the Appellant as executor of Robertson in respect thereof. Their Lordships think that there should be an inquiry whether any debts or legacies are unpaid, in place of the ordinary general account of debts and legacies, and whether any personal estate is outstanding. They propose, then, to reserve further consideration and costs in the Court below, and in particular the question whether the Appellant, as executor of Robertson, is entitled to any lien on the real estate in respect of any sum which may be found due in respect of the dealings with the real estate. And their Lordships will order that the costs of the Appellant and of the Respondent in this appeal should be made costs in the cause in the Court below. Perhaps it is better to mention—it will indeed be observed from what I have said—that their Lordships desire the account to be taken in the form which I have stated, and they do not propose that the recorded accounts should be taken as settled accounts in any way between the parties.

