

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Jerningham v. the Administrator-General of Demerara, from British Guiana; delivered 28th July, 1862.*

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Present:

LORD CHELMSFORD.

LORD KINGSDOWN.

SIR JOHN TAYLOR COLERIDGE.

THIS is an Appeal from an Order of the Supreme Court of Civil Justice of British Guiana admitting certain objections to an account rendered by the executors of Robert Waterton, deceased. From the length of time during which the proceedings in this case have been pending, there is much obscurity about some of the items, and one material point for their Lordships to determine is to whom the delay which has occurred is to be attributed, and on whom the consequences of any uncertainty must fall.

The Appellants are the residuary legatees of Robert Waterton.

The Respondent represents in his official character the estate of John Waddell.

John Waddell died on the 1st October, 1833, having by his will bequeathed the residue of his estate equally amongst his six children, Catherine, John, Anne, Jane, Margaret, and George.

On the 15th October, 1833, Robert Waterton was appointed to act as administrator to the estate of Waddell.

By the rules of the Court under which he was appointed he was bound to file annually accounts of his intromissions with the estate of the deceased, and to pay the balance into Court, and he accordingly on the 27th October, 1834, filed upon oath

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an account of his transactions from the commencement to the 18th October, 1834.

By that account on the balance of his receipts and payments, there appeared to be due from him a sum of 8,167 guilders 16 stivers 8 cents; against this, however, he made a claim for commission of 5 per cent. on all receipts, and 5 per cent. on all payments, together amounting to 2,463 guilders 4 stivers 5 cents.

These accounts were laid before the sworn Accountant, and having been allowed by him were submitted to the Supreme Court of Justice on the 19th January, 1835.

The commission claimed being allowed, the balance in the hands of the Administrator was reduced to 5,704 guilders 12 stivers 3 cents. This account was approved and confirmed by the Supreme Court on the 24th January, 1835, and to the Order confirming the Report was added this note:—

“The Court requires information as to the readiest mode of bringing this estate to a close to be given to the Registrar.”

The balance appearing on the account was not paid into Court as it ought to have been.

It is material to observe that in the account thus allowed, credit was taken for sums of very unequal amount paid to four out of the six residuary legatees of Waddell, *sub cautione de restituendo*, viz., George Waddell, 4,034 guilders, John Waddell, 4,038 guilders, Mr. Harman, 3,675 guilders, Margaret Waddell, 500 guilders.

These payments, of course, could only be properly allowed as against the other residuary legatees on the assumption that there remained assets of the deceased, out of which all the legatees might be put upon an equality.

Waterton continued to act as administrator up to the time of his death, which took place on the 29th June, 1837, but he filed no accounts for the years 1834, 1835, and 1836, and, of course, paid no balance into Court. He was clearly, therefore, in default at the time of his death.

Waterton by his will named amongst other executors two, Watson and Davison, who were appointed by the Supreme Court to act as official administrators of the estate of Waddell.

On the 5th July, 1838, they filed, upon oath, an

account of the dealings and transactions of Waterton as administrator of the estate of Waddell.

This account commenced with the balance found due from Waterton on the former account, and was continued up to the 31st December, 1837, in respect of interest and commission, but it does not appear to have included any receipts or payments after Waterton's death.

These accounts were referred, in the usual manner, to the sworn accountant of the Court, who reported upon them, and, as it appears, allowed them, with one exception. What that exception was, we are unable to discover. No Order, however, was ever made by the Court approving of the Report or passing these accounts.

It is with respect to items found in these accounts, thus rendered in the year 1838, that we are now required to pronounce a decision in 1862.

This account, after taking credit for commission claimed by Waterton's estate, showed a balance due from it to the estate of Waddell of 32,429 guilders 3 stivers 12 cents.

Watson and Davison were, soon afterwards, discharged from their office of administrators of the estate of Waddell, and by Order of the Supreme Court, dated the 12th December, 1838, Andrew Gallaway was appointed curator of that estate, the estate being represented to be insolvent in consequence of unexpected claims which had been brought against it.

This, however, we presume not to have been the case, as the first act done by the curator was to obtain an Order for a further distribution of the assets of Waddell amongst his residuary legatees.

Andrew Gallaway, soon after his appointment, sent in a Report to the Court neither the particulars nor the substance of which appear in the papers before us, and upon that Report an Order was made on the 2nd August, 1839, by which the curator was authorized to pay to the residuary heir of John Waddell 75 per cent. of 32,759 guilders 4 stivers (equal to 10,919 dollars 75 cents), represented by the Order as being the balance of the estate of Waddell paid into Court on the 5th of July, 1838, such payment, however, was to be made, "taking into account certain sums paid by Robert Waterton, in his lifetime, to those residuary legatees or heirs."

It is greatly to be regretted that this Order, and the Petition on which it is founded, are not amongst the papers transmitted to this country, and that we have no precise information of what was done under them. All we know of this transaction is from a reference to it in the Minutes of the Supreme Court of the 13th January, 1860.

Again, although this Order speaks of the balance as paid in on the 5th July, 1858, the money appears not to have been actually paid in till the 29th of October, 1859; and how the exact balance was made out we cannot ascertain, for it exceeds by some hundred guilders the balance appearing upon the account of July 1838.

On the 12th-December, 1838, Waterton's representation of the estate of Waddell ceased, and it is not alleged that the Defendants are chargeable with anything as received by Watson and Davidson on account of the assets of Waddell. All the receipts with which the Appellants, the residuary legatees of Waterton, can be charged, occurred before the end of June 1837.

In consequence of the neglect of Watson and Davison to obtain the sanction of the Court to the accounts approved by the Accountant, the Appellants are justly exposed to the present litigation, but they are not responsible for any acts or omissions of the residuary legatees of Waddell or the curator of his estate; they are not responsible for the neglect of the curator in disregarding the terms of the Order of the 2nd August, 1839, nor for the neglect of the residuary legatees of Waterton in permitting the Order to be disregarded.

From 1838 to 1846 no claim seems to have been made upon the estate of Waterton in respect of his intromissions with the estate of Waddell.

But in 1844 a change was made in the law of the Colony. The Board of Orphans and Unadministered Estates was abolished, and new officers were appointed; an Administrator-General for the counties of Demerara and Essequibo, and an Administrator-General for the county of Berbice. The duties of these officers were to take effect on the 17th February, 1845.

The effect of this appointment seems to have been, that the curator of Waddell's estate was superseded, and the Administrator-General came into his

place, and Gallaway handed over all the accounts of Waddell's estate, including those to which we have referred, to the Administrator-General so appointed, and on the 25th March, 1846, that officer instituted the suit in which the present Appeal is brought.

The suit was instituted against the present Appellants, persons all, as it seems, residing in this country, or in other countries in Europe, though represented by attorneys in the Colony; and they are sought to be charged with the receipts of Waterton during the period comprised between the 18th October, 1834 (the time to which the account rendered in his lifetime, and allowed by the Court, was carried down), and the time of his death on the 29th June, 1837.

The Defendants are charged as persons who had adiated the bædel, as it is termed, of Waterton, or, in other words, had taken possession of his assets without benefit of inventory, and were liable for his debts.

We must say that the delay in bringing forward this demand is neither excused nor explained by anything which we can find upon this record. The real parties interested appear to be the residuary legatees of Waddell, who, from the papers before us, seem to have been resident in the Colony and capable of looking to their own interest, yet they lie by during all these years without calling the legal representative of the estate into activity, or taking any step whatever to object to the accounts of Waterton, if they had any objection to make.

The Defendants put in their answer on the 27th May, 1846, by which, after stating that accounts had been rendered after Waterton's death by Watson and Davison, which they believed to be correct, they averred that all books, documents, and vouchers upon which the accounts were founded, had been taken possession of, and were then in possession of the Plaintiff.

On the 13th March, 1847, an order was made by the Court, directing the Defendants to account for the intromissions and transactions of Waterton with the estate of Waddell, and we have no doubt that this Decree would be sufficient to charge the Defendants with what, in the technical language of the Court of Chancery, is called wilful default.

The accounts rendered by Watson and Davidson

were referred by the Court to its Auditors for examination.

Those gentlemen made their Report on the 29th December, 1847.

This Report raises most of the questions which we have to decide.

It seems to have been the subject of discussion at different periods in the course of the year 1848, and by order dated 11th December, 1848, it was referred back to the Auditors for revision.

Nothing effectual was done under this Order. Some objection seems to have been taken by the Plaintiff to the regularity of the proceedings of the Auditors previously to the Report, and by an Order of the Court, dated the 14th May, 1849, the Report was quashed, and the Auditors were directed to investigate the accounts *ab initio*.

Again, no progress was made for many years in this investigation. In 1850 a change took place in the Auditors of the Court, and a new reference was directed. In April 1853 the Plaintiff moved to discharge the order of reference on the ground that the Auditor-General was interested in the matter. On the 9th of May, 1853, this motion was refused, with costs.

In 1854 it seems that, by length of time, the original order of the 13th March, 1847, had become inoperative, or, in the language of the Colony, superannuated; and on the 1st of November, 1854, the Plaintiff presented a petition to the Court to renew this Order, and to be at liberty to sue *pro Deo*, as it is termed.

The Defendants insisted that there was no power in the Court to renew the proceedings, but these objections were overruled by the Court, and on the 12th February, 1855, an order to revive the suit was made, against which the Defendants applied for liberty to appeal, but were refused.

At length, after a Report by the Accountant, dated 5th June, 1858, and various proceedings before the Court, the particulars of which it is difficult to ascertain, and not necessary to state, a sentence was pronounced by the Court on the 16th January, 1860, deciding matters all of which might have been settled and ought to have been settled in 1838.

We have thought it necessary to go through this

long history of the proceedings, which it is impossible to regard without great pain, as well that the attention of the colonial authorities may be drawn to the manner in which the suit has been protracted, as, in order to show the grounds on which we have arrived at the conclusion that the delay which has arisen in the final settlement of these accounts, is attributable mainly to the Respondent and those whom he represents, and that in cases of doubt arising from the loss of evidence and the absence of explanations, which might have been given if demanded at an earlier period, the presumption must be in favour of the Defendants.

We now proceed to the particular items the subject of dispute.

The first is a sum of 22,333 guilders 12 stivers 1 cent; which is described in the Order, as amount unpaid by the late administrator to three of the children and residuary legatees of Waddell.

As we understand the matter, the estate of Waterton is charged with this sum on this ground.

The Judges take the whole amount of all the sums which appear by the several accounts of Waterton to have been paid to the residuary legatees, and find it to amount to 116,148 guilders 14 stivers 2 cents. They find that, dividing that sum by six, the number of the residuary legatees, each legatee ought to have received, on an equal division, 19,358 guilders 2 stivers 11 cents; but that, in fact, three of the legatees have received more, and three less, than that amount; and they find the sum overpaid to those who have received in excess, and underpaid to those who have received too little, to amount to the disputed item of 22,333 guilders 12 stivers 1 cent, with which they have charged Waterton's estate.

It seems to their Lordships impossible to maintain the principle of this decision. If the 116,148 guilders had been the whole residuary estate, an equal division would have required the sum in dispute to be made good from some quarter; but we know that this was not the whole residue, for a sum of 32,759 guilders was paid into Court by the administrator in October 1839, and 75 per cent. of that sum was ordered by the Court to be paid to the residuary legatees in that year, having regard to the payments already made.

It is stated by the Supreme Court, in its Minutes of the 13th January, 1860, that this sum was paid out on the recommendation of Galloway to the heirs of Waddell, which they say is admitted on all sides, and if the terms of the order were attended to, the inequalities have been wholly, or in a great degree remedied. If the terms of the order were not attended to, and the money was distributed equally amongst the heirs, without regard to the sums which they had severally received, it is difficult to understand how the estate of Waterton can be responsible for the neglect. His responsibility for the management of the estate ceased in 1838, when a curator was appointed.

Again, the principle of making advances to the residuary legatees provisionally on account of their shares, had been sanctioned by the Court in its allowance of the first account rendered by Waterton in his lifetime. The sums so paid, had been paid *sub cautione de restituendo*, and it appears incidentally in the course of the proceedings, that an order was made by the Court on the 4th March, 1841, on the petition of Gallaway, the curator, presented on 26th November, 1840, that he should proceed against the heirs and heiresses to whom an excess appeared to have been paid. What was done under this order, or whether anything was done under it, and, if not, why it was not prosecuted, we have no information, nor does it appear what has become of the excess of the 32,759 guilders beyond the 75 per cent. paid out of Court. In this state of things the Order appealed from, cannot, in their Lordships' opinion, be supported as to the item now under consideration.

The next item in question is a sum of 1,000 guilders alleged to have been received by Waterton, and not credited by him. This appears to stand thus.

He is alleged to have received from the Vendue Master's office, on account of sales of Waddell's estate on the 8th July, 1835, the sum of 6,000 guilders, and to have debited himself with only 5,000 guilders.

If this matter had been investigated at the proper time, it would, no doubt, have admitted of a clear explanation, either in favour of one side or of the other. At present it appears to us impossible to



say that the error is made out. The Vendue Master's office was a public office, the proceedings of which were regulated by an Ordinance of the then Government in 1784.

The evidence produced of the payment of the 6,000 guilders to Waterton is, first, a receipt in the Vendue Master's books, signed by Crossman, Waterton's clerk, in these words:—

“ May 3, 1837.

“ Received the acceptance in favour of G. Anderson and Co., p. 6,000 guilders, dated 8th July, 1835.”

There is another entry in the Vendue Master's books, in these words:—

“ Demerara, July 1835.

“ Rcpt. est., J. Waddell, Dr. to bills payable. 10 accepted order, for G. Anderson, 6,000 guilders.”

What the meaning of these entries is none of the Counsel at the bar were able to explain; nor can we explain them. They do not of themselves import that Waterton received 6,000 guilders in cash from the Vendue Master on the 8th July, 1835.

The only other evidence of the receipt was the examination of S. H. Goodman, who was acting Vendue Master from 1832 to 1844. He is shown the receipt of the 3rd May, 1837 (which after objection made by the Defendant's Counsel is admitted by the Judge, for what it is worth), and his testimony is in these words:—

“ I presume the 6,000 guilders were paid from the entry in the books. I cannot say positively. It is entered in the books as 6,000 guilders. I cannot say if that amount was paid. Beyond that I cannot say.”

Now as far as we can discover, the Court has allowed this overcharge of 1,000 guilders simply because it considers there is proof that 6,000 guilders were received by Waterton from the Vendue Master on the 8th July, 1835, and that a sum of 5,000 guilders, and only that sum, is credited on that day. If the whole sum of 6,000 guilders was received the alleged deficiency may have been credited in other items.

It was assumed in the arguments on both sides, as we understood it, that the word “ acceptance ” found in the receipt of the 3rd May, 1837, meant a

If this be made out, of course the item of 13,800 guilders should appear on both sides of the account.

In support of this charge the Plaintiff produces first an entry on the Vendue Master's books in these terms:—

“ *Demerara, January 1836.*

“ Executor John Waddell Dr. to bills payable.

“ Accepted order. Executors Frankland 13,800 guilders.”

And another entry in these words:—

“ *May 3, 1837.*

“ Received the acceptance in favour of executors of Frankland p. 13,800 guilders, dated January 26, 1836.

“ R. WATERTON.

“ Per W. CROSSMAN.”

There is then the evidence of Goodman, who, looking at the book, says:—

“ On the 28th January, 1836, there is an entry 13,800 guilders paid executors of Frankland. There is a receipt on the 3rd May, 1837, for that amount by R. Waterton, per W. Crossman. The sum of 13,800 guilders was paid.”

Why the receipts for these two acceptances for 6,000 guilders and 13,800 guilders by Waterton are both dated on the 3rd May, 1837, though the transactions have no connection with each other, and neither seems to be connected with that date, we cannot understand. It may have been, as suggested at the bar, that there had been an omission to sign them at the proper time, which was afterwards supplied, or the documents proving the payments by the Vendue Master on account of Waterton, under and by his order, may on that day have been handed over to his clerk.

We think this evidence is sufficient to show that the payment of the 13,800 guilders was made by an order on the Vendue Master dated the 26th of January, 1836, “accepted,” which perhaps means acknowledged by him as valid, and paid on the 28th.

If this be the effect of the transaction, it is clear that the entry to the debit side of the account ought to have been 13,800 guilders, and not 1,380 guilders, which was made, no doubt, by mistake.

In the course of the argument we suggested that

the truth with respect to the two items of 1,000 guilders and 12,420 guilders must be capable of being easily ascertained, for that very nearly all if not all the sums with which Waterton's estate is debited in the account consist of sums received from the Vendue Master, and that the sums which he had received must appear upon the books of the office; and it would then be seen whether all the sums credited equal the sums so received.

We were not at that time aware that this plain course had ever been taken; but on referring to the Report made by the Auditors in December 1847, it appears that they actually adopted it; and they state in detail the different sums received by Waterton from the Vendue Master for sales of different parts of Waddell's estate, including, amongst other items, "for premises in George Town, and half lot No. 22, Stabrook," 32,300 guilders, and they make the whole amount so received by him 229,137 guilders 19 stivers; whereas they say that the total amount credited by him for these sales is 216,492 guilders 13 stivers, leaving a deficiency of 12,645 guilders 6 stivers. They then point that this deficiency is principally occasioned by the mistake in crediting 1,380 guilders only, instead of 13,800 guilders, on the 28th January, 1836.

It is very true that this Report was quashed for some alleged irregularity in the proceedings of the auditors on an objection taken by the Plaintiff; but at all events the fact of this alleged excess of sums received beyond those credited, with all particulars of the estates which had been sold and of the prices received for them, was by this Report brought to the notice of the Defendants. They had the means of showing any mistake if there had been any in so simple a matter; they have not attempted to do so, and we have no doubt that on this item the Court below has come to the right conclusion.

It will be seen that this Report is inconsistent with the allowance of the item of 1,000 guilders, which we have already disposed of.

The next item is a sum of 5,034 guilders 4 stivers for compensation money received, or which ought to have been received, for eight slaves belonging to the estate of Waddell.

It sufficiently appears that these slaves were in existence when the compensation was payable, and

an appraisement was made of them, and a claim for the amount was prepared and signed by Waterton in 1834. No reason is assigned why nothing was received in respect of this claim; it appears that other slave-owners received, in 1835 or 1836, about 38 per cent. on the amount of the appraisement, and with a sum calculated at this rate we understand that the Court has charged the estate of Waterton.

We think it has acted rightly in doing so.

The next item is a large sum of 12,626 guilders 10 stivers 11 cents, the amount of the commission charged by the administrators, after Waterton's death, in respect of his receipts and payments on account of Waddell's estate.

Waterton, by the codicil to his will, which we think is sufficiently proved, has declared that it is not his intention, nor his wish, to make any further charge for commission than his executors may pay to his clerk, Crossman.

We think that this must be considered as a direction to his executors not to make this charge. It is, in truth, a remission of a debt to the heirs of Waddell; and we cannot say that the Court was wrong in striking out the charge.

There remains the question of interest. The Court has charged the Defendants with interest on the whole balance found due for sixteen years and eight months, "being," as they say, "a period less than any of the times which have expired since Waterton ought to have deposited in the Registry of the Court the several sums of which the capital is formed." Of course, as, by our advice to Her Majesty, the balance will be altered, the interest will also be reduced.

We feel it to be a hardship upon the Appellants that, after so great a length of time, and upon a demand so tardily brought forward and so negligently prosecuted, they should be charged with interest which will amount, at the Colonial rate, to as much as the principal; and with respect to the sum disallowed for commission, which, in truth, the legatees of Waddell take as a legacy, the case is peculiarly hard. But we do not see how, upon general principles, we can relieve them.

Their testator ought, in his lifetime, to have paid into Court, in each year, the balance in his hands on account of the estate of Waddell. He neglected

to do so. His administrators, after his death, rendered an inaccurate account, and did not pay into Court the full amount of the money in their hands, and when they were removed from the administration of the estate of Waddell, they ought to have taken care that their accounts were allowed by the Court. The persons entitled to the estate of Waddell will lose the interest which they ought to receive, unless the Defendants are charged with it.

Their Lordships will humbly advise Her Majesty to allow the Appeal from the sentence complained of, as to the two items of 22,333 guilders 12 stivers 1 cent and 1,000 guilders, and, of course, as to the interest of those sums; and to affirm the sentence as to the other items and interest; and they will advise that each party shall bear his own costs of the Appeal.

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