estate of Terence, the father; and that there is rent due from him, to one-seventh of which the estate of Ann, the testatrix, is entitled: the Plaintiff has, therefore, in his hands, monies which belong to the estate of the testatrix; and I think the Court ought not to disregard that fact, and decree the full payment of his legacy by the executors of Ann. It is not suggested that there was any joint lease of the premises to the four tenants in common, who at different times occupied the house: they appear to be, at law, severally liable in respect of their occupation. I cannot, however, direct an account of what is due from the Plaintiff unless the whole of the residuary legatees are parties, and are bound by the account and inquiries. If the residuary legatees of Terence, who are not before the Court, will appear and **[99]** consent to be bound by the account, I may direct it to be taken in this suit. If anything be found due from the Plaintiff, William Mac Mahon, as the tenant of the premises in question, that will be set off as against his legacy; but it will not form any set-off against the legacy to the Plaintiff Henrietta, his wife.

The Plaintiffs consented to waive the undertaking on behalf of Charles, who was abroad, and an account was directed of the two legacies and interest. And all the residuary legatees of Terence appearing by their counsel, and consenting to be bound by the inquiries and accounts thereby directed, and the Plaintiffs and Defendants not opposing their appearance, but, so far as they were able, consenting thereto, it was referred to the Master to ascertain whether the Plaintiff, William Mac Mahon, was during any and (if any) what time in the occupation of "The Lower House" in, &c., since the death of the said Terence Mac Mahon, and, if so, whether the Plaintiff, William Mac Mahon, ought to be charged with any and (if any) what sum of money, in respect of such occupation; and the Master was to state whether anything and what was paid, and when, since the death of the said Terence Mac Mahon, by the Plaintiff, William Mac Mahon, for or in respect of repairs and outgoings of the said house, or otherwise on account thereof; and whether, at the death of the testatrix, Ann Mac Mahon, the Plaintiff, William Mac Mahon, had any and what assets of the said Ann Mac Mahon in his hands applicable to pay the said legacies, with liberty to state special circumstances.

[100] HENDERSON *v.* HENDERSON. *July* 4, 7, 11, 20, 1843.

[S. C. at law, 6 Q. B. 288; 11 Q. B. 1015. See *Mutrie* v. *Binney*, 1887, 35 Ch. D. 620; *In re Henderson*, 1887-89, 35 Ch. D. 716; 37 Ch. D. 244; and (sub nom. *Nouvion* v. *Freeman*), 15 A. C. 1. Discussed, *Worman* v. *Worman*, 1889, 43 Ch. D. 296.]

The next of kin of an intestate filed their bill in equity in the Supreme Court of Newfoundland against A., the brother and deceased partner of the intestate, for an account of the estate of the father of A. and of the intestate possessed by A., and an account of the partnership transactions, and the dealings of A. with the estate since the death of the intestate. The bill was taken, *pro confesso*, against A. in the Colonial Court, and, on a reference, the Master reported that certain sums were due to the several next of kin on the account of the estate of the intestate's father possessed by A.; but that no account between A. and the intestate had been laid before him: the Supreme Court decreed that the sums found by the Master to be due to the next of kin and the costs should be paid to them by A. The next of kin brought their actions in this country against A. upon the decree. A. then filed his bill in this Court against the next of kin and personal representative of the intestate, stating that the intestate's estate was indebted to him on the partnership accounts and on private transactions; alleging various errors and irregularities in the proceedings in the Supreme Court, and that A. intended to appeal therefrom to the Privy Council; and praying that the estate of the intestate might be administered, the partnership accounts taken, the amount of the debt due to A. ascertained and paid, and the next of kin restrained by injunction from proceeding in their actions.

Demurrer, for want of equity, allowed on the ground that the whole of the matters

were in question between the parties, and might properly have been the subject of adjudication in the suit before the Supreme Court of Newfoundland.

That, inasmuch as the Privy Council is the Court of Appeal from the Colonial Court, and has jurisdiction to stay the execution of the decree pending the appeal, the Court will not interfere by injunction, on the ground of error or irregularity in the decree of the Colonial Court.

Whether, in a case of error shewn in the judgment of the Court of a foreign country, from which there was no appeal to any of Her Majesty's Courts, the decision would be the same, *quære?*

The bill was filed in May 1843 by Bethel Henderson against Elizabeth Henderson, the widow of Jordan Henderson, his deceased brother, and Charles Simms and Joanna, his wife, who was the daughter of Jordan; and also against J. Gadsden, the administrator of the estate of Jordan, in England; and it stated that William Henderson, a merchant in Bristol and Newfoundland, the father of the Plaintiff and Jordan Henderson, in 1808, admitted them into partnership with him, and in 1817 resigned all his interest in the trade to them: that the Plaintiff and Jordan carried on the business in partnership from 1817: that the share or interest in the partnership, which their father gave up to them, was worth £15,000 or thereabouts, and was continued in, and formed part of, the partnership of the Plaintiff and Jordan: that Jordan Henderson died in March 1830 intes-**[101]**-tate, leaving the Defendants, Elizabeth, his widow, Joanna (the wife of the Defendant, C. Simms), his daughter, and also leaving William, a son: that Elizabeth, the widow, obtained letters of administration of the estate of Jordan in Newfoundland, and, together with the Plaintiff, carried on the partnership business for the purpose of winding it up; but before that was done, a fire in the island in August 1832 destroyed the buildings and plant of the partnership, and all the books, except the ledgers; and that disputes then arose between the Plaintiff and Elizabeth, the widow.

The bill then set forth a petition presented in November 1832 by the Defendants, the widow and children of Jordan, to the Judges of the Supreme Court in Newfoundland, which alleged that William, the father, before his death, gave or bequeathed £1000 to or for the Petitioner, Joanna, and gave or bequeathed the rest of his estate between Bethel, the Plaintiff, and Jordan, his sons, equally: that Bethel was living with William, the father, at Bristol, and possessed himself of his estate: that Jordan died possessed of considerable real and personal estate in the partnership, both in England and Newfoundland: that Bethel had possessed himself of all such estate, as well as of the partnership books, and carried on trade therewith, and had drawn monies thereout: that he also refused to satisfy the Petitioners whether Jordan had left any will; and prayed that Bethel might be decreed by the Supreme Court to come to an account in respect of all and singular the premises; and that as well the estate of William, the father, as the estate of Jordan, might be applied in a course of administration.

The bill stated that no personal representative of William, the father, or of Jordan, was a party to the said proceeding in the Supreme Court: that Elizabeth, **[102]** the widow, presented another petition, dated the 8th of December 1832, not intituled in any cause to the said Judges, which alleged that, since administration of the estate of her husband had been granted to her, Bethel, the Plaintiff, had rendered her certain accounts of debts and assets in Newfoundland, but refused to account to her for the property of the deceased in England: that he was then about to leave the country, whereby the Petitioner would, in all probability, be prevented from bringing him to any account respecting the said estate, unless the Supreme Court should grant immediate process against him: that a brig, called "The Elizabeth," belonging to the intestate and Bethel equally, had, without the Petitioner's authority, been laden at Harbor Grace, by Bethel, principally on freight, under an engagement to sail on the 10th of December for Bristol: that the Petitioner had good reason to know that the monies of Jordan, in the possession of Bethel in England, amounted from £5000 to £8000: the Petitioner therefore prayed the writ of *ne exeat regno*, to restrain Bethel from departing out of the jurisdiction, and that he might be ordered to exhibit to the Court a full account of all the estate of Jordan come to his hands: that C. Simms, by

affidavit, intituled "*Elizabeth Henderson* v. *Bethel Henderson*," deposed that Bethel was then justly indebted to Elizabeth, the widow, administratrix of the estate of Jordan, in the sum of £3100 sterling, exclusive of such further sum as he might be indebted to her on account of monies and property in England; and that he threatened to leave the island and go beyond sea, out of the jurisdiction of the Court, whereby the said debt would be lost or endangered, or the recovery thereof would be difficult.

The bill stated that an instrument purporting to be a writ of *ne exeat regno*, dated the 10th of December **[103]** 1832, was issued out of the Supreme Court, with a summons or *subpœna*, in the first-mentioned suit: that the Plaintiff, on the 22d of December, executed his bond, with two sureties, to the high sheriff of the island, in the sum of £6200, conditioned to be void if the Plaintiff should personally appear before the Court by the 10th of June then next, and render a full account of the estate of Jordan come to his hands, whether arising from the estate of William, the father, or otherwise; and also an account of the said partnership business, and answer and fulfil the orders and decrees of the Supreme Court touching the said estate, and also touching a certain bill, then filed, of Elizabeth Henderson and others, against the Plaintiff: that the Plaintiff then quitted the island and returned in 1834: that, on the 14th of June 1834, the Supreme Court ordered the bond to be put in suit, unless the Plaintiff should put in his answer to the first petition; and, in July 1834, the Plaintiff appeared in that suit by H. A. Emerson, Esq., Her Majesty's Solicitor-General in the island, who also prepared the Plaintiff's answer, which was sworn and filed on the 11th of July 1834, intituled in the first suit only.

The bill then stated the purport of the Plaintiff's answer: that exceptions were taken by the Petitioners, for that he had not set out an account of the partnership transactions, or of the estate of Jordan possessed by him; or whether William, the father, left any and what estate, for the use of Jordan or his family: that the Supreme Court ordered that the accounts prayed for in the first suit should be filed before the 25th of July, or that the bond should be assigned to the Petitioners to be put in suit: that the Plaintiff had, for several years, employed J. Fitzgerald, an accountant in the island, in keeping the accounts of the said business; and in order that Fitzgerald might make out the accounts of the **[104]** partnership, the Plaintiff, on the 20th of July, delivered over to him the books and accounts of the business in England, and on the same day the Plaintiff quitted the island.

The bill then stated that Fitzgerald made out in distinct parts the accounts of the partnership from 1817 to the death of Jordan, and the subsequent accounts of the Plaintiff, and filed the same on the 4th of August 1834, and verified them by affidavit, as true extracts from the Plaintiff's books: the bill stated the balances appearing by the several accounts; the result of which was that £4500 and £883, 7s. 5d. were owing to the Plaintiff from the Newfoundland concern, and that a further sum of £2366, 15s. 4d. was owing to him from the estate of Jordan, in respect of transactions since his death; and a large sum was also owing to the Plaintiff as a private debt, in respect of advances he had made for the use of Jordan and his family.

The bill then set forth a letter received by the Plaintiff from his solicitor and counsel, H. A. Emerson, Esq., stating that delay had occurred in the report on the exceptions, owing to the answer having been mislaid by the Clerk of the Court, and adverting to what had been since done: that the Plaintiff received no further information respecting the suit, except that he had recently learnt that the Master, on the 26th of December 1835, reported the Plaintiff's answer to be sufficient, but that the accounts had been subsequently filed; and, upon the motion of the Plaintiff's counsel, the accounts were referred to the Master for his report: that the Petitioners excepted to the Master's report, and in January 1835 obtained an order discharging the order by which the accounts were referred to the Master: that no further proceedings were ever taken on the said peti-**[105]**-tion: that in 1836 the Plaintiff discharged H. A. Emerson, Esq., as his solicitor, and did not employ any other solicitor, and thenceforwards had no counsel or solicitor in the island, as all the Defendants and their solicitor well knew.

The bill then stated that in January 1837 the Defendants obtained a rule for leave to amend the first-mentioned petition or bill, no person being authorized by the Plaintiff, who was out of the jurisdiction, to oppose the same; that in May 1837

the Defendants exhibited a bill in their own names (and in that of William, the son, without his authority), addressed to the Judges of the Supreme Court. [The bill was then set forth: it charged the Plaintiff with having possessed the sum of £30,000 in respect of the estate of William, the father, impeached the partnership and other accounts put in by the Plaintiff in various specific points, and charged him with misappropriation and loss of the partnership property and estate since the death of Jordan, and calling for discovery on various subjects: and it prayed that the Plaintiff might account and pay to the Defendants their share of the alleged assets of William, the father, the partnership property which belonged to Jordan, the amount of the losses thereto by the carrying on of the trade since his death, and that they might be at liberty to inspect the original books of account of the Bristol trade.]

The bill stated that the summons or *subpœna*, requiring the Plaintiff to appear to the bill, was served on H. A. Emerson, Esq., on the pretence that as he had been the Plaintiff's solicitor and agent in the petitions, he was so in the said third suit: that a commission was issued by the Supreme Court to take the Plaintiff's answer, and that in October 1837 one of the persons named in the **[106]** commission communicated with the Plaintiff, then residing at Bristol, and required him to put in his answer, and lent the Plaintiff a copy of the bill, being the first intimation of the suit which he had received. The bill then stated that the pretended service and other proceedings were wholly irregular, contrary to the rules of the Supreme Court, which were set out, and also to the statute for the better administration of justice in Newfoundland (5 Geo. 4, c. 67): that the commission was returned with a declaration by the commissioners that the Plaintiff had not put in, and did not intend to put in, any answer.

The bill then stated that the Defendants (the Plaintiffs in the third suit) in December 1839 obtained a rule *nisi* to take their bill *pro confesso* against the Plaintiff, and served the same on H. A. Emerson, Esq., who, without authority, took upon himself to appear on the motion as the Plaintiff's counsel and solicitor, and on the 11th of February 1840 the Supreme Court ordered the last-mentioned bill to be taken *pro confesso*, and referred it to the Master to compute principal and interest due to the Defendants: that on the 18th of April 1840 the Master of the Supreme Court made a rule or order, addressed to H. A. Emerson, Esq., appointing the 23d of April to take the account: that the meeting was adjourned to the 30th of April, when the Defendants' solicitor put in an account, charging the Plaintiff with sums amounting to £17,054, 12s. 9d. in respect of the partnership transactions, and £15,000 in respect of the estate of William, the father, but allowing no credits whatever to the Plaintiff: that the Master made his report, dated the 6th of June 1840, and thereby, after stating that *he had not had any account between* Bethel and Jordan laid before him, he found that the **[107]** Defendant, Bethel, received from William, the father, some time previous to his death, which occurred in the year 1821, the sum of £30,000 sterling, in trust to pay one moiety thereof to Jordan; and that Jordan died intestate, in 1830, leaving the Plaintiff Elizabeth, his widow, and two children only, namely, Joanna (married to C. Simms) and William; and he found that of the said sum of £30,000 sterling, one moiety, or £15,000, together with interest thereupon, was then due to the widow and children of Jordan by the Defendant, Bethel, to be paid in the proportions thereinafter directed; and, upon the said sum of £15,000, he computed simple interest, from the 1st of January 1822, to the 1st of June 1840, at £4 per cent. per annum, which amounted to £11,650 sterling, making, with the principal, the sum of £26,650, which he thereby reported to be due and payable to the Plaintiffs by the Defendant, Bethel, in the following proportions, namely, the sum of £8883, 6s. 8d. to the Plaintiff, Elizabeth Henderson; a like sum to the Plaintiff, C. Simms and Joanna, his wife; and a like sum to the Plaintiff, William Henderson.

The bill stated that this report was filed on the 6th of June 1840: that an order *nisi* to confirm was served on H. A. Emerson, Esq., and that the same was confirmed absolutely on the 10th of June 1840: that the Defendants obtained an order for a final decree *nisi*, but the Judges of the Supreme Court directed that as H. A. Emerson, Esq., had withdrawn from the defence of the suit, the notice of motion for the final decree should be served on the Plaintiff personally: and that, if cause should not be shewn by the then next term, the final decree should be made: that no notice of such

motion was ever served upon the Plaintiff; but that in March 1841 the Plaintiff was served with a document purporting to be a *subpœna* to hear judgment; to which was **[108]** attached a notice, signed by the solicitor of the Defendants, "that the Master's report, filed on the 6th of June 1840," stood confirmed; that, on the affidavit of the service of the said document, the Supreme Court, on the 6th of June 1841, made a decree. [The bill set forth the decree, which recited the various proceedings, as having been duly prosecuted; and ordered and decreed that Bethel, the Defendant therein named, should pay to Elizabeth, the widow, £8883, 6s. 8d. sterling; to C. Simms and Joanna, his wife, £8883, 6s. 8d., and to William, the son, £8883, 6s. 8d.; and that he should also pay to the Plaintiffs their costs of the suit.]

The bill then specified many of the statements recited in the decree, which it alleged were untrue; that the third bill was in fact an original, and not an amended, bill; and that there were various other irregularities in the proceedings; the bill alleged that in December 1841, before the Plaintiff had notice of the decree, the same was inrolled; that in August 1842 the Plaintiff was applied to, by the attorney of the Defendants, for payment of the said sum of £8883, 6s. 8d. to the Defendant Elizabeth, the widow, and the like sum to the Defendant, Simms, and Joanna, his wife, with £55 costs, which was the first notice he received of the final decree; and that the Defendants had lately brought two actions against the Plaintiff in the Queen's Bench to recover the said sums.

The bill charged that the decree was wholly irregular, and ought not to be enforced, and that the same ought to be reversed by Her Majesty in Council, on the Plaintiff's appealing against the said decree, which, notwithstanding the inrolment thereof, he intended to do; that there was no personal representative of Jordan Henderson, appointed in this country, party to any of the **[109]** proceedings; and that there was no personal representative whatever of William, the father, a party thereto; that none but a personal representative of Jordan Henderson was entitled to, or could give a discharge for, any part of his personal estate.

The bill alleged that the whole of the estate of William, the father, had consisted of the partnership property, given up by him to Jordan Henderson and the Plaintiff, his sons, and continued by them in the business, and that the Plaintiff was only accountable for the same with, and as part of, the other partnership assets; and, if the partnership accounts were properly taken, it would appear, and was the fact, that a very large sum of money was due and owing to the Plaintiff from the estate of Jordan, in respect of advances by the Plaintiff to the concern, payments beyond his receipts, and money drawn out by Jordan, his widow and family; and that the estate of Jordan was also indebted to the Plaintiff in two sums of £547 and £538, in respect of monies which the Plaintiff had expended, at Jordan's request, in the education of his said children.

The bill prayed that an account might be taken of what was due to the Plaintiff from the estate of Jordan, and of the other debts of Jordan, and of his personal estate, and that the same might be applied in a due course of administration: that an account of the partnership transactions between the Plaintiff and Jordan might be also taken: that all necessary inquiries might be directed to ascertain the personal estate of William, the father; that so much, if any, of the said two sums of £8883, 6s. 8d. as might be found payable by the Plaintiff (he not admitting that any part thereof was so payable) might be applied and administered as part of the assets of Jordan: that the Defendants, Elizabeth, the widow, and Simms and **[110]** his wife, might be restrained by injunction from proceeding with the said or any other action to recover the said two sums of £8883, 6s. 8d.: and that a commission might be issued to examine witnesses in Newfoundland.

To this bill the Defendants, Elizabeth, the widow, and Simms and his wife, demurred for want of equity, want of parties and multifariousness.

Mr. Tinney, Mr. Burge and Mr. Rolt, for the demurrer.

Mr. Purvis and Mr. Bagshawe, for the bill.

The points submitted to the Court in argument will sufficiently appear from the judgment. The authorities cited were *Phillips* v. *Hunter* (2 H. Bl. 402), *Cottington's case* (2 Swans. 326, n.; Lord Nottingham's MS.), *White* v. *Hall* (12 Ves. 321), *Henley* v. *Soper* (8 B. & C. 16), *Fuller* v. *Willis* (1 Myl. & K. 292, n.), *Alivon* v. *Furnival* (1

Cr. Mees. & Ros. 277), *Cowan* v. *Braidwood* (1 Man. & Grang. 882), *Becquet* v. *M'Carthy* (2 B. & Adol. 951), *Houlditch* v. *Marquis of Donegal* (8 Bligh (N. S.), 301), *Russell* v. *Smyth* (9 Mees. & W. 810), *Ferguson* v. *Mahon* (11 Ad. & Ell. 179), *Thompson* v. *Derham* (1 Hare, 358). Burge Com. Col. Law, vol. 3, p. 1058.

THE VICE-CHANCELLOR [Sir James Wigram]. The Plaintiff by his bill alleges that he and Jordan, his late brother, were partners in business, one branch of which was carried on at Bristol and the other at Newfoundland: and that, in respect of that partnership, he is **[111]** a creditor to a large amount on the estate of Jordan; that part of the partnership property was derived from their father; and that all the property which they derived from their father formed part of the assets of the partnership. The Plaintiff also alleges that he is a creditor on the estate of Jordan, in respect of a private debt; and the bill prays such an account as would comprise all these matters which are in question between the Plaintiff and the estate of Jordan. Upon these facts a decree for an account against Gadsden, the personal representative of Jordan in England, would be of course, and perhaps also, if that had been the object of the suit, the decree for an account might have been extended to Elizabeth, the widow, as the personal representative of Jordan in Newfoundland. The widow of Jordan and Simms and his wife are, however, before the Court in the character of next of kin, and there is no pretence for making them parties in that character in a suit for the mere administration of the estate of Jordan. The relief sought against those parties is founded upon the proceedings which have taken place in the Court in Newfoundland, and the use which they are about to make of these proceedings in this country.

The Defendants, who have demurred, insist, in support of their demurrer, first, that all and every part of the matter in question on this bill was concluded by a final decree of the Supreme Court of Newfoundland, dated in June 1841, made in a suit wherein the Defendants and William, the son of Jordan, were Plaintiffs, and the present Plaintiff was Defendant, except in so far as that decree is subject to be reviewed in the Privy Council; secondly, that by that decree the amount recovered was decreed to be paid to the Plaintiffs in that suit as beneficial owners, and that the same thereby ceased to be part of the estate of Jordan, subject to his debts. They **[112]** insist, moreover, that the proceedings appear upon the bill with sufficient certainty to sustain the decree upon the grounds advanced; and that the only party against whom the Plaintiff can proceed to recover his claim, or any part of it, is the Defendant, Gadsden.

I have read the bill carefully, and, without going minutely through the facts of the case, it is sufficient to say, for the purpose of explaining the order I am about to make, that the original bill in the Supreme Court of Newfoundland claimed an account of the same partnership dealings, of which accounts are prayed by the present bill; and also sought accounts in respect of the estate of William Henderson, the father, possessed by Bethel on account of Jordan; that the Defendant in that suit, who is the Plaintiff here, made claims by his answer to the original bill corresponding in substance with those which he makes by his bill in the present suit: that an amended bill, or a bill which the Court at least thought it right to term an amended bill, was afterwards filed by the same Plaintiffs against Bethel: that the amended bill stated and charged that Bethel was largely indebted to the estate of Jordan on the partnership accounts; but that such accounts could not be taken in consequence of Bethel absenting himself from the island and not producing the documents; and it further appears that, Bethel having absented himself from the jurisdiction, an order of the Supreme Court was made in February 1840 for taking the amended bill *pro confesso;* and that the amended bill was by the same order referred to the Master to compute principal and interest due to the Plaintiffs; and that the Master made his report in June 1840. [His Honor stated the report (*supra*, pp. 106, 107).] It appears further that the Supreme Court pronounced its final **[113]** decree in June 1841, and thereby, after referring to all the antecedent proceedings in the cause, decreed that Bethel Henderson should pay to the widow and two children of Jordan, who were Plaintiffs, the sum of £8883, 6s. 8d. each, and costs of the suit.

This decree, explained by the report, has in effect severed William the father's estate from the bulk of the property in question, and the partnership accounts and

the private debt are not specifically the subject of adjudication. Upon this decree Elizabeth, the widow, and Joanna, the daughter of Jordan, and the husband of Joanna have brought their actions in this country.

The bill charges that the proceedings leading to this decree were irregular, that the decree itself was irregular, that a large balance was due to the Plaintiff, and that the decree ought not to be enforced, but ought to be reversed by Her Majesty in Council, on appeal, which the Plaintiff intends to bring. The bill specially alleges, as one ground of irregularity, that the report of the Master, of the 6th of June 1840, wholly omitted any notice of the account connected with the partnership, and is confined to the monies alleged to be due from the Plaintiff, in respect of the estate of William Henderson, the father; and that a large sum of money is due to the Plaintiff on the partnership accounts, as would appear if they were properly taken. On behalf of the Defendants, it has been argued that the proceedings on the face of the bill shewed that the decree concluded the whole matter, that I could not rehear that decree, and that it was final and conclusive, unless reversed by the Privy Council, the proper appellate tribunal.

Without giving any opinion upon the question whether charges, shewing that the proceedings in a foreign **[114]** Court were altogether null and void, as being against natural justice, would or not, upon general demurrer, have been treated as null, and have sustained the bill as to the whole of the relief prayed, I have no doubt that mere irregularity in the proceedings is insufficient for that purpose, in a case in which an appeal lies from the Colonial Court to the mother country, and there is a tribunal competent to reform the errors of the Court below, and even to suspend the execution of the decree pending the appeal, if justice requires that it should be suspended.(1)

But as the Plaintiff in this case argued only that the whole question between the parties was not concluded by the decree, and did not contend that, upon the charges in the bill, I ought to disregard the decree, I assume, for the present purpose, that I must, upon this demurrer, consider the amount due from Bethel, in respect of William the father's estate, as concluded by the decree of the Supreme Court, subject only to the appeal to the Privy Council; and that the only question I have now to decide is whether I am to consider the partnership account and the claim of Bethel in respect of the private account as having been likewise the subject of adjudication by the Supreme Court in the island, or whether those items in the general account, which certainly might have been taken in that suit, are to be considered as excepted out of the operation of the decree, under the special circumstances appearing on the Master's report, and the other proceedings stated in the bill..

In trying this question I believe I state the rule of the **[115]** Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. Those who have had occasion to investigate the subject of bills of review in this Court will not discover anything new in the proposition I have stated, so far as it may apply to proceedings in this country: and in an application to a Court of Equity in this country, for its aid against the effect of a proceeding by a Court of Equity in one of the colonies, I conceive it to be the duty of this Court to apply the same reasoning, at least in the absence of charges in the bill, shewing that a different principle ought to be applied. (See *Bentinck* v. *Willink*, 2 Hare, 1.) The observations of Lord Cottenham in the case of *The Marquis of Breadalbane* v. *The Marquis of Chandos* (2 Myl. & Cr. 732, 733) have

(1) See stat. 3 & 4 Will. 4, c. 41, s. 21; and see also the Charter of Justice of Newfoundland, Clark's Summary of Colonial Law, pp. 433, 434.

an important bearing upon this point. I may mention also the cases of *Farquharson* v. *Seton* (5 Russ. 45), *Partridge* v. *Usborne* (*Id.* 195), and the judgment of Lord Eldon in *Chamley* v. *Lord Dunsany* (2 Sch. & Lef. 718), as shewing the general principle to which I have adverted. It is plain that litigation would be intermin-**[116]**-able if such a rule did not prevail. Now, undoubtedly the whole of the case made by this bill might have been adjudicated upon in the suit in Newfoundland, for it was of the very substance of the case there, and *primâ facie*, therefore, the whole is settled. The question then is whether the special circumstances appearing upon the face of this bill are sufficient to take the case out of the operation of the general rule.

Now, what are those circumstances? One circumstance relied upon was that, by the decree of the Colonial Court of the 11th of February 1840, the amended bill only was taken *pro confesso*. The amended bill, it appears, is not, as in this Court, the original bill amended and written upon, so that the amended bill wholly supersedes and comes in the place of the original bill; but the amendments are upon a distinct record.

The bill in this cause charges that the last bill was in fact and substance an original bill, and addressed to different Judges, and that it was not an amended bill; this charge I might have been bound to take as a fact if the Plaintiff had not, by settling out the amended bill and the final decree, given me an opportunity of judging in what sense only the charge is true. I find that the amended bill proceeds upon and refers to the original bill, and to the answer of the Defendant thereto, and the final decree of the Court recites the whole of the proceedings anterior to the final decree, beginning with the original bill. It is impossible, therefore, to contend with effect that the amended bill, though in a sense distinct from the original bill, as being written upon other paper, leaving the first bill still on the record, was not a continuance of the pleadings in one and the same cause, and this, critically considered, is not inconsistent with the charge in the bill which I have just read.

[117] Another objection was the absence or the irregularity of service upon the Plaintiff. Although it is not necessary that I should go into the question respecting the notice, I ought not to disregard the fact that the Plaintiff represents that he had on different occasions actual notice of the suit, and of the relief which was sought against him by it, however irregularly that notice might have been communicated; and if the Plaintiff thought that he might safely disregard the proceedings, and abstain from interposing any defence, on the ground of their irregularity, I think I ought to consider him as having relied on the strength of his case for establishing that irregularity by a complaint in the same jurisdiction, or in the Court of Appeal, and not to have relied on being therefore able to set the decree of the Supreme Court at defiance, even while it remained unreversed.

I may here recur to the observation that the omission of the Master to take the partnership accounts is stated in the bill to be an error in the decree, forming one ground for appeal to the Privy Council.

The point upon which I have had most difficulty in satisfying myself is this: if the decree of the Supreme Court is conclusive upon one party it must, I conceive, be conclusive upon both; and, if not conclusive upon both, it ought to be conclusive upon neither. Now the amended bill alleged that the Plaintiffs there were creditors upon the partnership account, but that the accounts of the partnership cannot be taken, owing to the manner in which the Defendant in that suit had acted. These allegations were established as facts, by the effect of the order for taking the bill *pro confesso;* and it appeared to me during the argument that the present Defendants (the Plaintiffs in Newfoundland) might have a **[118]** right to say that the accounts not taken by the Master were open for their benefit, by reason that it was the conduct of the Defendant alone which had prevented those accounts from being taken. But that, I think, is not a correct view of the case. The decree was to compute what was due to the Plaintiffs for principal and interest; that is, upon all the accounts in question in the pleadings, including the partnership and private account. The Plaintiffs were not compelled to take such a decree, but, having taken it, they are bound by the consequences, and must be taken to have waived any disadvantage to themselves which would result from it.

The conclusion to which I must come, in a case where relief is sought in this Court

in consequence of errors and irregularities in the decree of a Colonial Court, and an appeal lies from that decree to the appellate jurisdiction in this kingdom, is to allow the demurrer. I do not say that my conclusion would have been the same if the proceedings which were impeached had taken place in a foreign Court, from which there was no appeal to any superior jurisdiction which a Court of Equity in this country could regard as certain to administer justice in the case. I express no opinion on that point.

Demurrer allowed, with liberty to amend.

Dec. 18. The bill was not amended; and this day, on the motion of the Defendants, was ordered to be dismissed.

[119] HUMBLE *v.* SHORE. *Dec.* 23, 1842.

[See the judgment more fully reported, 1 H. & M. 550 (n.). Overruled, *In re Palmer*, [1893], 3 Ch. 369; *In re Allan* [1903], 1 Ch. 276, and cases there cited.]

A suit was instituted to administer and ascertain the residue of an estate, and one of the residuary legatees, after the bill was filed, and before he was served with the *subpœna* to appear and answer, assigned his share: the assignee was held to be a necessary party to the suit.

In an administration suit, a party interested in the residue, by his answer, averred that, according to his information and belief, the suit was collusive as between the Plaintiffs and the executors and other parties: there being no replication, the allegation was taken as proof of the fact; and it was held that the fact was no objection to the making of the decree.

The Plaintiffs were entitled, under the will of Lydia Shore, to certain residuary shares in her real and personal estate, and the bill was filed against the executors and trustees, and the other parties interested in the residuary estate of the testatrix, to carry into execution the trusts of the will. The cause coming on for hearing,

Mr. Temple and Mr. Freeling, for one of the residuary legatees, objected that he had executed an assignment of his share in the residuary estate after the filing of the bill, but before he had been served with the *subpœna*, and that the assignee was a necessary party to the suit: *Pigott* v. *Nower* (3 Swans. 529, n.).

Mr. Rolt, for the Plaintiffs, submitted that an assignee *pendente lite* would be bound by the proceedings in the cause, and that the absence of the assignee was not therefore any ground for refusing the usual decree: *Landon* v. *Morris* (5 Sim. 262).

THE VICE-CHANCELLOR allowed the objection and the cause stood over.

May 13, 1843. The Plaintiffs filed their supplemental bill against the assignee of the residuary share, seeking the like relief against the Defendant as was prayed by the original bill. The Defendant admitted the will, but said he was informed and believed that the suit was collusive as be-**[120]**-tween the Plaintiffs and the executors and other parties; and that he had instituted another suit against the executors, impeaching their conduct with respect to particular matters which did not form the subject of any special charge in this suit. The Plaintiffs did not reply to this answer. At the hearing,

Mr. Romilly and Mr. Rolt said that the allegation that the Defendant was "informed and believed" the Plaintiffs and Defendants colluded was no averment of the fact; and if it were true, the fact was wholly unimportant. The Plaintiffs and the other residuary legatees (except the Defendant to the supplemental bill and his assignor) desired that the accounts should be taken, and the trusts executed in this suit: in that sense a great part of the suits in this Court were collusive: any special inquiries which the objecting Defendants could suggest might be made in the decree.

Mr. Daniel, for the executors, offered to submit to any inquiries with respect to