JAMES S. SMITH, GABRIEL L. DENNIS, HENRY W. DENNIS, CHRISTIANA C. BURKE, and RICHARD R. W. GORDON for his Wife FRANCES MOORE-GORDON, Appellants, *v.* THOMAS J. R. FAULKNER, Executor of the Will of the Late FREDERICK E. R. JOHNSON, Representing the Heirs and Legatees of Said Estate, L. T. JOHNSON, Widow of the Late G. M. JOHNSON, for Herself and as Trustee and Legal Representative of JAMES C. JOHNSON, RACHEL E. T. MASSAQUOI, JOSHUA A. PHILLIPS for his Wife COLONETTE JOHNSON-PHILLIPS, SARAH KENNEDY for her Minor Daughter CATHERINE JOHNSON, and DANLETTE JOHNSON-TUCKER, Appellees.

APPEAL FROM JUDGMENT IN ACTION TO COMPEL ACCOUNTING.

Argued January 16–18, 22, 1940. Decided February 9, 1940.

1. Courts of equity exercise jurisdiction under three general heads: concurrent, exclusive, and auxiliary or supplemental.
2. A court of equity does not exercise exclusive jurisdiction of an action of account but exercises only jurisdiction concurrent with courts of law, unless it can be shown that without the aid of a court of equity adequate relief cannot be obtained.
3. As a general doctrine, in matters of account growing out of privity of contract courts of equity have a general jurisdiction where there are mutual accounts (and *a fortiori* where these accounts are complicated) and where accounts are on one side and discovery is sought and is material to the relief.
4. To support an auxiliary suit filed in equity for an accounting, there must be filed a principal suit within the jurisdiction of a court of equity.
5. Inasmuch as parceners do not inherit from their ancestors *per capita,* but rather *per stirpes,* title and interest of each of them should first be determined before any action for account is brought.

Appellants filed a bill in equity requesting the circuit court to compel appellees to account for rents and profits

accruing from property which, appellants alleged, appellants and appellees held as coparceners. The circuit court, sitting in equity, dismissed the bill for lack of jurisdiction. On appeal to the Supreme Court, *judgment affirmed.*

P. Gbe Wolo for appellants. *A. B. Ricks* and *W. E. Dennis* for appellees.

MR. CHIEF JUSTICE GRIMES delivered the opinion of the Court.

Appellants in the above entitled cause, who were petitioners in the Circuit Court of the First Judicial Circuit, filed a petition in the equity division of said court on November 2, 1938, against the appellees, who were named as respondents in the court below, praying for proper accounting. The petition rehearsed *inter alia* that the parties, both appellants and appellees, were all descended from one common ancestral stock, namely from the illustrious Elijah Johnson who, they alleged, had died intestate about eighty-nine years before the filing of said petition. Appellants also alleged that Elijah Johnson had been possessed of a very large estate, of which certain delectable portions enumerated in the petition were of great value, and appellants, ignoring all the rest of the property both real and personal, requested that the court should compel the appellees to account for the rents and profits accruing from that portion of the estate which appellants had selected for inclusion in the said complaint and which they alleged the parties, appellants and appellees, all held as coparceners.

The respondents, now appellees, filed an answer containing sixteen pleas, of which the important ones now relevant to this phase of the case may be paraphrased as follows:

1. A denial that petitioners could appeal to the equity

division of the circuit court for a proper accounting in this case because the respondents were not aware of the estate in which petitioners claim to have an interest.

2. That inasmuch as Elijah Johnson under whom they claim had died March 23, 1849, eighty-nine years before the institution of this suit, petitioners were barred by the statute of limitations from so commencing a suit at this time, as they or their privies should have compelled the adjustment and settlement of their rights before the lapse of eighty odd years.
3. That inasmuch as petitioners had not first of all petitioned the probate court to open the estate of Elijah Johnson, they had chosen the wrong form of action when they had filed a bill in equity for proper accounting.
4. That inasmuch as the laws of the country require that all intestate estates should be closed within one year with the privilege of extending the period to eighteen months in the event foreign claims exist, there could be no legal or equitable connection between the present petitioners and the alleged estate.
5. That petitioners had not shown that any of the property listed in their petition had ever been possessed and/or enjoyed by any of their respective parents or privies.
6. A denial that petitioners had any right, title, or interest to the rents and profits accruing from any properties for which an accounting was demanded, but rather that they were the bona fide properties of the late F. E. R. Johnson and G. M. Johnson which property had descended to the respondents and not to the petitioners.
7. That the deeds of lease for the delectable pieces of property devised by respondents had been probated

and registered without any objections from petitioners or their privies.

8. That Gabriel L. Dennis, one of the petitioners demanding proper accounting, had served as administrator of the estate of the late G. M. Johnson and, as such administrator, had executed a deed of lease, made profert of in the pleadings, by the execution of which deed he had admitted the absolute ownership in fee of the late F. E. R. Johnson and G. M. Johnson and by reason whereof he is now estopped from claiming any interest in said estate adverse to that of the intestate Gabriel M. Johnson.

In due course of time the pleadings rested with the filing by respondents of a rejoinder, and the issues raised in said pleadings having in due course been argued before His Honor R. F. D. Smallwood, Circuit Judge presiding in the First Judicial Circuit, he dismissed the petition upon the fourth, sixth and tenth pleas of the answer which had raised the points that petitioners were not entitled to recover because: (a) petitioners had wrongly appealed to the equity division of the court for proper accounting; (b) because of not having first had the estate opened and the interest of the parties fixed, petitioners had chosen the wrong form of action; and (c) they had not shown that any of the property for the proceeds of rent from which they were demanding an account had ever been the bona fide property of the petitioners or their privies. To this ruling of His Honor the Judge petitioners excepted and prosecuted an appeal to this Court for review.

As interesting as are several of the issues raised in these pleadings (the gist of which has been given in the above summary), since the majority of them are mixed issues of law and fact and the appeal is from a judgment dismissing the case wholly upon some of the demurrers raised, it is obvious that most of the issues above sum-

marized are not yet ripe for our consideration. Our review of the cause has therefore been confined to the question of whether or not the lower court was correct in dismissing the cause upon the demurrers pleaded in the answer of the respondents.

In *Nassre and Saleby* v. *Elias,* 5 L.L.R. 108, decided by this Court on the thirty-first of January 1936, it was therein pointed out, at page 112, that courts of equity exercised jurisdiction under three general heads, *viz.:* concurrent, exclusive, and auxiliary or supplemental. An action of account is not one of which the said court takes exclusive jurisdiction, but rather the jurisdiction in matters of accounting is exercisable concurrently with courts of law, leaving it up to the parties desiring to invoke the powers of a court of equity to show to the satisfaction of the trial court that, without the aid of a court of equity, the party aggrieved, or feeling himself aggrieved, could not obtain adequate relief.

Thus, said the learned Justice Story, in his *Commentaries on Equity Jurisprudence:*

> "One of the most difficult questions arising under this head (and which has been incidentally discussed in another place) is to ascertain whether there are any, and if any, what are the true boundaries of equity jurisdiction in such matters of account as are cognizable at law. We say cognizable at law; for wherever the account stands upon equitable claims, or has equitable trusts attached to it, there is no doubt that the jurisdiction is absolutely universal and without exception, since the party is remediless at law." 2 Story, Equity Jurisprudence § 594, at 10–11 (14th ed. 1918).

The author proceeds:

> "But in cases where there is a remedy at law there is no small confusion and difficulty in the authorities. The jurisdiction in matters of this sort has been asserted to be maintainable upon two grounds, distinct

in their own nature and yet often running into each other. In the first place it has been asserted that where in a matter of account the party *seeks a discovery of facts and these appear upon his bill to be material to his right of recovery*, there, if the answer does in fact make a discovery of such material facts (for it would be no ground of jurisdiction if the discovery failed), the court having once a rightful jurisdiction of the cause ought to proceed to give relief in order to avoid multiplicity of suits. . . .

"The doctrine now generally (perhaps not universally) held in America is (as we have seen), that in all cases where a *Court of Equity has jurisdiction for discovery, and the discovery is effectual, that becomes a sufficient foundation upon which the court may proceed to grant full relief.* In other words where the court has legitimately acquired jurisdiction over the cause for the purpose of discovery it will, to prevent multiplicity of suits, entertain the suit also for relief." (Italics supplied.) *Id.* §§ 595–96, at 11–12.

Mr. Justice Story continues:

"Courts of Equity will also entertain jurisdiction in matters of account not only when there are mutual accounts, but also when the accounts to be examined are on one side only, and a discovery is wanted in aid of the account and is obtained. But in such a case if no discovery is asked or required by the frame of the bill, the jurisdiction will not be maintainable. And a fortiori where there are no mutual demands but a single matter on one side, and no discovery is required, a Court of Equity will not entertain jurisdiction of the suit, although there may be payments on the other side which may be set off; for in such a case there is not only a complete remedy at law, but there is nothing requiring the peculiar aid of equity to ascertain or adjust the claim. To found the jurisdiction in cases of a claim of this sort there should be a

series of transactions on one side and of payments on the other." *Id.* § 600, at 15–16.

Mr. Justice Story continues:

"So that on the whole it may be laid down as a general doctrine that in matters of account growing out of privity of contract Courts of Equity have a general jurisdiction where there are mutual accounts (and a fortiori where these accounts are complicated), and also where the accounts are on one side, but a discovery is sought and is material to the relief. And on the other hand where the accounts are all on one side and no discovery is sought or required, and also where there is a single matter on the side of the plaintiff seeking relief, and mere set-offs on the other side and no discovery is sought or required,—in all such cases Courts of Equity will decline taking jurisdiction of the cause. The reason is, that no peculiar remedial process or functions of a Court of Equity are required; and if under such circumstances the court were to entertain the suit, it would merely administer the same functions in the same way as a Court of Law would in the suit. In short it would act as a Court of Law." *Id.* § 602, at 17.

Two reflections arise out of the preceding citations, *viz.*: (1) Although counsel for appellants argued rather exhaustively here that F. E. R. Johnson and G. M. Johnson, the privies of the respondents, had by implication become trustees in behalf of the appellants as cestuis que trust, yet, as before pointed out, the case has not yet reached the stage where evidence could be produced, and it does not appear to us that a sufficient foundation for equity jurisdiction was laid in the bill. Said bill recites that all of the parties in interest, both appellants and appellees, were holding an estate in coparcenary and that they were all in privity of relationship by blood, the one to the other; and the bill has not made it clear whether the claim now attempted to be set up by respondents, now

appellees, arises out of fiduciary relationship of ancestor and heir, as was suggested by the appellees, or of trustee and cestui que trust, as was contended by appellants. (2) Nowhere in the bill is there an allegation or suggestion that a discovery of facts is sought in this suit, and, as has been shown, in the absence of a prayer for discovery or if the discovery failed, there would be no foundation for the equity jurisdiction to attach. According to the learned author's treatment of this subject in *Ruling Case Law:*

> "Perhaps the statement most generally met with respecting the scope of equity jurisprudence is that it has jurisdiction in cases of rights recognized and protected by the municipal jurisprudence, where a plain, adequate, and complete remedy cannot be had in the courts of common law; but it is extremely doubtful if the absence of a complete and adequate remedy at law can constitute the sole basis on which the whole jurisdiction of equity rests. As embracing such primary rights, estates, or interests, the old division of chancery jurisdiction into three great heads, the concurrent, the exclusive, and the auxiliary or supplemental jurisdiction, has possibly not yet outlived its usefulness, despite the fact that conceivably a more philosophical and scientific division might be made, and although the widespread adoption of the reformed procedure and the frequent statutory modifications of equity jurisdiction has undoubtedly robbed it of much of its force. . . ." 10 R.C.L. *Equity* § 11, at 266 (1914).
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> "That branch of equity jurisdiction which is exercised over certain subjects concurrently with courts of law may be said to embrace, if not all, at least a very large portion of the original jurisdiction. Its true origin lies in one of two sources: either that the courts of law, although they have general jurisdiction over the subject-matter involved, cannot give adequate,

> specific and perfect relief, or that, under the actual circumstances of the case, they cannot give any relief at all. In a general way, therefore, it may be said that the concurrent jurisdiction of equity extends to all cases of legal rights, where, under the circumstances, there is not a plain, adequate and complete remedy at law. . . ." *Id.* § 13, at 267.

Two of the pleas in the answer of respondents specifically passed upon in the decision of the trial court are the sixth and tenth, which raise the points that inasmuch as Elijah Johnson, the common ancestor of all the parties, had been dead for eighty-nine years, appellants had been guilty of laches in not having had the probate court reopen and settle the alleged estate and that, hence, the action for a proper accounting was not the correct form of action.

According to the pleadings now before us, it is undisputed that the parties are all tenants in coparcenary, having all been descended from one common ancestral stock and being related to each other in the third and fourth degrees of kinship. Inasmuch as parceners do not inherit from their ancestor *per capita,* but rather *per stirpes,* it does appear to us proper that the rights, title, and interest of each of them should first have been determined before any action for account should have been brought.

Courts of equity gradually assumed jurisdiction to compel an accounting, which had previously been cognizable almost exclusively in courts of law, in cases where the accounts were mutual or were complicated and a discovery was necessary in order to clarify certain items therein or to elicit facts only within the knowledge of the parties. Hence,

> "That there are complicated accounts is ordinarily a good reason for a court of equity taking jurisdiction of matters of accounting, although they are all on one side. But equity will exercise its discretion in the matter and deny the accounting where it appears that

it would result in great inconvenience and possible oppression to the defendant. Equity will not take jurisdiction in matters of account which are not complicated where there is no other ground for equitable jurisdiction, and the reason for this is said to be that if equity were to assume jurisdiction there would be an end to the action of assumpsit in every instance where there had been a single payment on the part of the defendant, did the creditor choose to proceed in equity." 1 R.C.L. *Accounts and Accounting* § 25, at 223–24 (1914).

Suppose, for example, that the trial judge had not dismissed the case upon the grounds stated, had proceeded with the hearing, and had rendered a final decree that respondents should render a proper accounting; and suppose further that the judge had appointed an auditor to make up the accounts and the auditor had demanded of the judge information as to the date to start the accounts, the property to be accounted for, and the respective shares of the parties. What intelligent answer could the judge have given to such auditor based upon the pleadings which he had before him, and what intelligent answer could any judge have given before the claims of the respective parceners had been first established and their respective interests had been definitely fixed?

In view of the premises, it is the opinion of this Court that the bill in equity for proper accounting filed in the case under review is in the nature of an auxiliary suit without any principal suit to support it. Because of the want of a proper foundation, the said auxiliary suit should necessarily be abated. Ergo, His Honor the Judge of the Circuit Court of the First Judicial Circuit in our opinion quite correctly dismissed the bill with costs against the petitioners, which decree should be affirmed with all additional costs ruled against the said appellants; and it is hereby so ordered.

Judgment affirmed.