

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of Lindsay
v. Duff, from the Supreme Court of Ceylon;
delivered 19th July, 1862.*

Present:

LORD JUSTICE KNIGHT BRUCE.

SIR EDWARD RYAN.

LORD JUSTICE TURNER.

THIS is an Appeal from two Orders of the Supreme Court of the Island of Ceylon, made in the cause of *Lindsay v. Duff*, and bearing date respectively the 6th October and the 3rd November, 1860. The grounds of the Appeal are, as to the Order of the 6th October, 1860, that by that Order, the Defendant, George Smyttan Duff, who is the Respondent to this Appeal, was ordered to pay into the Registry of the Court, only the sums of 1,875*l.* and 2,291*l.* 1*s.* 6½*d.*, amounting to the sum of 4,166*l.* 1*s.* 6½*d.* in the whole, when, as the Appellants contend, he ought to have been ordered to pay into Court the sum of 6,457*l.* 3*s.* 1*d.*; and as to the Order of the 3rd November, 1860, that by that Order the Court overruling an objection taken by the Appellants to a report in the cause, allowed the Defendant, George S. Duff, commission on his sales and purchases on account of the estate in question, and ordered him to pay into Court only the sum of 10,344*l.* 0*s.* 11½*d.*, when, as the Appellants contend, he ought to have been ordered to pay into Court a much larger sum.

The cause of *Lindsay v. Duff*, out of which this Appeal arises, was instituted by the Appellants as Plaintiffs against the Respondent, George Smyttan Duff, and against James Ingleton, Alexander Brown, and David ~~Brown~~ Lindsay, and afterwards continued against the Respondent George S. Duff, as the

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executor of Alexander Brown in the District Court of Kandy, for the purpose of recovering the possession of a coffee plantation or estate in the above-mentioned district, called the Rajawelle Plantation or estate, with mesne profits, and by the Decree of the District Court, bearing date the 16th April, 1855. It was decreed that the Defendants be ejected from the premises in dispute, and that the Plaintiffs, the now Appellants, be restored to and quieted in the possession thereof, and that they do recover from the Defendants mesne profits to the amount of 6,457*l.* 3*s.* 1*d.* sterling, in the following proportions from the Defendant, George S. Duff, the now Respondent, from 1st of February, 1849, to the 30th April, 1850, and from the Defendant, George S. Duff, the now Respondent, as executor of the estate of Colonel Brown, and from James Ingleton, from 1st May, 1850, to 21st May, 1853, at the rate of 1,500*l.* a-year.

From this Decree of the District Court, the Defendants appealed to the Supreme Court, and by a Decree of that Court bearing date the 8th March, 1856, the Decree of the Kandy Court was reversed, and the suit instituted by the now Appellants was dismissed.

The Appellants then appealed from the Decree of the Supreme Court to Her Majesty in Council. That Appeal was heard before their Lordships, who reported to Her Majesty their opinion thereon; and thereupon Her Majesty, by an Order in Council bearing date the 30th June, 1860, was pleased to approve the Report, and to order, and it was thereby ordered that the Decree of the Supreme Court of the 8th March, 1856, should be, and the same was thereby, reversed, and that so much of the Judgment of the District Court of Kandy of the 16th April, 1855, as directed that the Defendants, the Respondents to that Appeal, should be ejected from the premises, and that the Plaintiffs, the Appellants, be restored to and quieted in the possession thereof, be, and the same was thereby restored, but that so much of the said Judgment of the said District Court as ordered mesne profits to the amount of 6,457*l.* 3*s.* 1*d.* sterling to be paid in certain proportions by the Respondents, George Smyttan Duff and James Ingleton, to the Appellants, be, and the same was thereby varied, by ordering, and it was

thereby ordered, that the said mesne profits of the estate be paid by the said last-named Respondents, in the like proportions, into the Registry of the Supreme Court of Ceylon, and that an account of subsequent rents and profits of the estate in question, received by the Respondents Duff and Ingleton, or either of them, or by their or either of their order, or for their or either of their use, since the 21st of May, 1853, be taken; and that the amount which might be found due upon such account, be also paid by the said Respondents into the Registry of the said Supreme Court. And after directions as to the moneys so to be paid into Court not being paid out without notice, and as to the order being without prejudice, and as to the parties being at liberty to apply to the Supreme Court, it was ordered that the said cause be, and the same was thereby, remitted back to the said Supreme Court of Ceylon, with directions to give effect to the said Report, and that the same be punctually observed, obeyed, and carried into execution.

Upon this Order of Her Majesty in Council reaching Ceylon, the Appellants moved before the Supreme Court for the payment into the Registry by the Respondent, George S. Duff, of the sum of 6,457*l.* 3*s.* 1*d.*, being the amount of the mesne profits from the 1st February, 1849, to the 21st May, 1853, as fixed by the Decree of the District Court of Kandy, and for a reference to the District Court to take the account of the mesne profits from the 22nd May, 1853, to the 25th August, 1860, when possession of the estate had been given to the Appellants.

It was upon this motion the first of the Orders now under appeal, the Order of the 6th of October, 1860, was made, directing the Respondent, George S. Duff, to pay into the Registry the sum of 4,166*l.* 1*s.* 6½*d.*, that sum being the aggregate amount of the sum of 1,875*l.*, the amount of the mesne profits at the rate of 1,500*l.* a year, from the 1st February, 1849, to the 30th April, 1850, which by the Decree of the District Court of Kandy was ordered to be paid by the Respondent George S. Duff, and of one-half of the sum of 4,582*l.* 3*s.* 1*d.*, the amount of the mesne profits from 1st May, 1850, to the 21st May, 1853, at the same rate, which by the same Decree was ordered to be paid by the Respondent,

George Smyttan Duff, and by the said James Ingleton. By this Order of the 6th October, 1860, it was also, in conformity with Her Majesty's Order in Council, ordered that an account should be taken by the Registrar of the subsequent profits of the estate received by the Respondent, George S. Duff, and by the said James Ingleton, or by their or either of their order, or for their or either of their use.

In pursuance of this Order the Registrar made his report, by which he found 16,726*l.* 0*s.* 4*d.* to be the amount of the subsequent mesne profits; but he certified that in arriving at that amount questions of interest and commission had not been settled, and that interest amounting to 3,962*l.* 1*s.* 7*d.* had been charged by the Respondent, George S. Duff, in the accounts on the capital embarked, and commission amounting to 4,143*l.* 9*s.* 6*d.* on the sales and purchases on account of the estate; and he certified that he had allowed both these charges in the Respondent's accounts. He further certified that the shares in which the proprietors held the estate and divided the profits were as follows: estate of Brown, one-half; estate of Ingleton, one-quarter; estate of Dr. Smyttan, one-quarter; and that the profits divided in these proportions would stand thus: estate of Brown, 8,363*l.* 0*s.* 2*d.*; estate of Ingleton, 4,181*l.* 10*s.* 1*d.*; estate of Dr. Smyttan, 4,181*l.* 10*s.* 1*d.*

The Appellants objected to this Report, in respect of the allowance to the Respondent, George S. Duff, of the interest on capital, and of the commission; and upon the case coming on before the Supreme Court upon the Report, the Court disallowed the interest on capital, but allowed the commission, and made the second of the Orders complained of in this Appeal, the Order of the 3rd November, 1860. The sum of 10,344*l.* 0*s.* 11½*d.* by this Order directed to be paid into the Registry by the Respondent, George S. Duff, is the aggregate of the sums of 8,363*l.* 0*s.* 2½*d.*, by the Report certified to be the proportion of the subsequent profits belonging to Brown's estate, and of the sum of 1,981*l.* 0*s.* 9½*d.*, being one-half of the sum of 3,962*l.* 1*s.* 7*d.*, the interest on capital disallowed by the Supreme Court. By this Order the Supreme Court also ordered that the question of costs should stand over until it should be seen

what, if any, further proceedings were taken in the matter under the leave given to the Defendants by the Order in Council, and what might be the result of such proceedings. It is under these circumstances the Appellants have again brought this case before us.

Three questions arise upon the Appeal, and were argued at the Bar: first, whether the Respondent, George Smyttan Duff, ought not to have been ordered to pay into Court the whole, and not one-half only, of the sum of 4,582*l.* 3*s.* 1*d.*, which, according to the Decree of the Kandy Court, was payable by him and by James Ingleton; secondly, whether he ought not to have been ordered to pay into Court the full amount of the subsequent profits found by the Report of the Registrar, and not one-half of those profits only; and thirdly, whether he ought to have been allowed the commission which has been allowed to him by the Supreme Court.

As to the first of these questions, their Lordships find themselves unable to agree in the conclusion at which the Supreme Court has arrived. That conclusion rests upon these grounds: that, by virtue of the Ordinance No. 5 of 1852, the effect of the Judgment of the District Court of Kandy, if it had remained undisturbed, would have been to be determined by the Roman-Dutch law, and that Her Majesty's Order in Council has revived and re-ordained that Judgment, not merely as to the proportions in which the mesne profits were to be answered by the Respondent, and by him and James Ingleton, but also as to the liability of those parties under the Judgment, and that, according to the Roman-Dutch law, that Judgment did not give the Plaintiffs (the now Appellants) the right to recover against both or either of those parties the full sum payable by both of them, but gave the Plaintiffs the right to recover a moiety, and a moiety only, of that full sum against each of those parties. Upon this question, as to the effect of the Roman-Dutch law if applied to the Judgment of the District Court of Kandy, their Lordships do not think it necessary to give any opinion, for they are of opinion that it ought not to be so applied. They are satisfied (as they observed in their Judgment upon the former Appeal in this cause) that all the proceedings in the cause have been conducted and carried on according

to the English law and course of procedure, and treated as depending on that law. They are not even satisfied that the proceedings of the Respondent himself which necessitated the institution of the suit on which this Appeal is brought, were not so conducted, carried on, and treated; and they are not disposed to think that upon the sound construction of the Ordinance No. 5 of 1852, it was meant to provide by it that the Roman-Dutch law should be applied to determine the operation and effect of a Judgment or Decree pronounced under a different law. They are, on the contrary, much disposed to think that this Ordinance was intended, and ought to be held to apply only to cases in which there may be a Kandyan law, or Kandyan custom having the force of law, applicable to the rights of the parties in issue in the suit, and to be determined by the Court; but even if the Ordinance ought to be held to go further, and to apply not merely to the substantive rights in issue in the suit, but to questions arising on the law of procedure, their Lordships are led, from the proceedings in this suit, to believe that the procedure in the District Court of Kandy is according to the English law; and the procedure of a Court being the law of the Court, this alone would, as they conceive, prevent the Roman-Dutch law being applicable under the Ordinance.

Their Lordships have less difficulty in concluding that the Roman-Dutch law ought not to have been applied to this case in the mode in which the Supreme Court has applied it, from the fact that it appears by the Judgment that it has never before been so applied, and from the confusion and inconvenience which would result from attempting to apply the doctrine of one law to the proceedings under another.

It is not, however, necessary, in their Lordships' judgment, for them to give, and they do not therefore give, any final opinion upon the construction of this Ordinance; for assuming it to bear the extended construction contended for by the Respondent, they do not think that it was competent to him to insist upon the Roman-Dutch law when he had throughout, both in the proceedings in the District Court of Kandy and in the Supreme Court, and ultimately upon the former Appeal to

Her Majesty in Council, concurred in treating the questions in the cause as depending upon the English law. Moreover, the duty of the Supreme Court was to carry into effect the Order of Her Majesty in Council, and there can be no doubt that that Order proceeded upon the footing of the English law being applicable to the case. Their Lordships, therefore, think that the Order of the 6th of October, 1860, cannot be maintained upon the grounds on which it has been rested in the Judgment of the Supreme Court; and they have no doubt that, according to the English law, the Respondent was liable to pay into Court the full sum which, under the Decree of the District Court, was to be paid by him and by James Ingleton.

They are of opinion, therefore, that this Order ought to have been for payment into the Registry of the Court, by the Respondent, of the full sum of 6,457*l.* 3*s.* 1*d.* What has been already said applies even more forcibly to the subsequent profits; for the payment of them rests wholly upon Her Majesty's Order in Council, to which it was not pretended that the Roman-Dutch law could be applied.

Their Lordships are of opinion, therefore, that the Order of the 3rd of November, 1860, ought to have directed the whole of these profits to be paid by the Respondent into the Registry of the Court. It was attempted to distinguish the case, as to some part of the rents received by the Respondent, upon the ground that he received and paid them over as agent. But their Lordships are of opinion that the Respondent cannot protect himself from his liability to the Appellants upon this ground; for as to the rents up to the 21st May, 1853, the title of the Appellants was established by the Order of Her Majesty in Council, and as to the subsequent rents they were received and paid over *pendente lite*, when the Defendant was in possession as part owner, and was wrongfully insisting on retaining that possession against the Appellants.

Then as to the commission allowed to the Respondent in his accounts, their Lordships are of opinion that this allowance ought not to have been made to the Respondent. According to their Lordships' Judgment on the former Appeal, which was approved by Her Majesty in Council, the Respondent's possession of the plantation or estate was a wrongful

possession, and he cannot be permitted to make a profit to himself out of his own wrongful act. The Supreme Court in making this allowance seems to have proceeded on two grounds: first, that if the allowance was not made, the Appellants would recover more than they could otherwise have realized; and secondly, that the account directed was an account of profits merely;—but as to the first ground, if it was maintained, every wrongdoer would equally be entitled to make and maintain such a claim, a proposition which is quite untenable; and as to the second ground, it is sufficient to say that an account of profits is an account of receipts after making all just allowances, and that under the circumstances of this case the commission claimed by the Respondent could not properly be held to be a just allowance.

The Appeal also complains of the reservation of the costs contained in the Order of the 3rd November, 1860, but their Lordships see no reason to alter the Order in this respect.

Their Lordships, therefore, will humbly recommend Her Majesty to reverse the Order of the 3rd of November, 1860, so far as it overrules the objection taken by the Appellants to the Report, and to declare that by the Order of the 6th of October, 1860, the sum of 6,457*l.* 3*s.* 1*d.* ought to have been ordered to be paid by the Respondent into the Registry of the Court; and that by the Order of the 3rd of November, 1860, the sum of 24,831*l.* 11*s.* 5*d.*, being the aggregate amount of the sum of 16,726*l.* 0*s.* 4*d.* the subsequent profits, of the sum of 3,962*l.* 1*s.* 7*d.*, the interest on capital disallowed by the Supreme Court, and of the sum of 4,143*l.* 9*s.* 6*d.* the commission allowed to the Respondent, ought also to have been ordered to be paid by him into the Registry, and again to remit the cause to the Supreme Court, with directions to carry into effect this Order; and further to order that the costs of this Appeal be paid by the Respondent. The Order of course to be without prejudice, as provided by Her Majesty's former Order in Council.
