

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Elsy Lindsay and James Farquhar Hadden v. the Oriental Bank and others, from the Supreme Court of Ceylon; delivered 23rd June, 1860.

Present :

LORD KINGSDOWN.

LORD JUSTICE KNIGHT BRUCE.

LORD JUSTICE TURNER.

SIR JOHN TAYLOR COLERIDGE.

THIS appeal arises out of a suit instituted by the Appellants in the District Court of Kandy, in the Island of Ceylon, against the Oriental Bank Corporation, George Smyttan Duff, personally, and, as executor of Alexander Brown, deceased, James Ingleton, and David Baird Lindsay, for the purpose, according to the prayer of the libel in the suit, of having it declared and decreed that an instrument of the 11th July, 1848, and a warrant of attorney of that date mentioned in the libel, were and are, so far as regards the rights of the Plaintiffs (the Appellants) and the estate of Martin Lindsay, deceased, wholly null and void, and insufficient to convey or pass any interest in the said estate, or to create any charge or incumbrance thereon; and of having it also declared and decreed that the rights of the Plaintiffs (the Appellants) and of the estate of the said Martin Lindsay, were not and are not in any way affected by any proceeding in a suit against the Defendant David Baird Lindsay, No. 8,997, mentioned in the libel; and that by no proceeding had in the said suit in respect of the execution against the effects of the said David Baird Lindsay, and the sale thereupon of the Rajawelle estate, lands, and

premises, could the said estate, lands, and premises be legally passed; and that the same did not by any such proceeding become the lawful property of the Oriental Bank mentioned in the libel, or of any of the Defendants; and for the further purpose, according to the prayer of the libel, that the Defendants might be ejected from the said estate, lands, and premises, and that the Plaintiffs (the Appellants) might be restored to their original rights, and put and placed in the possession of the said estate, lands, and premises, on behalf of themselves and those minors and others whose interests they represented, of which possession they had, as alleged, been illegally and fraudulently deprived; and that the Defendants might be decreed to pay to the Plaintiffs (the Appellants), as and for mesne profits, the sum of 10,000*l.* sterling, with costs of suit.

Upon the hearing of this suit, the District Court of Kandy, on the 16th April, 1855, made the following Decree: That the Defendants be ejected from the premises in dispute; that the Plaintiffs (the Appellants), as devisees in trust of the estate of Martin Lindsay, be restored to and quieted in possession thereof; that they recover from the Defendants mesne profits to the amount of 6,457*l.* 3*s.* 1*d.* sterling, in the following proportions, that is to say, from the Defendant George Smyttan Duff, from the 10th February, 1849, to the 30th April, 1850, and from the Defendant George Smyttan Duff, as executor of the estate of Alexander Brown, and from the Defendant James Ingleton, from the 1st May, 1850, to the 21st May, 1853, at the rate of 1,500*l.* per annum; and that the above Defendants do pay the costs of the suit, except the costs of the Oriental Bank Corporation, as against whom the libel was dismissed with costs, and except the costs of the Defendant David Baird Lindsay, which were to be borne by himself.

From this Decree of the District Court of Kandy the Defendant George Smyttan Duff, in his own right, and as executor of Alexander Brown, and the Defendant James Ingleton, appealed to the Supreme Court of the Island of Ceylon; and that Court, by its Decree dated the 8th March, 1856, reversed the judgment of the District Court, and dismissed the libel with costs.

The appeal before us is brought by the Plaintiffs, the Appellants from this latter Decree.

Martin Lindsay, the testator, to whom the estate in question belonged, and who appears to have been domiciled in Scotland, by his will dated the 21st of December, 1844, after directing payment of his debts and funeral and testamentary expenses, gave, devised, and bequeathed his undivided share of the Rajawelle estate in the Island of Ceylon, with the fixtures, implements, and utensils thereto belonging, which he held jointly with the heirs of the late George Turnour, and all other messuages, lands, tenements, and hereditaments, and other property, whether real, or personal, or mixed, belonging to him in the said Island of Ceylon, unto and to the use of his wife the Appellant Elsy Lindsay, his son the Respondent David Baird Lindsay, his brother the Rev. Henry Lindsay, his brother-in-law James Hadden, and his son-in-law the Appellant, James Farquhar Hadden, their heirs, executors, and administrators, upon trust, to manage and cultivate the same as they should think most beneficial for the persons who should be entitled thereto under his will, with very full and extensive powers of management, and with a declaration of his most earnest desire that his trustees should continue to manage the same as long as might be practicable without bringing the same to a sale; and after declaring trusts of the net proceeds to be derived from the estate and premises for the benefit of his wife and children, he provided that any one or more of his sons who might feel disposed to take the management of the said estate and premises, and for that purpose to reside in Ceylon, should be at liberty to do so if his trustees should consider the same advantageous, but not otherwise; and he declared that the son or sons so for the time being acting in the management of the said estate and premises should be considered as the agent or agents, and be subject to the control and direction of his trustees in the management thereof and otherwise relating thereto. He then gave power to his trustees to sell the estate and premises, or any part thereof, and gave, devised, and bequeathed all his real and personal estates, property, and effects not before disposed of, and not being real or heritable property in Scotland, to which he should be entitled at the time of his

decease, unto and to the use of the same trustees, upon trust to convert the same into money, and invest the proceeds thereof, and to stand possessed of the invested fund upon trusts for the benefit of his wife and children; and he appointed his wife and the said David Baird Lindsay, Henry Lindsay, James Hadden, and James Farquhar Hadden, to be his executors.

In the month of April 1846, after the date of his will, the testator made some arrangements with the heirs of Turnour, under which he became solely entitled to the greater part of the Rajawelle estate, and he mortgaged the part of the estate to which he had thus become entitled, and which seems to have retained the name of the Rajawelle estate, to Henry Alexander Atcheson, the executor of George Turnour.

In the month of January 1847, the testator died, leaving several children; and at that time the sum of 4,000*l.* was due upon Atcheson's mortgage, and the estate, it appears, was also in mortgage to other persons.

In the month of April 1847, the Appellants and James Hadden, (who afterwards died in the year 1848,) proved the testator's will in Scotland, and in the month of July 1847 it was proved in Ceylon by David Baird Lindsay. It is stated in one of the deeds to which we shall have occasion to refer, that the will was thus proved by David Baird Lindsay under a power of attorney from the other executors and trustees; but this fact does not appear to have been proved in the cause as against the Respondents. Henry Lindsay did not prove the will or accept any of the trusts created by it.

Soon after the death of the testator, the 4,000*l.* secured by Atcheson's mortgage was required to be paid; and thereupon David Baird Lindsay, who was the eldest son of the testator and resided in Ceylon, and had the management of the estate there, came over to this country for the purpose of making arrangements to provide for the payment of the mortgage, and for securing the means of keeping up the cultivation of the estate. These purposes were effected by an agreement which was come to about the end of the year 1847 by all the trustees of the will, including David Baird Lindsay, with Mr. Caffary, a merchant

carrying on business in London under the firm of Shaw and Caffary, and which agreement was embodied in a deed made between the Appellants and David Baird Lindsay, and James Hadden of the one part, and Caffary of the other part.

By this deed, after reciting the testator's will, and that the trusts of the will had been accepted by the executors and executrix, except Henry Lindsay, and that the will had been proved by David Baird Lindsay under a power of attorney from the acting executors and trustees, and that David Baird Lindsay had, with the concurrence of the trustees, taken upon himself the management of the Rajawelle estate, it was agreed that Caffary should forthwith pay 2,000*l.* to the trustees, and should forthwith give David Baird Lindsay a letter of credit authorizing him to draw bills at six months' sight to the extent of 4,000*l.*, to be applied towards paying the mortgage-debt and interest; that upon payment of the mortgage-debt and interest the trustees should procure the securities for the same to be transferred to Caffary, and should, on Caffary's request, execute to him a legal mortgage for the full amount which should have been advanced by him, and for all further advances and supplies which should have been made and furnished by him, and should do all necessary acts for rendering the mortgage effectual according to the laws of Ceylon, and for constituting it the first charge upon the estate, and for enabling Caffary to sell the estate in case the interest should be in arrear for three months, or the principal should not be paid within six months after payment should have been required. That the produce of the estate should be consigned to Caffary, he accepting David Baird Lindsay's bills against the produce, so as to provide the funds for cultivating the estate. That out of the moneys to arise from the sale of the produce, Caffary should reimburse himself the bills drawn against the produce, and keep down the interest on the mortgage, and should apply the surplus, if any, in reduction of the principal if he should think proper; and if not, then as the trustees should direct; and that if the consignments should be duly made, the principal should not be called in before the 31st December, 1852, and the trustees should not be at liberty to pay it off before that day unless Caffary should be willing to receive it.

It appears that, according to the laws of Ceylon, it is essential to the validity of deeds affecting immovable property there, that they should be executed in the island; and this deed, therefore, was not executed until the 15th February, 1848, when the several parties executed it in the Island by attorneys appointed for the purpose. The Respondent George Smyttan Duff, who was the Manager of the Ceylon Branch of the Oriental Bank, was the attorney by whom it was executed on the part of Caffary.

In order to effectuate the agreement with Caffary, it was necessary, of course, to provide for the negotiation of the bills for 4,000*l.*, to be drawn upon him by David Baird Lindsay, and accordingly, coterminously with the agreement entered into with Caffary, an arrangement was come to by the trustees with the Oriental Bank for the Bank's discounting those bills. This they agreed to do, on being guaranteed by the other executors and trustees of the testator; and accordingly, on the 20th January, 1848, the appellants and James Hadden gave their joint and several guarantee to the Bank for the payment of the bills to the amount of 4,000*l.*

Upon the occasion of the power of attorney being sent by Caffary to Duff, empowering him to execute the deed of the 15th February, 1848, on his behalf, Caffary, on the 24th December, 1847, wrote to Duff to the effect that when the deed was executed by the attorneys of the executors, David Baird Lindsay was authorized to draw upon him (Caffary) for the 4,000*l.* to discharge the existing mortgage, and that the title-deeds of the estate were then to be handed over to Duff, and he requested that Duff would hold them on his behalf; and in answer to this letter, Duff, on the 15th February, 1848, wrote to Caffary that the deed had been executed by the attorneys of the executors, and that David Baird Lindsay had negotiated through the Bank the bills to the amount of the 4,000*l.*, which was to be appropriated to the discharge of the mortgage, but that there had not been time to pay over the amount and receive the title-deeds. On the 19th of February, 1848, however, he again wrote to Caffary that everything requested in his letter of the 24th December had been complied with. In fact, immediately upon the execution of the deed of the

15th February, 1848, David Baird Lindsay drew upon Caffary for the 4,000*l.*, the bills were discounted by the Bank, and by means of the moneys thus raised, and of other moneys raised by bills drawn by David Baird Lindsay upon Caffary and discounted by the Bank, the mortgage was paid off, and the title-deeds of the estate were handed over to Duff.

It seems that by the rules of the Ceylon branch of the Oriental Bank, collateral security was required to be given with bills on England, and that in consequence of David Baird Lindsay's having negotiated through the Bank the bills beyond the amount of 4,000*l.*, an arrangement was come to by Duff with David Baird Lindsay, who had then returned to Ceylon, that he should give a temporary mortgage of the estate, to become void on payment of the bills, subject to the mortgage in favour of Caffary. In pursuance, as it would seem, of this arrangement, an application was made to the District Court of Kandy by David Baird Lindsay, on the 28th February, 1848, for the authority of that Court to mortgage the estate. This application proceeded upon allegations that the testator, at the time of his decease, was indebted to the amount of about 12,500*l.*, of which 8,500*l.* was secured by mortgages which had become payable and had been called in, and that David Baird Lindsay held full authority from the other executors of the will to mortgage the estate, with a view to discharge the above claims, and to meet the necessary expenses attending the up-keep and cultivation of the plantations.

By an order of the District Court of Kandy, made upon this application, and dated the same 28th of February, 1848, it was ordered that David Baird Lindsay, as executor aforesaid, be authorized and empowered to mortgage so much of the testator's landed property in Ceylon as should be sufficient to raise 12,000*l.*, to be appropriated towards payment of the testator's debts, and the management and cultivation of the plantations; and on the 13th of March, 1848, David Baird Lindsay executed an instrument of bond and mortgage in favour of Duff, in which he, David Baird Lindsay, was described as sole executor in Ceylon of the estate of Martin Lindsay, and whereby he bound himself, his heirs,

executors, and administrators, and all his property whatsoever to Duff, in the penal sum of 4,000*l.*, and after reciting that he had passed and intended to pass bills drawn on Caffary, and payable to the Bank, to the amount of 2,000*l.*, he, as executor as aforesaid, duly authorized thereto by the District Court of Kandy, by the order of the 28th February, 1848, in order to secure the due payment of the said bills to the amount of 2,000*l.*, mortgaged the estate which was therein described as being the property of the estate of the late Martin Lindsay deceased, to the said George Smyttan Duff, and deposited the title deeds of the estate with him, but subject to a mortgage for 6,000*l.*, thereafter to be made in favour of Caffary, in pursuance of the articles of agreement of the 15th February, 1858, and the bond was conditioned to be void if, upon non-payment of the bills, the 2,000*l.*, with interest and expenses, should be paid by David Baird Lindsay, his heirs, executors, or administrators, upon demand.

In the month of May 1848, before the bills which had been drawn by David Baird Lindsay and negotiated through the Bank had become due, Caffary, on whom the bills were drawn, stopped payment, and there was at this time due to him, on his account with the testator's executors and trustees, a very large balance, a considerable portion of which, to the amount of upwards of 2,800*l.*, appears to be still remaining unpaid.

In consequence of Caffary's failure, it became necessary that new arrangements should be made with reference to the payment of the bills which had been drawn on Caffary, and to the carrying on the cultivation of the estate; and David Baird Lindsay accordingly again came over to this country: but before leaving Ceylon he was required by Duff to give further security to the Bank, and, accordingly, on the 11th July, 1848, he executed another instrument of bond and mortgage in favour of Duff, in which he was also described as sole executor in Ceylon of the estate of Martin Lindsay, and whereby he bound himself, his heirs, executors, and administrators, and all his property whatsoever, to Duff, in the penal sum of 14,000*l.*, and after reciting that he had, by virtue of an agreement made between him and the devisees and trustees of

the late Martin Lindsay, with Caffary, dated the 15th of February, 1848, drawn the bills on Caffary for 4,000*l.*, and that Caffary had suspended payment, and that a bill which had been drawn upon him by Messrs. Hudson and Chandler, on account of the Rajawelle estate, and had become payable to the Bank, and which he had accepted, had been returned protested, and that the Bank had agreed to advance 230*l.* on a bill drawn by him on his mother, to carry on the Rajawelle estate during his absence from Ceylon, and that other bills on Shaw and Caffary had been passed by him to the Bank, with shipping documents for coffee shipped, and which coffee was supposed not sufficient to cover the amount of the bills, he, as executor, as aforesaid, duly authorized thereto by the District Court of Kandy, by order thereof dated the 28th February, 1848, mortgaged the estate, which in this instrument also was described as being the property of the estate of the late Martin Lindsay, to Duff, for securing the due payment of the bills of exchange and sums of money aforesaid, and the bond was conditioned for the payment on demand of the bills of exchange and other moneys aforesaid, with interest and expenses, but with a proviso that the sum to be recovered upon it should not exceed 7,000*l.* David Baird Lindsay also, at the same time, executed a warrant of attorney to confess judgment, and consented to the issuing of execution upon the bond; and on these securities being executed, Duff, on the same 11th July, 1848, wrote and delivered to David Baird Lindsay the following letter:—

“ Oriental Bank, Colombo,

“ Dear Sir, 11th July, 1848.

“ With reference to the 4,000*l.* bill drawn by you on Shaw and Caffary, of London, on the 15th February, 1848, at six months' sight, to the failure of those parties, and to the visit you now propose paying London, to endeavour to form a new connection, I hereby agree, on the part of this Bank, that, provided the cultivation of Rajawelle is properly kept up, you shall not be proceeded against on the said bills in the event of their dishonour until your return to Ceylon, or say previous to the 1st January, 1849.”

The arrangements thus entered into by Duff with David Baird Lindsay were, it appears, immediately communicated to the Bank in London. We do not, however, find amongst these papers the first letter by which this communication was made; but on the 15th August, 1848, we find a letter from Duff to the Secretary of the Bank, stating to the effect that these arrangements gave the Bank the first mortgage over the whole property to the full extent of their claim against David Baird Lindsay not otherwise covered, and in this letter, after referring to arrangements which had been proposed to the Bank by Mrs. Lindsay, Duff adds, "I suspect that Mr. Lindsay is not exactly in a position, at present, to carry out the arrangement proposed by his mother. The Bank of Ceylon have a claim of about 1,500*l.* against him, a settlement of which is only delayed until his return to Ceylon, and he entered into an engagement with them not to mortgage the crops; and unless we make him a bankrupt at once, they may lay claim to their share of this year's produce."

It appears that the Oriental Bank, in the first instance, intended to leave the final settlement of the transaction to Duff, but they seem afterwards to have changed that intention; for early in November 1848, they came to an arrangement with David Baird Lindsay, who had then arrived in this country, which was embodied in a deed dated the 4th November, 1848, and purporting to be made between David Baird Lindsay, described as one of the executors and devisees in trust of Martin Lindsay, of the one part, and G. S. Duff of the other part. By this deed, which was executed in this country by David Baird Lindsay and by the Secretary of the Bank here, and was intended to have been executed by Duff and by David Baird Lindsay by power of attorney in Ceylon, after reciting amongst other things, that there was then due from David Baird Lindsay, as such executor as aforesaid, to the Bank the sum of 7,000*l.* or thereabouts, exclusive of interest, and that the Bank were also holders of bills to the amount of 2,000*l.* or thereabouts, drawn by David Baird Lindsay on Shaw and Caffary, which were unpaid, but as collateral security for payment of which the Bank held bills of lading and shipping documents of coffee; it was agreed, in substance

as follows: that David Baird Lindsay, as such executor as aforesaid, should forthwith assign to Duff all crops of coffee then grown and being on Rajawelle, or which should be grown or produced thereon for the space of two years next ensuing, and should deliver over all such crops to Duff; and that in case David Baird Lindsay should omit to do so, Duff should have power to gather the crops, and to consign the same to the Bank in London for sale; that David Baird Lindsay should continue to manage the estate subject to the control of the Bank or of Duff; that David Baird Lindsay should not, during the said term of two years, mortgage the estate or the crops without Duff's consent; that the Bank would, during the two years, or such part thereof as David Baird Lindsay should fulfil the agreement, advance, for the cultivation of the estate, such sums as should be necessary for the purpose, after applying the net proceeds of the crops of coffee, but so as not to exceed in any year a certain average sum for every hundredweight of coffee delivered to the Bank in that year; that the proceeds to arise from the sale of the coffee should be applied—first, in payment of the expenses of cultivation; secondly, in payment of 40*l.* monthly to the Appellant, Elsy Lindsay; thirdly, in payment of the sums advanced by the Bank for cultivation, with interest; and fourthly, in reduction of the 7,000*l.*, and of so much of the 2,000*l.* as the shipments of coffee appropriated to the payment thereof should be insufficient to satisfy; that at the expiration of the term of two years, the Bank should have power to sell the estate, and that the proceeds of the sale should be applied in payment of the 7,000*l.* and 2,000*l.*, and of all other moneys advanced by the Bank, and as to any surplus upon the trusts of the will of Martin Lindsay, and that nothing therein contained should prejudice the rights of the Bank or of Duff over the estate under their two several bonds and mortgages, or over the title-deeds or any other property secured by the bonds.

This deed, it appears, was forwarded by the Bank to Duff on the 24th November, 1848, with a power of attorney from David Baird Lindsay to a Mr. Moir, authorizing him to execute the deed on his, David Baird Lindsay's, behalf; but the deed was never executed by Duff, nor so far as appears

by Moir, for before it reached Ceylon Duff, notwithstanding the undertaking contained in his letter of the 11th July, 1848, had taken the following proceedings in the island.

On the 30th November, 1848, he commenced the suit No. 8,997, mentioned above, against David Baird Lindsay. By the libel in this suit, after setting forth the bond of the 11th July, 1848, it was alleged that the sums mentioned in the bond to be paid by the defendant had been demanded, and had not been paid, and that there was due and owing to the Plaintiff the sum of 7,838*l.* 13*s.* 3*d.*, with further interest on the sum of 7,805*l.* 7*s.*, part thereof, at the rate of 12 per cent. until payment, and it was prayed that the Defendant might be adjudged to pay the said sum of 7,838*l.* 13*s.* 3*d.*, with further interest as aforesaid, and costs. Immediately upon the libel being filed an admission in full of the Plaintiff's claim was also filed by virtue of the warrant of attorney, and thereupon and on the same day it was decreed that the Plaintiff recover from the Defendant the said sum of 7,837*l.* 13*s.* 3*d.* upon the bond dated the 11th July, 1848, with interest on 7,805*l.* 7*s.*, at 12 per cent. from the 28th of November, 1848, till payment, and costs of suit; and it was ordered that execution issue against the property of the Defendant for the principal and interest. A writ of execution was, thereupon, immediately issued to the Fiscal of the province, whereby he was directed to levy and make of the houses, lands, goods, debts and credits of David Baird Lindsay, by seizure, and, if necessary, by sale thereof, the sum of 7,838*l.* 13*s.* 3*d.*, and under this writ the sheriff caused the Rajawelle estate to be seized and taken.

Notwithstanding the transmission to Duff of the deed of the 4th November, 1848, the execution was not withdrawn; the Bank alleging that in the negotiations which they had had with David Baird Lindsay he had misled them as to the power which Duff held over the estate and its produce. This was the state of matters when David Baird Lindsay again returned to Ceylon about the month of December 1848. He took no steps to impeach the proceedings which had been taken by Duff, and, on the contrary, in a letter which he wrote on the 29th January, 1849, to Ingleton, who

had been in the management of the estate during his absence, and at the time when the property was seized under the execution, he expressed himself thus: "The steps which you took with the Bank were perfectly correct. It was no use attempting to resist."

Under these circumstances the estate was put up to sale by the Fiscal on the 5th March, 1849, and was purchased by Duff, on behalf of the Bank, for 2,500*l.*, and Duff thereupon entered into possession of the estate. By an order of the District Court, dated the 11th July, 1849, this sum of 2,500*l.* was ordered to be set off against the debt due to the Bank, and by a deed, dated the 6th September, 1849, reciting that, by virtue of the writ of execution, the Fiscal had caused to be seized and taken the property thereafter described, and, further, reciting the sale and the order for crediting Duff with the purchase-money against the debt, and that thereby Duff had become entitled to all the rights, title, and interest, of David Baird Lindsay in the said property, the Fiscal conveyed the estate to Duff in fee.

The 40*l.* per month, by the deed of the 4th November, 1848, agreed to be paid to Mrs. Lindsay, was paid to her by the Bank down to the month of April 1849; but in April 1849 the Bank discontinued the payment upon the same allegation that they had been misled by David Baird Lindsay in their negotiations with him. They afterwards agreed, however, to pay Mrs. Lindsay 25*l.* per month, irrespective of the arrangement made by the deed of November 1848, and without prejudice, and they continued to make this payment to Mrs. Lindsay down to the month of April 1850, and, perhaps, longer; but the exact time when this payment was discontinued does not appear.

In the month of May 1852 the Bank sold the estate to Colonel Brown, George Smyttan, and James Ingleton, for the sum of 10,000*l.*, and by a deed poll, dated the 4th of May, 1852, George Smyttan Duff, in consideration of 5,000*l.* paid by Colonel Brown, 2,500*l.* paid by George Smyttan, and 2,500*l.* paid by James Ingleton, conveyed the estate to those parties in fee, that is to say, as to two fourth-parts to Colonel Brown, one fourth-part

to George Smyttan, and one fourth-part to James Ingleton. James Ingleton had been, as has been stated, the manager of the estate; Colonel Brown was the father-in-law of the Respondent George Smyttan Duff, and it appears that this Respondent advanced to Colonel Brown part of the moneys which were required by him to enable him to complete the purchase on his part. The Respondent, however, denies that he was interested in the purchase. It does not appear that there is anything to cast suspicion upon George Smyttan in reference to his connection with the purchase.

The libel in the suit out of which this appeal arises, was filed on the 21st of May, 1853, and answers having been put in, a great deal of evidence, both documentary and parol, has been entered into on both sides. Their Lordships, however, in the view which they have taken of the case, do not think it necessary to go at length into the evidence. It is sufficient to state that in their opinion it establishes the facts as above detailed, that it leaves no doubt in their Lordships' minds that the mesne profits have been fairly and justly estimated, and that the case attempted to be proved on the part of the Defendants, that Duff's proceedings in Ceylon were occasioned by the cultivation of the estate not having been properly kept up, is by no means established to their Lordships' satisfaction. Their Lordships have entered thus at length into the details of this case, considering that although there are many points arising upon the facts which it is not necessary, and would not, indeed, be right for them now to decide, it is upon the whole case and not upon any detached portion of it that part of their judgment depends.

A formal objection to the suit was raised on the part of the Respondents which it may be convenient first to dispose of. It was objected on their part that George Smyttan and the Oriental Bank ought to have been made parties to the suit; but this is an objection of form and not of substance, and is one, therefore, to which their Lordships would be most unwilling to accede. They do not find that the objection was pointedly, if at all, insisted upon by the answers. nor do they find that either Smyttan or the Oriental Bank was within the immediate jurisdiction of the Court, and they readily adopt the

view which seems to have been taken by the Supreme Court on this point, that the objection was not one to which weight ought to be given, unless the justice of the case required it. It does not appear to their Lordships that this was the case. They see no grounds on which it could be necessary to add these parties to the record, unless there was a right of contribution or of resort over against them; and if the Respondents, the Defendants to the suit, were wrong-doers as to the Plaintiffs (the Appellants), each liable *in solido* to them, their Lordships are by no means prepared to say that they were entitled to set up any such right to the prejudice of the Plaintiffs' claims against them, even assuming the case to be wholly in equity. At all events their Lordships are satisfied that any possible injustice will be obviated by the course which they are about to recommend for Her Majesty's approval, and they have no hesitation, therefore, in overruling this objection, and proceeding to dispose of the case upon the merits.

On considering the case upon the merits, the questions which arise appear to their Lordships to resolve themselves into two distinct classes; the one relating to the claim of the Appellants to recover the estate, and the other to the claims of the Respondents against the estate. The burthen is, of course, upon the Appellants as to the one class, and upon the Respondents as to the other. As to the first class of questions, the title of the Respondents to this estate rests upon the purchase made by them from the Oriental Bank, who became the purchasers of the estate at a sale made under an execution upon a judgment obtained, in effect, by the Bank against David Baird Lindsay. The first point to be considered therefore seems to be, whether the estate was properly taken in execution and sold under the judgment. We were not referred, in the course of the argument, to any peculiar law prevailing in the province of Kandy which could affect this question, or indeed any other of the questions which arise in the case, nor have we been able to find that any such peculiar law exists. The case, indeed, was argued before us on both sides as depending upon the English law, and was so treated in the Courts of Ceylon, and it is sufficiently evident from the pro-

ceedings in the cause that they were not taken under the Roman Dutch law which prevails generally in Ceylon. We consider therefore that the question must be determined according to the principles of the English law. It is to be considered then whether, according to that law, this estate was properly seized and sold under the judgment. Now, the action on which this judgment was founded, was brought upon the bond of the 11th July, 1848, by which David Baird Lindsay was bound for the payment of the sum of 7,000*l*. It was upon the obligation created by that bond the action proceeded. David Baird Lindsay is described in the bond as the sole executor in Ceylon of the testator, Martin Lindsay; but although he is thus described in the bond, the condition of the bond is for the payment by him, his heirs, executors, and administrators; and their Lordships do not think that the description in the bond can in any way alter the liability upon it, or convert the debt which was by law his personal debt, into a debt due from the estate of the testator. David Baird Lindsay could not, as their Lordships think, have pleaded to the action that the debt was not due from him personally, but from him in his character of executor only. Again, the warrant of attorney on which this judgment was entered up is from David Baird Lindsay personally, and does not even purport to be given by him in his character of executor; but what seems to be even more decisive on this part of the case is, that the judgment is that the Plaintiff do recover from the Defendant; that the order for the execution is for execution against the property of the Defendant, and that the writ of execution is to levy of the houses, lands, goods, debts, and credits of David Baird Lindsay. It is to be seen, then, whether this estate was the property of David Baird Lindsay. Their Lordships are of opinion that it was not. It is not disputed that the estate was well devised by the will of Martin Lindsay. It was thereby devised not to David Baird Lindsay alone, but to him and the other trustees. It is clear that all the trustees, except Henry Lindsay, accepted the trust, and the estate therefore vested in them all. It was argued, on the part of the Respondents, that David Baird Lindsay having been the sole executor in Ceylon, had full power

over the estate, and several passages were cited from the Dutch Executors' Guide in support of that position; but these passages, as their Lordships understand them, relate to the powers of a Dutch executor over property governed by the Dutch law. They have no bearing upon the question of the power of one of several executors and trustees over property, the disposal of which is made under, and governed by, the English law. It was attempted, too, on the part of the Respondents, to give effect to this judgment, and to the proceedings under it, against this estate, by reference to the power given by the order of the Ceylon Court to David Baird Lindsay to mortgage the estate to the amount of 12,000*l.*; but without reference to the question whether this power was well created—and their Lordships are by no means satisfied that it was, having regard particularly to there having been no proof of the allegation on which the order proceeded that David Baird Lindsay had full authority from the other executors to make the mortgage—their Lordships do not consider that David Baird Lindsay's power to mortgage the estate can be called in aid of this judgment and the proceedings upon it. The bond and mortgage, although comprised in the same instrument, are different securities, leading to different results, and capable of being enforced by different modes of proceeding; and the power to create the one cannot, in their Lordships' judgment, have any influence upon the question as to the validity or invalidity of the proceedings under the other. There are other considerations which may affect the validity of this judgment and of the proceedings under it—the amount of the debt for which it was entered up; the times at which the several parts of the debt were payable; and the circumstances under which the judgment was obtained and the execution issued: but these considerations, although they might affect the case as between the Appellants and the Bank, might not, perhaps, be available to the Appellants as against the Respondents; and their Lordships, therefore, must not be understood to rely upon them. They rest their judgment upon the question as to the validity of the seizure and sale of the estate upon the fact that the estate was not the property of the judgment debtor, and that so far as he had any interest in it

which was liable to be taken under the judgment, that interest was vested in him as a trustee only.

It was argued, however, on the part of the Respondents, that whatever might be the rights of the Appellants against the Bank, they had no such rights against the Respondents. That the Respondents were purchasers for value without notice, but it is clear that the Respondents are affected with notice. Their very purchase-deed refers to the conveyance by the Fiscal to the Bank. That conveyance refers to the judgment; the judgment refers to the bond and to the order of Court; and both the bond and the order of Court refer to the will by which the estate was devised to the trustees. It cannot be doubted, therefore, that the Respondents must be taken to have had notice of the will, and of the devise to the trustees which it contains: but independently of the notice which is thus traced to the Respondents, their title rests wholly on the judgment; and as purchasers from those who purchased under that judgment, they were surely bound to see that the proper parties were before the Court to be bound by the judgment which was the root of their title. Moreover, if the Fiscal had not, as their Lordships think he had not, any authority to seize or sell the estate, it is difficult to see how his conveyance could pass any title to the Bank, or through them, to the Respondents.

The Respondents, therefore, as it seems to their Lordships, have failed to establish any title to the estate against the Appellants by the direct operation of the conveyance under which they claim; and it follows, therefore, as their Lordships think, that the possession must be restored unless the Respondents are entitled to maintain their title upon some other ground. It has been argued on their behalf that they are so entitled; that the Courts in Ceylon having both a legal and equitable jurisdiction, and the case presenting mixed questions of law and equity, the Appellants can have no relief, without, as it is said, doing equity by giving effect to the equitable claims of the Respondents; but the possession of the Respondents was illegally taken, and is illegally held, and their Lordships do not think that persons holding an illegal possession are entitled to use that possession for the purpose of com-

elling submission to their equitable claims by those to whom the possession legally belongs. They think that, under such circumstances, the wrong-doers must restore the possession, and themselves initiate such proceedings as they may be advised to take for the assertion of their equitable claims.

They are of opinion, therefore, that the decree of the Supreme Court must be reversed, at all events to this extent:—that the possession of the estate must be restored to the Appellants. But it is one thing to refuse to allow an illegal possession to be continued for the purpose of giving effect to equitable claims; another to compel the restitution of moneys which have been received by virtue of the legal possession, but are claimed to be held under an asserted equitable title; and their Lordships are not prepared to go so far as the District Court has gone, in decreeing payment to the Appellants of the mesne profits of the estate. They think that there are some views of this case in which the Respondents may be able to establish a title to those profits, and they are of opinion that the means of effectually asserting that title ought to be secured to them. For this purpose they think that those profits, instead of being paid to the Appellants, as directed by the District Court, ought to be paid into Court, and impounded until the Respondents shall have had the opportunity of asserting their claims. Whether they will assert their claims or not, and upon what particular grounds they will rest their claims if they think proper to assert them, it is for them and not for their Lordships to determine. Their Lordships desire only to be understood as giving no opinion as to the validity or invalidity of those claims. They do not think it would be right for them to enter at all into this part of the case. The case has been so complicated by the course which has been pursued, that it would be difficult, if not impossible, to unravel it in this suit, and their Lordships are not satisfied that they have before them all the parties who may be interested in the questions of equitable right.

It remains, then, only to consider the question of costs: and as to this point their Lordships are of opinion that no costs ought to have been given

against the Plaintiffs the Appellants in the Supreme Court, and that the costs of this appeal ought to be borne by the Respondents, except the Oriental Bank Company, as to whom their Lordships agree with the Courts in Ceylon that there was no foundation for the suit.

Their Lordships will, accordingly, humbly recommend Her Majesty to reverse the decree complained of, to restore the decree of the District Court, so far as it relates to the Defendants being ejected, and the Plaintiffs restored to the possession; to vary the decree of the District Court, so far as it directs the mesne profits to be paid to the Appellants, and order those mesne profits to be paid into Court; to direct an account of subsequent rents received by the Respondents, and order the amount found due to be also paid into Court. The moneys to be paid into Court not to be paid out without notice to the Respondents until the expiration of six months from this time, with liberty to the Respondents in the meantime to take such proceedings as they may be advised for asserting their claims to the said moneys, or any parts or part thereof, or to the said estate, otherwise than under or by virtue of the judgment, or any proceedings thereon. The order to be without prejudice to such claims.

Liberty to all parties to apply to the Court.

The Respondents Duff and Ingleton to pay the Appellants' costs of the appeal.

*Analysis of the Evidence in the Appeal of
Elsy Lindsay and James Farquhar Hadden,
Executrix and Executor of the late Martin
Lindsay, &c., v. the Oriental Bank Corpora-
tion, George Smyttan Duff, James Ingleton
and others, from the Supreme Court of
Ceylon.*

(Drawn by the Lord Justice Turner.)

21st August, 1847.—Hudson, Chandler, and Co. draw on David Baird Lindsay at Aberdeen, two bills, 420*l.* each. The bills pass through Oriental Bank (p. 89).

18th December, 1847.—Shaw and Caffary write David Baird Lindsay that they will honour his draft for 4,000*l.*, on his return to Ceylon (p. 71).

January 1848.—The Scotch executors guarantee to the Oriental Bank the due payment of Shaw and Caffary's bills for 4,000*l.*; and the Bank writes its manager at Colombo to negotiate to that amount (p. 72).

February 1848.—15th, Deed of arrangement between the trustees and Shaw and Caffary executed, and David Baird Lindsay draws on Shaw and Caffary for 4,000*l.* (pp. 16, 71, 65, 89); and David Baird Lindsay also, on 16th February, draws cheques on the Bank of Colombo, in favour of Stewart, for 4,555*l.* 4*s.* (p. 92), and 89*l.* 7*s.* 6*d.* February 19th, manager at Colombo writes Shaw and Caffary deed of arrangement registered (p. 89); and on 28th February, David Baird Lindsay obtains order of District Court of Kandy, empowering him to mortgage for 12,000*l.* (pp. 87, 88).

March 1848.—13th, David Baird Lindsay mortgages to Duff for securing due payment of bills, to amount of 2,000*l.*, subject to mortgage to be made

in favour of Shaw and Caffary for 6,000*l.* (p. 87); and on 28th March, David Baird Lindsay draws on Shaw and Caffary for 250*l.* (p. 90).

April 1848.—14th and 20th, David Baird Lindsay draws on Shaw and Caffary for 257*l.* 10*s.* and 450*l.* (p. 90).

May 1848.—15th, David Baird Lindsay again draws on Shaw and Caffary for 700*l.* (p. 91). Shaw and Caffary stop payment in this month.

June 1848.—7th and 16th, Farquhar, on part of Mrs. Lindsay, communicates to Gordon her negotiation with Gladstone and Co., and amount of shipments of coffee to Shaw and Caffary by David Baird Lindsay (p. 73). 17th June, David Baird Lindsay draws on Mrs. Lindsay for 350*l.* (p. 91). 21st June, Mrs. Lindsay writes to Gordon requesting Bank to hold over for three years, stating they will have first mortgage, estate in fine condition, 5,000 cwt. per annum. The Bank to have bills of lading; her son manager, drawing 30*s.* per cwt.; she herself to receive 40*l.* per month (p. 65). 23rd June, the Bank writes Mrs. Lindsay that they will advance to keep up estate, and give the 40*l.* per month on having the bills of lading for all the coffee placed in their hands, provided they have first mortgage, the estate yields 5,000 cwt., and local manager approves (p. 73).

July 1848.—11th July, David Baird Lindsay mortgages to Duff for 7,000*l.* (p. 10), and Duff writes to David Baird Lindsay that provided cultivation be kept up, he shall not be proceeded against on the bills until 1st January, 1849 (p. 88). David Baird Lindsay draws on Mrs. Lindsay for 230*l.* and 270*l.* (p. 91).

August 1848.—15th, Duff writes Bank his arrangements with David Baird Lindsay giving first mortgage to full extent not covered; recommends instead of Bank guaranteeing up-keep and 40*l.* to Mrs. Lindsay, a reduction out of proceeds of sales of coffee, leaving David Baird Lindsay to keep up estate, provided additional security given to the Bank. David Baird Lindsay not in position to carry out arrangement proposed by his mother. His debt to the Bank of Ceylon; engagement with them not to mortgage crops; unless they make him bankrupt at once, the Ceylon Bank may lay claim to share of this year's produce. The crop of this

season short of Mrs. Lindsay's estimate 1,000 to 1,500 cwt. (p. 74).

October 1848.—7th, the Bank write manager they will leave final settlement to him. They learn crop 4,000 cwt. would net to Bank 3,000*l.*, reduce debt to 8,000*l.*; suggest sale after securing this crop, the proceeds in reduction of 8,000*l.* to be further reduced to extent of 4,000*l.* by Hadden, Anster, Lancaster, and Smith's bond when it expires (p. 74).

November 1848.—4th, deed of arrangement between David Baird Lindsay and Duff (p. 66). Bank give cheque in favour of David Baird Lindsay for 150*l.* (p. 79). 7th, Bank write manager they have learnt inability to secure present crop without David Baird Lindsay's sanction, and that mortgage does not give power of sale, except in compliance with regulations of Ceylon Courts. They have accordingly completed arrangements with David Baird Lindsay, giving them power over both crops and estate, Bank paying up-keep, Mrs. Lindsay's 40*l.* per month, and David Baird's passage out. The bond for two years. Then there may be sale or new arrangement. Finding mortgage now held did not give complete power over property, the arrangement appeared the most judicious (p. 74). 10th November, David Baird Lindsay writes Bank, giving directions as to payment 40*l.* per month (p. 78). 13th November, the Bank make payment accordingly (p. 78). 14th November, Mrs. Lindsay forwards to the Bank a letter received by her, announcing shipment of coffee, and directing insurance; all such matters being to be settled by them under the arrangement with David Baird Lindsay (p. 75). 19th November, David Baird Lindsay forwards to Bank Mrs. Lindsay's acceptance for 200*l.*, amount of 40*l.* a-month from 1st July (p. 78). 24th November, the Bank writes its manager, forwarding mortgage of 4th November, with power of attorney to Moir to execute for David Baird Lindsay, giving absolute control over estate and crops for two years. The advance to work estate not to exceed 25*s.* per cwt. David Baird Lindsay wrote by last mail to make over crop to Bank (p. 75).

December 1848.—6th, 8th, and 13th, the Bank make a monthly payment of 40*l.* (p. 79). 21st,

Mrs. Lindsay's letter, inclosing account of shipment of coffee, as on 14th November.

January 1849.—15th, Mrs. Lindsay gives receipt for two months at 40*l.* (p. 79). 24th, Bank write manager David Baird Lindsay seems to have misled them as to his power over estate and crops. That led to the new deed, giving complete control over both for two years. Hoped the two deeds do not clash. If they do he may act on most beneficial (p. 75). 29th, David Baird Lindsay writes Ingleton the steps he took with the Bank correct. No use attempting to resist (p. 88).

February 1849.—25th, David Baird Lindsay's account with Shaw and Caffary, showing 2,816*l.* 10*s.* due to them (p. 72). 27th February, Bank pay Mrs. Lindsay 40*l.* (p. 79). Receipt, 1st March, ditto.

March 1849.—Sale by Sheriff (p. 18).

April 1849.—5th, the Bank write Mrs. Lindsay that by mail arrived on 2nd, they are informed that when David Baird Lindsay negotiated with them, their manager had full power over estate and produce, of which David Baird Lindsay did not apprise them. That consequently the contemplated arrangement fell to the ground, and they return her receipt for 40*l.* (p. 76). 7th, the Bank write their manager that being now advised that he held David Baird Lindsay's power to confess judgment, the suppression of that fact would nonsuit David Baird Lindsay in an action to force agreement, and they have therefore discontinued payment to Mrs. Lindsay (p. 76). 25th, Mrs. Lindsay appeals to Bank to continue her allowance, without prejudice (p. 76). 30th April, 2nd May, the Bank move in the suit against David Baird Lindsay, that they may have credit for their purchase money, and Court orders it (p. 19).

May 1849.—4th, David Baird Lindsay writes Ingleton: glad to find he continues at Rajawelle (p. 88). 14th, the Bank write Mrs. Lindsay they have authorized payment to her of 25*l.* per month, irrespective of previously contemplated arrangements with David Baird Lindsay (p. 77). 21st May, Mrs. Lindsay draws 50*l.* from the Bank (p. 80).

September 1849.—6th, the Sheriff conveys to the Bank (p. 18).

December 1849.—14th, Mrs. Lindsay writes Bank to furnish particulars of Rajawelle to Colesworth and Co.

March 1850.—19th, Mrs. Lindsay applies to Bank to continue her allowance of 25*l.* per month (p. 77); and on 21st Bank continue it till further notice (p. 78).

April 1850.—6th, Frith and Co. write Mrs. Lindsay for an appointment, in consequence of application from David Baird Lindsay to assist him in recovering Rajawelle (p. 80).

May 1852.—The Bank convey to Brown and others (p. 23).

1853, May 21.—Libel (p. 1).

October 28.—Answer of Bank, Duff and Ingleton (p. 12).

1854, June 15.—Plaintiffs' replication to this answer (p. 19).

July 7.—Amended answer of above Defendants (p. 20).

August 17.—Plaintiffs' replication to amended answer (p. 25).

September 15.—David Baird Lindsay's answer (p. 26).

October 13.—Plaintiffs' replication to this answer (p. 30).

November 9 to 24.—Witnesses examined under a Commission in England (p. 32).

November 29, December 4.—Letter from Defendants' solicitors that they do not mean to examine Mrs. Lindsay or Hadden (pp. 80, 81).

1855, 14th February.—Answer of Ingleton, denying he is executor of Brown (p. 31).

15th February.—Plaintiffs' replication to this answer (p. 31).

14th February.—Answer of Duff as executor of Brown (p. 32).

15th February.—Plaintiffs' replication thereto (p. 32).

10th February to 12th April.—Examination of witnesses in District Court of Kandy (pp. 81 to 86).

16th April.—Judgment of District Court (p. 93).
