

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Moung Shoay Att v. Ko Byaw, from
Rangoon; delivered 14th February 1876.*

Present :

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THIS is an Appeal from a decree of the Special Court of British Burma, reversing a decree of the Judge of Moulmein, which had dismissed the Plaintiff's suit, and giving instead of that decree a judgment for the Plaintiff for the sum of Rs. 8,480, with interest.

The Plaintiff and Defendant are merchants in the timber trade, residing at Moulmein, in British Burma, and it is their practice to go up into the Siamese territory, and under permission from the Government to cut timber there, and bring it down, in a manner which has been described by Mr. Coryton, to Moulmein. The Plaintiff, at the time when the transactions which gave occasion to these proceedings took place, did not go into the Siamese territory himself, but employed an agent called Douk to purchase timber for him, and entrusted him with a considerable sum of money, and with elephants used in drawing the timber which has been cut. It seems that Douk, on the 20th September 1870, entered into an agreement with a man called Pho to purchase some timber, 200 logs, if Pho could obtain a permit. It will be necessary, hereafter, to consider that agreement more in detail; it is sufficient now to

state the fact that such an agreement was made, and the general purport of it. A few months afterwards, on the 3rd of January in the following year, 1871, the Defendant, who was personally on the spot, also entered into an agreement with the same man, Pho, to cut timber for him, under a permit which the Defendant had obtained from the Siamese authorities. The Defendant entered into agreements with two other foresters of a similar kind. Timber was cut by Pho and by the two other foresters, and on the 6th May, Douk, the Plaintiff's agent, went to the two creeks which seem to be called Whaypoogan and Whaykoonpai, where the timber was stacked, and put his mark upon 152 logs. It appears upon the evidence, that at that time there were no marks upon the timber, except those of the foresters who had cut it. It seems that Pho had cut 81 of these logs, and the two other men had cut 71 logs. The Defendant hearing of this proceeding, complained to a Siamese officer, styled binyakin, who was said to be a judge of the district, of what Douk had done, and the judge sent a peon with the Defendant to arrest Douk, and to bring him before him. It seems that after searching for Douk for two or three days, he was found, and taken into custody, considerable violence being used. How far some violence was necessary to secure him, or what degree of force might reasonably have been employed for that purpose, does not appear, but certainly it would seem that a great deal of violence was used; that he was beaten, tied with a rope, and in this state carried into the presence of the binyakin. When there the binyakin put Douk into irons, with an iron collar round his neck, and it is said that threats of personal violence were used towards him, unchecked by the binyakin.

held to avoid a contract, except in certain cases where the imprisonment is lawful. But this exception would not be held to apply to a case where a man is in custody upon a criminal charge like the present, and has made an agreement to give a benefit to another to release him from that charge; in fact such a contract in this country would be held to be void on other grounds. Upon the face of it, this contract shows that the man was charged with a criminal offence. "Treephaw"—that is Douk—" requests not to raise contention against me " with regard to having stolen, impressed, and " struck with hammer mark the 152 logs of " teak timber which has been cut, worked, and " kept at the place allotted by Moungh Shoay " Att in the forest, for which Moungh Shoay " Att obtained the Imperial order and written " permit." It was to get rid of that charge of having stolen these logs, when he was in custody under the circumstances which have been referred to, that this agreement was made. Their Lordships therefore think that the Plaintiff may repudiate it, as having been made by his agent when under duress.

It is to be observed that the treaty between the British Government and the Siamese Government contains this clause: " With " reference to the punishment of offences " or the settlement of disputes, it is agreed " that all criminal cases in which both parties " are British subjects, or in which the " Defendant is a British subject, shall be tried " and determined by the British Consul." It seems, therefore, that the binyakin had no jurisdiction to try the offence, and the proceedings bear the character of an attempt, by bringing Douk before this Judge, to extort an agreement from him.

Their Lordships for these reasons think that

this agreement does not in any way bind the Plaintiff; and inasmuch as Rs. 3,000 of his money was paid, and his elephants were delivered under it, that he is entitled to bring this suit.

A question was raised whether the agreement had not been confirmed and ratified by the subsequent acts of the Plaintiff, or Douk as his agent. No doubt, if there had been a clear ratification, it being in the power of the Plaintiff to ratify or reject it, if there were circumstances from which a ratification might properly be presumed, he would be bound by it, but their Lordships do not find any evidence of such a ratification. The delivery of the elephants was in effect made before the constraint or the apprehension of constraint had disappeared; for simultaneously with entering into this agreement, it appears that Douk gave an order to the man who had the custody of the elephants, to give them up to the Defendant, and although the actual delivery did not take place immediately, it was made in consequence of that order, and Douk says he was in such a state of apprehension that he could do nothing afterwards, and, as soon as he recovered from his beating, went down to Moulmein. The other point is that the timber was accepted by the Plaintiff. But their Lordships think that it was not accepted under such circumstances as constitute a ratification, because, all the way through, Douk was protesting against this agreement, and so was the Plaintiff, claiming the timber as his own property.

Another ground suggested by the Special Court on which this agreement could not be sustained as against the Plaintiff, seems to their Lordships to be well founded. Douk being in custody upon a criminal charge had clearly no authority to part with his employer's

property, or to make an agreement to part with it, to relieve himself from such a charge. If there had been any question of a civil nature, it might have been within the scope of his authority, as a general agent, to compromise such a claim, but when charged with personal misconduct and a crime, which it cannot be assumed that his principal had authorised, no authority from the employer can be implied that his money and his elephants should be handed over to the man making the charge, in order to relieve his agent from it. It is sufficient, however, to decide that the agreement is avoided on the ground of duress, for, as the Lower Appellate Court observes, this last ground for impeaching the agreement was not made in the pleadings.

Their Lordships having come to this conclusion upon the agreement, it follows that the decree in favour of the Plaintiff must stand.

Then the question arises whether a deduction should not be made from the amount of the decree for the value of the timber, which their Lordships are satisfied the Plaintiff got into his possession. Undoubtedly if the timber belonged to the Plaintiff, and the claim made by the Defendant upon it was an invalid one, no deduction ought to be made from the damages, although possession of it may have been obtained in consequence of this agreement.

This raises the question to whom the timber belonged at the time when this agreement was made upon the 10th May. Although the question is not an easy one to decide upon the materials before their Lordships, they do not see that any further or better evidence could be obtained upon another inquiry. It is evident from the whole course of the proceedings in the case that a material point was made throughout them as to the property in the timber; and upon

the best judgment their Lordships can form on the evidence, they have come to the conclusion that this timber really belonged to the Defendant. Fortunately the case does not depend wholly on oral testimony, and the documents which are found in the case are tolerably clear, the only doubt being upon the precise nature of these permits. There is still some doubt about the nature of the permits, but as far as the case can be understood from these agreements, it is tolerably clear that, as between the Plaintiff and the Defendant, the Defendant is entitled to this timber. The evidence with regard to it is found in the agreements made by the Plaintiff's agent with Pho, and by the Defendant with Pho and two other persons. The agreement made by the Plaintiff's agent Douk with Pho, is to the effect that Pho had stated "that there was timber which had been killed by order of Shoay Nan Shin of Zimmay"—the chief or some official under him of Zimmay,—“in several creeks,” mentioning them, two being those which have already been named. The agreement goes on, “And as I have no elephant, pony, and money for expenses for the purpose of cutting and working the said timber, by applying for and obtaining the imperial order for the same, therefore hire, lend, and accommodate me now with Rupees 600, and one female elephant valued at Rs. 730, and that at the time of arrival of the 15th day of increase of Wahtsoe in the year 1233 (corresponding to the English 1st of July 1871), 200 logs of timber will be put down and delivered to the waters reach of Mhineyoongyee.” That is an agreement for the cutting of the timber “by applying for and obtaining an Imperial order.” The whole agreement appears to be made conditionally on that order being obtained. After providing that

Pho shall pay double the value of that which has been deposited with him if he does not deliver timber, the agreement concludes thus:—"There-
 " after, if the permit for the forest could not be
 " obtained, and thereby unable to work and
 " handle, then Rs. 600 and female elephant,
 " valued Rs. 730, must be returned by Nway
 " Pho to Moug Treephaw," that is Douk. It appears therefore that the permit was considered, as between the two contracting parties, to be essential to the title, and the agreement was made conditionally upon its being obtained. When we come to the agreement which the Defendant made with Pho, it will appear that a permit had been obtained by the Defendant before he entered into it. "Pho states and requests to be
 " permitted to cut, work, drag and put down the
 " killed and standing trees of three cubits and two
 " mike, the lowest up to four cubits, five cubits,
 " and six cubits (in girths of 20 cubits, the
 " lowest up to 25 cubits, and 30 cubits in lengths,
 " which are (in) Whaypoogan Creek, and Whay-
 " koonpai Creek in the said two creeks within
 " the forests, for which Thetgoung Moug Shoay
 " Att obtained the imperial order and written
 " permit"—for a hire of 15 Rs. per log. The agreements of the two other foresters are to the same effect. Under them it seems that 152 logs at least had been cut, which Douk marked with the Plaintiff's mark. Now as a question of title, it would certainly seem that the Defendant had the permission of the proper officer of the Government to cut timber. There is some doubt as to whether the permit gave an exclusive right to cut timber in the particular forest, or whether it only gave a right concurrently with any other persons who might obtain similar permits; but it seems to be plain from the wording of these agreements that all parties considered that a permit of one kind or the other was

necessary to give a title to the timber. The Defendant had got one, the Plaintiff had none, but employed Pho in the expectation that Pho would get it, making the agreement terminable, and stipulating that the money advanced should be returned if it was not obtained. It has already been stated how these logs were cut, and there is evidence in the case, which the Judge below believed, that they were cut for the Defendant.

Then as regards the conduct of the Plaintiff, there can be no doubt that he brought an action against Pho in the Siamese Court, and apparently to recover double the amount of the money he had deposited with him, on the ground that he had not delivered any logs. This claim assumes that Pho had not performed any part of his contract, and therefore that the 152 logs did not belong to the Plaintiff. The judgment is differently translated, if it be the same judgment, in this Record, and one translation is not very intelligible; but supposing, as appears from one translation, that the Judge decided that Pho was to be allowed for 152 logs, the Defendant was no party to that suit, and cannot in any way be bound by it. The conduct of the Plaintiff in bringing such a suit remains as an admission at that time on his part that none of the logs had been delivered by Pho under his contract.

Then there is a statement in Douk's petition of a subsequent date, which is found at page 18 of the Record, to the effect that these 152 logs did belong to Shoay Att. He says in that part of his petition, "In regard to the
" 152 logs of teak timber, as they belong to
" Moungh Shoay Att, and the price was fixed at
" Rs. 45, I shall have to pay by one way; that
" I deposited with Byahngyah Khin Rs. 3,000,
" which money Byahngyah Kin took and gave
" away to Moungh Shoay Att; besides that, four
" elephants valued Rs. 6,000, which Byahngyah

“ Kin confiscated, took and gave to Mounng Shoay
“ Att.” Douk here states that the 152 logs belonged to the Defendant, and that he had been forced to pay these sums to get them by way of purchase from him. Upon a point of this kind, their Lordships think also that reliance ought to be placed on the finding of the Judge at Moulmein, who heard the evidence and was well able to appreciate it, that the property was in the Defendants. The Appeal Court of British Burma do not express any opinion to the contrary. All they say is that they think Douk might have acted *bond fide*, and might have had some grounds for supposing that the timber belonged to him, and so relieve him from any criminal intention to appropriate the timber.

On the whole, therefore, their Lordships think it is established that the property in this timber belonged to the Defendant (so far as it could belong, under the circumstances which have been described in a very interesting way by Mr. Coryton, to anybody), and that he would have had the benefit of that timber and taken it down to Moulmein, but for the act of Douk. Whether the timber ever got down to Moulmein or not, or whether all of it got down, is uncertain; but however that may be, their Lordships have no doubt that under the agreement which has been held to be void, the Plaintiff had, or might have had, possession of it at the creeks, and therefore there must be a deduction from the damages to the extent of the value of the timber there. It seems to be admitted that Douk marked the best logs he could find, and according to his own statement, the value at the time he marked them was from Rs. 18 to Rs. 20 per log.

Their Lordships are therefore of opinion that the total amount decreed and payable to the

Plaintiff under the decree appealed from should be reduced by the sum of Rs. 3,040, being the value of the 152 logs of timber at Rs. 20 per log. The amount so reduced will be payable to the Plaintiff with interest thereon at five per cent. from the date of the said decree to the date of realization.

Their Lordships will humbly advise Her Majesty that the decree be varied by making the reduction in these terms, and that in other respects it be affirmed. The decree being thus varied, their Lordships think there should be no costs of this Appeal.