Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Moung Tha Hnyin v. *Mah Thein Myah and Another, from the Special Court of Lower Burmah at Rangoon; delivered* 21*st July* 1900.

Present at the Hearing:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD LINDLEY.
SIR RICHARD COUCH.
SIR HENRY DE VILLIERS.

[*Delivered by Lord Hobhouse.*]

The Appellant in this case is the Defendant below. The Respondents are the representatives of the original Plaintiff, who has died in the course of the suit. His death has not in any way varied the matters of dispute between the parties, who may for present purposes be conveniently styled Plaintiff and Defendant throughout.

On the 20th October 1885 the Plaintiff and Defendant who resided at Moulmein made a written agreement to advance Rs. 1,10,000 for obtaining 4,445 logs of teak timber which was therein stated to be lying in the Mhineloongyee forests and to have been hypothecated and delivered by the owner Moung Shoay Hpaw to the Defendant as security for advances made by him. The parties were to advance the amount and to bear further expenses in the proportion of 3 shares to the Plaintiff and 2 to the

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Defendant and the proceeds were to be shared in the same proportion. In the next year the partners advanced Rs. 30,000 more to the mortgagor in the same proportion. In point of fact the timber said to be delivered was in Siamese territory at a great distance from Moulmein, and it had to be dragged to and launched upon the River Salween, down which it must travel some hundreds of miles before reaching Kado where the loose logs could be captured for their consignees.

In August 1886 the mortgagor of the timber died, and the Defendant was declared his administrator in the following October. After that it was found that more money was wanted to recover the timber, and the partners provided Rs. 20,000 in the stated proportions. In March 1887 the Defendant required Rs. 10,000 more to meet expenses, and the Plaintiff declined to pay the two-fifths demanded of him. The Defendant alleged in his written statement that the partnership was then dissolved by mutual consent.

In 1896 the Plaintiff brought this suit to take the accounts and to wind up the partnership. The preliminary question was whether it had been dissolved in March 1887; and a separate issue was framed by the Judge of Moulmein to try that question. The Plaintiff denied that there was any dissolution, or any abandonment by him of his interest in the concern, and said that he did not advance the money demanded because the Defendant would not render any account of his dealings with the last advance. The Defendant said that on the Plaintiff's refusal he considered the partnership to be at an end; that the Plaintiff gave no reason for refusal; that he the Defendant made no further demand, and gave no notice to the Plaintiff that the partnership was dissolved.

Upon this evidence the Judge of Moulmein found that there had been no dissolution by consent; and on 1st June 1896 he passed an order which declared that the partnership was dissolved as from that date, and ordered the Defendant as managing partner to file accounts.

The Defendant raised the same question again after the accounts were taken, both in the first Court and on appeal in the Special Court of Lower Burma. But he raised it in a different shape; not alleging mutual consent, but relying on the laches of the Plaintiff, and his abandonment of the undertaking. There was however no more evidence of express abandonment than of consent, and there was some evidence of the Plaintiff's subsequent intervention in the partnership affairs. So the Defendant had nothing to support his plea except the fact that the Plaintiff had declined to advance money in March 1887, and had left the management of the business to the Defendant, who filled three characters. He was mortgagee prior to the partnership, he was legal representative of the mortgagor, and he was managing partner.

The Special Court held that they could not infer abandonment, and they maintained the judgment of the first Court on what they call this much-laboured and unsubstantial point. It has been laboured again with all the resources of able advocacy at this Bar; but their Lordships have not been induced to doubt the soundness of the view taken by the Courts below. It is not necessary to enter again on an examination of the well-known class of cases exemplified by *Norway* v. *Rowe* 19 Ves. 144. Even assuming in the Defendant's favour that the subject matter of this partnership is as precarious as a mining speculation, it is a matter of inference to be drawn from the facts of each case, whether or no there has been abandonment, or loss of

interest by laches. And there is no case, or at least none cited, in which the Court has held a partner to have lost his position on grounds so slender as those which exist here.

On coming to take the accounts great difficulties were found. Besides the various characters filled by the Defendant another element of confusion appeared. He had dealings in timber peculiar to himself in the same quarter as the partnership dealings, and on a larger scale. His agent in the timber district was his brother Moung Galay who had indubitably expended large sums of money, but on what account it was impossible to say. The Defendant says:—

"I instructed my clerk to make an abstract "of all my payments to Moung Galay, no "matter on what account. I cannot distinguish "the account on which the money was spent "without Moung Galay's accounts. He never "specified in his demands the purpose for which "he wanted the money nor rendered accounts of "his expenditure although I asked for them. I "did not discharge him because he was my "brother and I knew he would not cheat me. "I carried on the partnership as though it were "my own business and kept no separate account "for it." (Rec. p. 101).

Moung Galay is dead and no accounts are produced as coming direct from him. Perhaps if there were any they would not make matters any clearer, for the Defendant tells us again:

"I made payments to Moung Galay for "my own business besides those for the "partnership. Moung Galay never rendered "accounts since Wahzo 1252. The account I "have filed (Abstract 4) was made up from an "account furnished by Moung Galay and "returned to him. In his account the expendi-"ture on each business was not shown separately,

" but Moung Hpo Tsin and he went through " the accounts and ascertained what had been " spent on each business." (Rec. p. 100.)

The Burmese year 1252 may be gathered from the documents to cover parts of the Christian years 1890–91. (*See Exhibit* 9, *Rec. p.* 7.)

The clerk Moung Hpo Tsin was examined, and tells us: " I wrote accounts marked 'copy " 'of Moung Galay's accounts A and B.' Some " of the entries were taken from Moung Galay's " accounts, and some from Defendant's cash " books." Further he relates in cross-examination how Moung Galay brought an account book; how he and the clerk picked out items which the clerk copied into a book; how the account so prepared was taken to Mr. Thompson who was advising the Plaintiff with reference to settlement of the partnership affairs; and how Mr. Thompson rejected the account as confused. " The accounts now produced as copies of Moung " Galay's accounts were written to make matters " clear for the purposes of the dispute between " Plaintiff and Defendant." Further he says that Moung Galay " did some timber business for " Defendant at Maihan. He also looked after " Defendant's business with Pah Taw and Pan " Nyo, and others. About two lakhs were sent up " altogether to Moung Galay. In his demands he " never specified the account for which the money " was required. From 1252 when Moung Galay " went up the second time it is impossible to " distinguish the expenditure on the partnership " business from the expenditure on other " accounts." (Rec. p. 100).

From these statements it results that the accounts now put in are not those kept by the Defendant nor those kept by Moung Galay. They are a hash of some books or papers belonging to Moung Galay and of others belonging to the Defendant, and of verbal statements by

Moung Gelay, put together for submission to Mr. Thompson and rejected by him as confused, and a re-hash of the same with some subsequent items for the purposes of the suit. They are doubtless tendered in good faith, for no attempt is made by the Defendant to conceal their deficiencies or to claim for them more authenticity than they possess.

The accounts were referred to a Commissioner, Mr. Bayly, whose report made in November 1897 shows that he went into the matter with much care. There was little difficulty on the receipt side. On the other side, owing to the lack of accounts, and to the confusion between the Defendant's private business and his executorship business and the partnership business, the Commissioner found himself compelled to disallow nearly all of the claims disputed by the Plaintiff. He expressed an opinion that the Defendant was entitled to some reasonable allowance for the services of his agents and for the expenses of getting the timber and of litigation connected with it, and for interest on money advanced by him; but he thought he had no authority to decide such matters, and so he referred them to the Court. Subject to the Court's decision he found the Plaintiff entitled to Rs. 50,835 1a. 5p. as his two-fifths share of the money received by the Defendant for which he has not accounted.

On receipt of this report the Judge of Moulmein overruled some objections taken by the Defendant, among which were objections founded on the Plaintiff's laches; but as to the Commissioner's recommendations the learned Judge could not discover any more materials for guidance than were in the hands of the Commissioner. He found the Plaintiff entitled to Rs. 50,835 1a. 5p., and then sent the case back to the Commissioner for the purpose of ascer-

taining the value of the assets in items 9 and 10 of "Statement 3. Assets of the partnership"; and also to ascertain from the parties what allowance they agree (as there is no evidence and it is only by mutual agreement any allowance can be made) should be made for the services of the agents employed for the partnership business and for the expenses they (the agents) defrayed in "ounging" out the timber belonging to the estate of the deceased debtor, and in connection with the litigation in which the estate was involved; also the value of a set-off claimed by Plaintiff. (Rec. p. 118.)

This further reference came to nothing because the parties could not agree. In reporting that result to the Court the Commissioner added "It is possible I consider for Defen- "dant to give if he chooses full details of his "own private work that was carried on by the "partnership agents so as to enable me to allow "a proper proportion of remuneration for the "services of the agents in the partnership "business; but he has not done this although "he has had ample opportunity both before me "and the Court to do so, nor has he furnished "such particulars of the ounging work including "the employment of the partnership elephants "as would also enable me to ascertain the cost "of ounging the partnership timber." (Rec. p. 122.)

After some further discussions and evidence, and after making an arrangement about the lawsuit in Siam, the case was brought again before the Judge of Moulmein who delivered a detailed judgment explaining why he could not vary the prior conclusions. He made a final decree in favour of the Plaintiff for Rs. 50,835 4a. 5p. with interest and costs.

On appeal the Special Court took the same view, confirming the judgment on the

same grounds as were indicated by the Commissioner and by the two successive Judges of Moulmein. Their Lordships have nothing to do now except to say that the Appellant's Counsel have wholly failed to persuade them that a Court of Justice can properly arrive at any conclusion more favourable to the Appellant. If it be true, as is earnestly alleged on his behalf, that expenses honestly incurred for the partnership have been disallowed to him, the answer is that by his own acts in mixing up his private affairs with those of the partnership, and his omission to keep clear accounts of any kind he has made it impossible even to conjecture what those expenses are. Their Lordships will humbly advise Her Majesty to dismiss this Appeal, and the Appellant must pay the costs.