Judgment of the Lords of the Judicial Committee of the Privy Council on the two Appeals of the Bombay Burmah Trading Corporation, Limited, v. *Mirza Mahomed Ally Sherazee and the Burmah Company, Limited, Nos.* 96. *of* 1872, *and* 44 *of* 1873, *and Cross Appeals in the same suits of Mirza Mahomed Ally Sherazee and the Burmah Company, Limited,* v. *The Bombay Burmah Trading Corporation, Limited, from the Court of the Recorder of Rangoon, delivered* 13*th April* 1878.

Present :

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THESE are appeals and cross appeals from judgments of the Recorder of Rangoon in two suits, in which Mirza Mahomed Ally, together with a company called the Burmah Company, Limited, were Plaintiffs. The Burmah Company, being merely put upon the record as assignees of the Plaintiff's right of action, need not be further referred to. The Defendants in both cases were the Bombay and Burmah Trading Corporation. The first action was brought to recover damages for the conversion by the Defendants of a large quantity of logs of timber belonging to the Plaintiff, the second to recover damages for the obstruction by the Defendants of the Plaintiff in the exercise of his alleged right to remove timber from certain forests in Burmah. The Recorder gave judgment for the Plaintiff in both suits.

The case of the Plaintiff may be stated in

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outline thus. He was what may be called a middle man between the foresters in the woods of Burmah and the merchants of Rangoon who bought the timber felled. In the year 1867 he had a right, obtained from the Burmese Government, to fell or otherwise possess himself of timber in a certain forest known as the Ningyan forest belonging to the King of Burmah, and to take the timber by water to Rangoon. In that year two other persons, who may be also called middlemen, named Darwood and Goldenberg, had a concurrent right to obtain and export timber. In the summer of that year Darwood and Goldenberg succeeded in obtaining from the Burmese Government a monopoly of the right to export timber from the Ningyan forest, lasting for four years. The grant was dated on the 15th July 1867, but was not to come into operation until November of that year. In obtaining that grant Darwood and Goldenberg acted as agents of the Defendants. The Plaintiff's case is that between the date of the grant and the time when it came into operation, he was possessed of a large quantity of logs of timber, in all about five thousand, part of which he had felled, part of which he had bought, and that he would have been able to take these logs by water to Rangoon during that interval, in which it was permitted to him and other foresters to take away their timber, but that he was forcibly prevented from doing this by Darwood, who acted as an agent of the Defendants. He further goes on to show that in the next year 1868 he actually found in the possession of the Defendants, at a place called Tounghoo, an intermediate station between the Ningyan Forest and Rangoon, a large quantity of logs, 1,241 in number, which belonged to him. They are alleged to have been discovered in the year 1868 in the possession, at Tounghoo, of a Mr.

Petley, an agent of the Defendants. The Plaintiff brings his first action to recover damages for the conversion by the company of the logs found at Tounghoo in Petley's possession. He brings his second action to recover damages in respect of the injury he has sustained by being prevented by Darwood in August or September 1865, from removing the remainder of the logs to which he was entitled. These logs, after deducting such as had by some means come into his possession, he alleges to be in number 1,873.

Such is a short outline of the Plaintiff's case. Their Lordships do not propose to review the evidence in detail, a task which was very carefully and laboriously performed by the learned Recorder. They cannot help observing, however, with respect to the evidence in general, that it appears to them of a loose, confused, and embrangled character, and that the Plaintiff cannot be regarded as a satisfactory witness, inasmuch as he has been convicted of perjury.

It now becomes necessary to deal with the two actions separately.

In the first action the Plaintiff, as before observed, claimed damages for the conversion of 1,241 logs. The learned Judge has found that 1,041 of his logs were converted by the Defendants, and has given as damages the full value of each of those logs at Rangoon, which he estimates at 50 rupees. Undoubtedly, in this case there is evidence, which if believed would justify the learned Judge in his finding for the Plaintiff, that a large quantity of his logs were in the possession of the Defendants. The Plaintiff produces a list which is sworn by a person whom he employed to have been made out from memoranda taken from personal observation of logs which he found in Petley's possession in 1868, bearing the Plaintiff's property marks, though not his delivery marks. The

number of the logs in that list is 1,187. There is some further evidence of the same kind respecting a lot of 11 logs. It is contended for the Respondents that this list is to a certain degree confirmed by another list which was put in and sworn to by another witness, of 981 logs, which are alleged to have been found in the same summer and autumn in the possession of Darwood in the creeks at Ningyan. There is also some evidence of Darwood having taken possession of about 1,000 logs of timber in the forest. Their Lordships are not insensible to the weight of several observations which have been addressed to them by the counsel for the Appellants impugning the genuineness of these documents, and the general truthfulness of the Plaintiff's case, not the least weighty of which was that the Plaintiff brought actions in 1869 for some far smaller lots of timber which, according to his own showing, came down the river to Tounghoo after the large lot for which he brought his present action in 1872, and that he appears to have demanded this lot for the first time shortly before he brought his action. But after giving due weight to this and other objections which have been made to the whole of the Plaintiff's case, their Lordships have come to the conclusion that whatever view they might have taken of the case had it come before them as a Court of First Instance, it has not been sufficiently established that the learned Recorder, who considered the evidence with great care, was wrong in coming to the conclusion of fact that the Defendants had in their possession a large quantity of logs belonging to the Plaintiff.

Their Lordships, therefore, are not prepared to reverse his finding, that the Defendants had in 1868 a large quantity of logs of the Plaintiff's in their possession, nor are they satisfied that

his computation of the number of those logs was wrong. But they are of opinion that he has somewhat erred in his estimation of the damages. He appears to have treated the case as what, in language familiar in Westminster Hall a few years ago, was called an action of detenue, in which the Plaintiff sought to recover a specific chattel which the Defendant detained from him, and in which the judgment was that the Defendant do deliver the chattel or pay the value of it. But this is neither in form nor in substance such an action, but more resembles what used to be called an action of trover. The subject-matter of the action is timber, an ordinary article of commerce, which, according to the evidence of the usage of trade is disposed of in the same year in which it arrives at Rangoon, either by sale or by being cut up, or in various ways. This the Plaintiff must have perfectly well known, and he could not, and indeed he does not profess, to claim four years afterwards the restitution of the particular logs which were found in 1868 at Tounghoo. His claim is to the damages which he has sustained by the conversion of the logs by the Defendants at Tounghoo at that date. It may be right indeed to take the value of the logs at Rangoon, where the principal if not the only market for them existed, as the basis of the calculation; but from the price at which the Plaintiff could have there sold them must be deducted what it would have cost him to bring them to the market. This principle of estimating the damages is in accordance with the case of Morgan *v.* Powell (3 Queen's Bench Reports), and with other cases with which English lawyers are familiar. It has been found by the learned Judge upon the evidence that 4 rupees a log would be the cost of conveying logs from Tounghoo to Rangoon. There is no

direct evidence of what the cost of conveying logs from Ningyan to Tounghoo would be; but the distance is said to be about three days' journey, and the price of logs at Tounghoo is more than double the price of logs in the forest, a difference which must in some degree be composed of the cost of conveyance.

On the whole their Lordships are of opinion that they will be doing no injustice to the Plaintiff if they assume the cost of conveying timber from Ningyan to Tounghoo to be as much as that of conveying it from Tounghoo to Rangoon. They think, therefore, that the sum of 8 rupees per log should be deducted from the selling price at Rangoon. As some evidence was given of the price which the Recorder adopts, viz., 50 rupees per log, they adopt his finding on this point. They are therefore of opinion that from the 52,050 rupees which have been given to the Plaintiff, 8,328 rupees should be deducted, leaving a balance of 43,722 rupees.

The next action gives rise to different considerations. It was originally an action for conversion of logs, but the amended plaint alleges in substance that the Defendants obstructed the Plaintiff's right of ingress and egress to the forest, and his right of obtaining and removing timber therefrom, whereby he suffered the damage complained of. It is not necessary further to advert to a question of limitation which was disposed of during the argument; but a more formidable objection to the maintenance of the action has to be dealt with, viz., that the Defendants are not responsible for the wrongful acts of Darwood in August or September 1867, assuming them to be proved; whether or not the Recorder was right in finding that they were proved it becomes immaterial to decide, in the view which their Lordships take of the case.

It was contended on behalf of the Respondents, that Darwood was the agent of the Defendants, and that the Defendants are responsible for those acts. That view was endeavoured to be supported by reference to the case of Mackay *v.* The Commercial Bank of New Brunswick (5th Law Reports, Privy Council), in which the rule was laid down as to the principles which regulate the liability of a master for the acts of an agent done without his express authority, but still within the scope of the authority of the agent. Some expressions of Mr. Justice Willes, in the case of Barwick *v.* The English Joint Stock Bank, referred to in the judgment of this board, were especially relied upon, and appear to contain as clear an exposition of the law upon this subject as is anywhere to be found. They are as follows:—"With respect to the question, whether "a principal is answerable for the act of "his agent in the course of his master's "business and for his master's benefit, no "sensible distinction can be drawn between "the case of fraud and the case of any other "wrong. The general rule is, that the master "is answerable for every such wrong of the "servant or agent as is committed in the course "of the service and for the master's benefit;" and the learned Judge goes on further, with reference to what may be deemed the course of the service, to observe, "In all these cases, it "may be said, as it was said here, that the "master had not authorised the act. It is true "he has not authorised the particular act, but "he has put the agent in his place to do that "class of acts, and he must be answerable for "the manner in which that agent has conducted "himself in doing the business which it was "the act of his master to place him in." It has been contended on the part of the Respondents, that although there is no evidence of the

Defendants authorising the particular acts of violent obstruction of Darwood complained of, still that, inasmuch as the Defendants put Darwood in a position to do that class of acts, and they were done for the Defendants' benefit, they are responsible for them, upon the principle laid down in the cases just referred to.

It now becomes necessary to refer to what evidence there is of Darwood's authority. On the 28th March 1867 we have an agreement put in between Darwood and Goldenberg and the Company, Defendants, whereby Darwood and Goldenberg agree to sell to the Company, and the Company to purchase, the logs which Darwood and Goldenberg cut. That document establishes the relation of vendor and purchaser only, and not that of master and servant or principal and agent. The next material fact is that on the 15th July 1867 Darwood obtained a grant of the monopoly for four years, in obtaining which he must be taken to have been the agent of the Defendants, but that monopoly was not to take effect until the November following. Then follows an agreement in February 1868, wherein Darwood and Goldenberg agree to assign over the lease or grant which they had obtained in their own names to the Company, and to work for them from that time at certain rates. Undoubtedly this document creates as between Darwood and the Company the relation of employer and employed. It may be that this relation existed before, and that the document only embodied the terms under which Darwood and Goldenberg acted for the Company in November 1867, when the monopoly which was obtained in Darwood's and Goldenberg's names was really exercised on behalf of the Company. But their Lordships are unable to find any proof that before November Darwood (Goldenberg may be thrown aside

as he was not in the forest) can be considered as having acted as the servant or agent of the Company. Until the lease of July 15th, giving the monopoly, took effect on the 1st November, it would appear that the relation created by the agreement of March 1867 of vendor and purchaser continued; it is certainly not shown that any relation other than that of vendor and purchaser existed between the Defendants and Darwood up to November 1867, except that of agent to procure the lease in the previous July, but an agency to procure this lease is a totally different thing from an agency to work the forest on behalf of the Company.

In this view, taking the exposition of the law of Mr. Justice Willes, which has been quoted, their Lordships are of opinion that the acts of Darwood cannot be treated as the wrongful acts of a servant or agent committed in the course of his service, for the plain reason that at that time it is not shown that Darwood was a servant or an agent for the purpose of working in the forest on the behalf of the Company, or of doing any class of acts analogous to those complained of. It may be added that there is no proof of the Defendants having ever knowingly adopted or ratified those acts, or indeed of the acts having been committed for their benefit.

This being so, their Lordships are of opinion that the second action fails altogether.

They will therefore humbly advise Her Majesty that in the first action the judgment be varied by reducing it from the sum of 52,050 rupees to 43,722 rupees; that the costs of the appeal be borne respectively by each party, but that the cross appeal be dismissed with costs. In the second action they will humbly advise Her Majesty that the judgment appealed against

be reversed, and the suit dismissed, and that the Appellants have their costs in the Court below and of this appeal, and that the cross appeal be dismissed with costs.