

*Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Nan Karay Phaw and others v. Ko Htaw Ah, and Ko Htaw Ah v. Nan Karay Phaw and others (by cross appeal), and also on the Appeal of Ko Htaw Ah and another v. Nan Karay Phaw and others from the Special Court of British Burmah; delivered 16th February 1886.*

Present :

LORD BLACKBURN.

LORD MONKSWELL.

LORD HOBHOUSE.

SIR RICHARD COUCH.

THESE are two appeals from Judgements of the Special Court of British Burmah, in both of which the widow and children of one Phatadah were Plaintiffs, and Ko Htaw Ah, a Burmese merchant, was Defendant, in the second case an agent of his being joined as a co-Defendant with him. In the first case, which may be conveniently called the timber case, the Court of Moulmein gave Judgement for the Plaintiffs. That Judgement was reversed by the Special Court of British Burmah, by which Judgement was given for the Defendant and the suit dismissed. From this Judgement the Plaintiff appeals, and there is a cross appeal by the Defendant on the ground that he has a cross claim which makes Phatadah to have been his debtor. In the second case, which may be called the elephant case, both Courts concurred in finding for the Plaintiff, and the Defendant only appeals.

It will be convenient to deal with the cases separately; but in order to make them intelligible, a short statement is necessary.

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On the banks of the Salween river and its tributaries are extensive forests, partly, it would appear, in the Burmese territory and partly in the territory of a neighbouring semi-barbarous tribe called the Karens. A large timber trade is carried on in these forests, timber being cut and, as it is called, ounded—that is, dragged or pushed by elephants into the creeks or adjoining rivers and streams, and left to find *its* way, apparently without assistance, down to Moulmein. Near Moulmein there is a station called Kadoe where the timber is intercepted, chiefly for the purpose of the revenue being collected upon it; and it appears that Burmese merchants who were in the habit of buying timber from the Karens (the Karens for the most part confining their operations to the forests), or employing the Karens to cut timber for them, and of sending it to float down to Kadoe, used certain marks for its identification, which marks were registered by a Government official at Kadoe. It has not been very distinctly explained what the regulations were under which those marks were registered, but their Lordships collect (what appears to be sufficient for the present purpose) that the existence of the mark of a merchant on timber was sufficient *prima facie* to constitute some title on his part to it, and also some title of the Government to be paid revenue by him for it.

The late husband of the Plaintiff was a Karen. He seems to have been a leading man among the Karens, to have had some capital and a number of elephants, and before the transaction which forms the subject of this action, to have been in the habit of cutting timber in these forests and of selling it there. He was in no sense a merchant conveying timber from the forests to Moulmein, and he had consequently no registered mark. The Defendant is a timber merchant carrying on extensive transactions,

having considerable capital, and the lessee of one of the forests in which the timber was felled which formed the subject of the action.

The plaint in the suit states the Plaintiff's cause of action clearly and succinctly. She says she is the widow of Phatadah, who died in 1879. "That in or about the year 1871  
 " Phatadah entered into an agreement with  
 " the Defendant, whereby he was to send to  
 " Moulmein timber marked" with the '*pin-byit*' mark—which may be shortly described as three circles with crosses within them—"worked  
 " and purchased by him in the Thoungyeen  
 " Forests, and Defendant was as Phatadah's  
 " agent, and for and on his behalf to dispose of  
 " the same and render an account of the proceeds  
 " of the sales effected by him. That between  
 " July 1871 and January 1879 the Defendant  
 " received and entered at Kadoe 5,226 logs of  
 " timber bearing the said mark, which he disposed  
 " of. That subsequently, that is to say, about  
 " six years ago, the said Phatadah agreed with  
 " the Defendant to work and send timber down  
 " from the Mai Nget Forests to Moulmein,  
 " which timber was to be marked by him with  
 " the mark 'Ko Lan,' and that the Defendant  
 " should sell the same for Phatadah as his agent  
 " and account for the proceeds of the sales  
 " effected by him. That between November  
 " 1879 and July 1880 the Defendant received  
 " and entered at Kadoe 1,183 logs of timber  
 " bearing the said mark, and disposed of the  
 " same." The plaint then states that the Defendant paid Phatadah Rs. 30,000 on account, but that he has rendered no account of the sales. Then the plaint prays for an account of the sales against the Defendant.

The Defendant in his written statement denies having entered into either of the alleged agreements. He says that the "*pin-byit*" mark is his own.

but registered by him in his son's name, and that the timber which came from the Thoungyeen Forest was his own, purchased by him there out of his own moneys. He further says that "with regard to the timber marked Ko Lan (which is the Defendant's own registered hammer mark), Defendant begs to state that in the year 1238 Phatadah, who had for several years previously been working on his own account in the Maipain Forests, came to him and asked him to assist him with some money to buy elephants, and to permit him to work in the Mai Nget Forests. That in accordance with his request Defendant lent him Rs. 17,555 on the understanding that he should work for Defendant in the Mai Nget Forests, on the following terms:—Phatadah was to cut and bring with his elephants as much timber as he could, and make it over to Defendant in the Salween river, at the rate of Rs. 17 per log for full-sized logs, and Rs. 5 for under-sized logs, Defendant paying the revenue due to the Chief of Zimmay on all timber so delivered. Phatadah was, in accordance with the prevailing custom of foresters working in other people's forests, not to remove his elephants from the Mai Nget Forests as long as he was indebted to the Defendant." The plea then states that in accordance with the above arrangement Phatadah worked in the Defendant's forests until his death, during which time he took several further advances from the Defendant; and that at the time of his death Phatadah was indebted to Defendant in the sum of Rs. 40,234, which with further payments and interest amounted to a cross claim of Rs. 55,360 against the estate of Phatadah.

The evidence was extremely conflicting and unsatisfactory. Their Lordships think that no good purpose would be served by going through

it in detail, and it will be enough to indicate some of its leading features. The Plaintiff, the widow, speaks of the original contract in these terms. After saying that her husband was a head man among the Karens, she says "I know the Defendant; he came to my house at May Too village 12 years ago. He entered into an arrangement with my husband as follows: 'Let us form friendship and drink each other's blood.'" It seems that there is a custom among the Karens, if they make a solemn contract, for each party to drink the blood of the other. "The Defendant told the deceased to cut down timber and send it to Moulmein, and he, that is Defendant, would sell it. Defendant said, 'Friend, this is your mark.' (exhibit A., a marked hammer, identified.) Defendant produced this and gave it to Phatadah. My husband worked timber after Defendant went up for five years at Thoungyeen. He came down to Tsiu-yo." Then she says, "after arrival at Tsin-yo I came with my husband to Kaw Nhat, where Defendant was residing, to ask for the price of the 6,000 logs of timber sent down from Thoungyeen." It is represented by this lady and several of the witnesses that Phatadah sent down as many as 6,000 logs of timber from Thoungyeen. Then she says:—"The Defendant said, 'Friend, do not be alarmed about the money; keep it here until you build a substantial house.'" Then she speaks of the second contract about working timber at Mai Nget. "My husband said he was getting old and could not do it. Defendant said:—'You are acquainted with the Karens, and if you work timber can be obtained.' Phatadah was to send down the timber; Defendant was to sell it and pay him. I was present and heard this. My husband was present and went up to the Mai Nget Forests. He never got any money

“ from Defendant,” and so on. She also says in her evidence that Phatadah was to become security, with the other Karens, for the Defendant; and that that was the consideration on which the Defendant agreed to act for him. She says, subsequently, in respect of the second contract:—“The Defendant agreed to sell Phatadah’s timber at the second agreement out of “gratitude, as he had stood security for him.” She calls four coolies, all of whom declare themselves to have been present on this occasion, and to have witnessed the drinking of the blood, and all of whom speak in substance, though somewhat vaguely, of the transaction, namely that Phatadah was to cut timber and send it down, and that the Defendant was to sell it for him in consideration of friendship, and of his having gone security for him with certain Karens. It may be observed that there is no proof in the case of his having gone security, whatever that expression may mean.

It may be observed here that, according to this lady’s evidence, herself and a number of her witnesses were entertained by a person of the name of Ma Bwin, a rich lady, who seems to have maintained the suit, the Defendant suggests out of illwill to him on account of his having obtained possession of a forest which she wanted; and there also seems to have been some written agreement between the widow and her witnesses that in the event of her succeeding in establishing her case they were all to receive something.

The coolies also speak of Phatadah having, during five or six years, sent down as many as 1,000 logs a year; so that on the whole some 6,000 logs of timber were sent down, according to their account, from the Thoung-yin Forest to Kadoe, to be sold for the Plaintiff by the Defendant. There is also some further evidence to the effect that Phatadah bought some logs of timber,

about 500, and that he put, or caused to be put, his "*pin-byit*" marks upon some timber which he sent down; further that he demanded payment of Defendant and was put off with excuses. Further, the hammer which is said to have been delivered to him by the Defendant is put in, by which it appears that although the circles remained, the crosses had been in a great measure intentionally defaced. That is in substance the case of the Plaintiff.

The Defendant denies the contracts. He admits that he received a large number of logs, amounting to 5,000 in round numbers, at Kadoe, some bearing the "*pin-byit*" mark, and others bearing the mark of the circles without the crosses, *i.e.*, the "*pin*" mark only, and he accounts for it in this way. He says that he made an agreement in 1870 or 1871 with one Tsit Paw, a Karen (who is dead), to buy of him 3,500 logs, and that he put this circle and cross mark upon all of those. He further says that upon the conclusion of his transaction with Tsit Paw he bought a number of other logs, some 1,500, and afterwards some more, from Ko Nan Gay; and that in order to prevent confusion between his purchases from Tsit Paw and his purchases from Ko Nan Gay, he caused the crosses on all the hammers he had (he appears to have had several) to be obliterated. So that, according to his story, there ought to have arrived from Tsit Paw some 3,500 logs with the "*pin-byit*" mark and Tsit Paw's mark; and there ought to have arrived from Ko Nan Gay, who had no mark of his own, a certain number with the pin mark without the cross. This is what happened. It seems from the record which is kept at Kadoe that 3,318 logs with the "*pin-byit*" mark and Tsit Paw's mark arrived in the course of two or three years, which certainly is confirmatory of the Defendant's story,

as far as it goes, and 1,607, or somewhere about that number, came with the plain pin mark, together with some other marks which, though Ko Nan Gay had no mark of his own, might have been impressed upon them by persons with whom he dealt. This is also confirmatory of Defendant's story. He goes on to say that with respect to the subsequent alleged agreement in 1876 the Forest of Mai Nget was his own; and he puts in his lease. He insists that it is highly improbable that he should have given Phatadah his own timber and consented only to act as agent for him. He says that what he really did was to employ Phatadah to cut and oung timber for him in his own Mai Nget Forest; and that he made him a considerable advance—some Rs. 17,000 odd—for the purpose of enabling him to do all that was necessary for that purpose. It should be said that with regard to the former alleged contract, having reference to the Thoung-yin Forest, he said that he did employ Phatadah to oung four thousand logs at eight annas a log; he further says with respect to the Mai Nget Forest that he made subsequent advances and that he got promissory notes for them. He maintains that Phatadah was largely in his debt.

The first question is whether the Plaintiff has proved her case. In the first place we have to deal with a supposed contract made 12 years before the trial, entirely by word of mouth, and on which the evidence is that of the Plaintiff herself and the coolies—evidence of a very loose description, which appears to their Lordships not satisfactory. Further, the contract alleged bears a great deal of improbability on the face of it. Phatadah was a Karen with some but not a large capital. Before this transaction he had confined his dealings to cutting and selling timber in the forests. It does not seem very



probable that he should have entered upon transactions of the magnitude alleged, whereby he sent down some 6,000 logs, the price of which would far exceed a lac of rupees. Again it seems improbable that the Defendant, a merchant, and a considerable capitalist, should have consented to reverse positions with Phatadah, to make Phatadah the principal and himself the agent, and to agree to account to Phatadah. That becomes still more improbable when we consider that he is alleged to have done this without any commission such as would ordinarily be given on the sale of timber, but simply out of friendship—signified by the drinking of blood—and a supposed promise to become security which was not proved to have been performed.

It appears therefore to their Lordships, without going more in detail into the evidence, that on the whole the two contracts alleged by the Plaintiff—the first as to the Thoung-yin Forest, and the second as to the Mai Nget Forest—are not sufficiently proved. They regard the account which the Defendant gives of the transactions the more probable; and they may further observe that the production by the Plaintiff of the marked hammer, on which a great deal of reliance has been placed, seems to bear against her. The Defendant states that he obliterated the crosses, and why he did so; the hammer is shown, and the crosses appear to be obliterated so far that though traces of them remain, they would not be sufficient to impress the cross mark upon timber. That would indicate that the hammer must have been in the possession of the Defendant for some time, and does not accord with the case of the Plaintiff that Phatadah continued in possession of it from the time of receiving it. The obliteration of the crosses agrees with the Defendant's account, and disagrees with that of the Plaintiff, who appears to have had no knowledge of the obliteration.

and whose case is that all the timber which was sent down was marked with the full mark of the circles and the crosses, and with no other. On these grounds it appears to their Lordships that the Court of Appeal was right in holding that the Plaintiff had not proved her case.

With respect to the cross claim on the part of the Defendant, the first question which arises is whether it is admissible under the pleadings. The claim is not for the recovery of money, but for an account, and it is, at all events, doubtful whether a set off could be pleaded in answer to such a claim. It must further be observed that no issue was framed or even applied for on this question. It appears to their Lordships, therefore, that it is not open to the Defendant to raise it. That being so, it is not necessary to go into the question of whether the alleged promissory notes are or are not genuine. Their Lordships however, cannot help observing that the evidence of the cross claim is highly unsatisfactory.

For these reasons their Lordships will humbly advise Her Majesty in this case that the Judgment of the Special Court of British Burmah be affirmed, and that both appeals, the Plaintiff's appeal and the cross appeal, be dismissed. The appeal will be dismissed with costs; and the cross-appeal without costs, save those which were incurred by Nan Karay Phaw in opposing the petition for special leave to enter a cross-appeal.

The second suit is a suit by the widow for the purpose of obtaining, as against the Defendant, certain elephants of Phatadah which he has detained, or the price of those elephants; and further for damages for the detention and use of those elephants by the Defendant for two years. The Defendant seeks to justify the detention of the elephants on the double ground, first of a contract with Phatadah, by which he was entitled to

detain them, and secondly of a custom of the forest. Both these contentions are negatived by both Courts, and being questions of fact, must be treated as decided. The amount of damages on which a question was raised falls under the same rule. No set off has been pleaded in this case. The Judgement therefore of the Special Court will be affirmed, and the appeal dismissed with costs, and their Lordships will humbly advise Her Majesty to this effect.

