Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Alexander Watson v. *Aga Mehedee Sherazee and others, from the Court of the Recorder at Rangoon; delivered June 2nd,* 1874.

Present:

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

SIR LAWRENCE PEEL.

THE question raised by this Appeal is, whether any, and, if so, what amount is due from the Respondents, who are either general partners as timber merchants at Rangoon, in the province of Pegu, or were engaged as co-adventurers in the working of the forests in that country, to the late firm of Currie and Company, which carried on business as merchants and agents at Rangoon, and apparently also at Moulmein.

The question arose between the Respondents and the Appellant who had been appointed the manager under the provisions of section 243 of Act VIII. of 1859, with power to sue on behalf of certain judgment creditors of Currie and Company who had attached the debt, if any, due from the Respondents to Currie and Company. Currie and Company appear to have afterwards become insolvent, and their books to have passed into the hands of their general assignee, but it must be presumed that at the date of their insolvency the Plaintiff's title, under the attachments, to the debt, if any, had already

accrued. The suit was commenced on the 28th February 1871. It appears by the proceedings that the course of dealing between the Respondents and Currie and Company was regulated, at all events after that date, by the agreement of the 17th of May 1867, which is set out at page 14 of the record. It is impossible, their Lordships think, to read that agreement without coming to the conclusion that the course of dealing between Currie and Company, and the Respondents, was the ordinary course of dealing between principal and agent, Currie and Company being often in advance on account of their principals, and being, on the other hand, responsible for the proceeds of the timber sent down from the forests to them for the purpose of sale, and sold by them. The agreement, which starts with an admitted balance of Rs. 44,000, clearly contemplates the existence of an account current between the two firms containing mutual items of debit and credit. The ninth clause of it contains a distinct stipulation that on the adjustment of the accounts the Respondents shall be bound to pay such balance as may be then found due from them. That was the state of things so long as these mutual dealings subsisted. The suit having been brought on the 28th of February 1871, the Defendants put in written statements. The first and second Defendants put in a joint statement, and the third Defendant put in a separate statement. They do not materially differ, except that the two last Respondents on the record raised a point which is now no longer insisted upon as material, namely, that the agreement having been executed only by the first Defendant, though under powers of attorney by them, they were not bound by it as by an agreement under seal. All the Respondents admitted that they were generally bound to Currie and Company by the agreement, and also that something, though a

sum very far short of the Rs. 44,000, which was claimed by the Plaintiff, might be due to Currie and Company on the balance of the account. The only issues that were settled in the suit were, first, whether the claim of the Plaintiff had been rightly made by regular suit, a question which has since been treated as immaterial; and secondly, what amount, if any, was due by Defendants to Plaintiff on the cause of action alleged in the plaint. That being the state of the record, the parties on the 5th of April 1872 agreed by their counsel that the cause should be referred to a Commissioner to take accounts, who in taking them was to decide upon all questions of fact, whether as to the delivery of timber or the value of timber delivered, or otherwise, with full powers for the purposes of the investigation; and that if questions of law should arise and could not be settled or disposed of before the Commissioner, they were to be submitted to the Court. And the formal commission issued on the 19th of April to Mr. Lockie, the Commissioner, by the Court stated, "You are hereby "appointed Commissioner for the purpose of "taking accounts, and in taking accounts you "are to decide upon all questions of fact "whether the delivery of timber, or the value "of timber delivered, or otherwise, with power "for the purposes of the investigation, and if "questions of law arise and cannot be settled "or disposed of before you, they are to be "submitted to the Court, and to report to this "Court on or before the 17th day of May 1872." The Commissioner so appointed appears to have made a careful investigation, and the result of his report was this: He says,—"From the result "of my examination it appears to me that the "Defendants are indebted to Plaintiff in the "sum of Rs. 24,898. 11. 5., and it is a question "for the Court to decide whether the commis-

" sions on renewals, &c., amounting to Rs. " 9796. 6. 9., are due by Defendants as a fair " charge on the account; also no further de- " liveries of timber than appears in Currie and " Company's account have been proved by the " Defendants. Mr. Elmes, counsel for the De- " fendants, it will be seen from the proceeding, " reserved several objections in law, to which " I would beg to refer the Honorable Court."

The question with reference to these commissions may be at once dismissed from consideration, because there is no longer any contention raised on the part of the Appellant that they ought to have been allowed, and the question, now to be determined is simply whether the Commissioner's report, which finds the sum of Rs. 24,898. 11. 5. to be the amount due, is to be upheld or not.

The points of law taken by Mr. Elmes are stated in the record in these words: "1st, That " Currie and Company's accounts have not " been proved lawfully, and cannot therefore " be received in evidence as to any fact; 2nd, " That the deed of 17th May 1867, marked " Exhibit A, is not binding as against the second " and third Defendants, since no authority under " seal from either of them to execute it has " been proved or shown; 3rd, Mr. Elmes re- " serves all questions as to limitation affecting " the several items charged for the consideration " of the Court." Their Lordships think that it will be convenient to deal first with these questions of law, and to take them in their inverse order.

The contention as to limitation seems to have been that the suit having been commenced on the 28th of September 1871, the Plaintiff's claim was barred, at least as to many items of the account, by the clause of Act 14 of 1859, which prescribes a three years' limitation for

suits for breaches of contract, money lent, and the like. It is unnecessary to consider whether, after the consent order referring the question to the investigation of the Commissioner, nothing having been said in the written statements about the claim being barred by limitation, and no issue on that point having been settled, the objection was not taken too late. For their Lordships are of opinion that the Plaintiff's claim does not fall within the three year's limitation. It appears to them that it would be a misapplication of the law to treat the claim as barred as to some, and valid as to other items of the account. They are of opinion that the account was one continuous account between principal and agent, with debits and credits on each side of it, and that the contract was to pay the balance of that account when it should be struck; and that the case therefore falls within the 8th section of Act 14 of 1859, there being several items which bring the mutual dealings down to March or May 1868. Therefore the objection that has been taken on the ground of the Statute of Limitation cannot prevail.

With respect to the second point raised by Mr. Elmes, that has not been insisted upon at the bar to-day, and it is unnecessary for their Lordships to say more about it.

The other objection seems to be that upon which the decree of the learned Recorder of Rangoon is founded. It is, "That Currie and "Company's accounts have not been proved law- "fully, and cannot, therefore, be received in "evidence as to any fact." In order to see whether the learned Judge was right in dismissing the suit on this ground, it is necessary to consider more particularly what was the course of the proceedings before the Commissioner.

He acted in this way: he first took the

evidence of one of the Respondents—Aga Mehedy Sherazee—who after several meetings, and under an order of the Commissioner, produced the accounts of his firm. He also took the independent evidence of the bill collector of the Bank of Bengal, who produced certain promissory notes, fourteen in all, made by the Respondent Aga Mehedy Sherazee, and indorsed by Currie and Company, and proved that those fourteen promissory notes had been taken up and paid by Currie and Company. As to every other item of the charge which the Commissioner has allowed, he upon the examination of Aga Mehedy Sherazee, and on the accounts produced by him as the accounts of his firm, found that they tallied with the like items in the books of Currie and Company.

In fact, the claim of the Plaintiff was proved wholly independently of Currie and Company's accounts, by those two witnesses and the accounts of the Sherazees. In one part of his judgment the learned Recorder states, and states correctly, that the accounts of Currie and Company would have been, under the Indian Evidence Act, merely corroborative evidence. It follows therefore that the real result of his finding is, that inasmuch as by reason of the non-calling of the clerk who had made some of the entries those accounts had not been satisfactorily proved and made corroborative evidence, he was bound to reject all the independent evidence,—that evidence which is the real foundation of the Commissioner's finding,—and to come to the conclusion that the Plaintiff had failed to substantiate his case. That is a decision which cannot be supported. Their Lordships desire also to observe that even if the learned Recorder had the power, which is a question afterwards to be considered, to go into these

questions of fact, and had on sufficient grounds come to the conclusion that the Commissioner's finding was based upon evidence improperly received, it would have been his duty to send the case back for further investigation rather than to dismiss the suit altogether; since even upon the accounts of the Sherazees which were in evidence, it appears that at least Rs. 4,000 odd were due from them to the firm of Currie and Company. In their Lordships' view, it is unnecessary to consider whether the accounts might not have been treated as properly before the Commissioner by way of corroborative evidence—whether, as Mr. Brown argued, it was not sufficient to show that they were accounts regularly kept in the course of business, although the clerk who made particular items, and who might have been called, was not called to verify those items.

This being their Lordships' view upon the question on which the decision of the Court below has principally turned, the only remaining question is whether there are sufficient grounds upon which the Sherazees can, so to speak, surcharge the account as found by the commissioner, by taking credit for the sum of Rs. 14,000, being the last item in the account shown by their books, and also for the supposed value, a value which can only be ascertained by subsequent investigation, of three rafts of timber alleged to have been received by Currie and Company, for the proceeds of which, if they ever sold them, they have never accounted. The Commissioner has found, as a fact, that no further deliveries of timber than appears in Currie and Company's account had been proved by the Defendants, and this raises a material question as to the powers of the Commissioner, and the effect to be given to the consent order

under which it was referred to him to take the accounts. It is contended on behalf of the Respondents that the reference must be taken to be not a reference to him as an arbitrator, but a mere reference under the 181st article of the Code of Procedure, by which the Court is empowered to direct a Commissioner to investigate the accounts and to make a report with which the Court can afterwards deal, treating it merely as evidence. It appears, however, to their Lordships that this particular reference, though not in the form of a reference for the final determination of a cause by an arbitrator, according to the provisions of the 312th and following articles of the Code of Procedure, is something higher than and different from the ordinary reference to a Commissioner to investigate accounts under article 181. In the first place it is made by consent, and the parties are bound by that consent, whatever may be the true construction to be put upon the order. A consent to such a reference under article 181, does not appear to be made necessary by the Code. Nor can their Lordships construe the terms of the orders of the 5th and 19th of April 1872 as importing anything but the agreement of the parties, and it was by no means an unreasonable agreement, that the Commissioner, who was probably more conversant with mercantile accounts than the learned judge, should decide the questions of fact, reserving any question of law which might arise to be disposed of by the Court. There is no proof upon the record of a formal exception taken to his finding upon any question of fact. The objections are all founded on matters of law, or on the improper reception of evidence, and of those objections their Lordships have already disposed.

Their Lordships, for these reasons, would feel

very great difficulty in re-opening, and would think it was hardly competent to them to re-open this question, against a clear finding upon a question of fact relating to the account and to the delivery of timber by the Commissioner upon the evidence properly before him. But even if this were otherwise, they are by no means satisfied that there are grounds in the present case upon which they would be justified in directing any further investigation on this point. The claim rests on the evidence of Aga Mehedy Sherasee, and that evidence cannot in their Lordships' opinion be treated as satisfactory proof of the further delivery of timber to Currie and Company, or of their receipt of the proceeds of that timber, or of their failure to account for such proceeds. On his, first examination he said:—" I was also told by them," he does not say by whom, " that Rs. 14,000 had been realized " for timber on my account in January 1868. " There were also three rafts of timber delivered " to Currie and Company by the second De- " fendant, which do not appear in my books. " I cannot speak personally as to the delivery " of these rafts to Currie and Company. I " made entries in my books from what Currie " and Company told me, not from accounts " rendered by them." After the accounts were filed he was again examined, and he then said, as to the first item:—" I delivered 350 logs of " timber to Currie and Company in 1867, and " they sold them in the month of January 1868. " The proceeds are entered in my account filed " on the 18th February 1868. I made the " entry on my return from Toungoo at that " time, according to the value of the timber, " but I received no account sales. I cannot " give any information about the three rafts of " timber sent down from Toungoo by Mirza

"Mahomed Ally." On re-examination he said:—"I delivered the 350 logs of timber "to Mr. Gair. They were not delivered on "account of any private transactions with "Mr. Gair. Mr. Gair was acting on behalf of "Currie and Company. I never got receipts for "the timber delivered to Currie and Company. "Currie and Company ordered the 350 logs of "timber to be taken to Aga Mahomed Ismails "Bankshall." The account, which he produced, contains this item:—"For 350 logs of timber "sold privately by Mr. Gair at Aga Mahomed "Ismails Bankshall, January 1868, Rs. 14,000." Therefore as to the principal item, the only item in respect of which any ascertained amount is claimed, there is nothing but this loose evidence of the Respondent himself as to the delivery of the timber, and of his having been told by somebody connected with Currie and Company that they had sold that timber; and that latter statement seems to be inconsistent with what he afterwards says, viz., that he made the entry on his return from Toungoo, according to the value of the timber.

It seems to their Lordships that if that transaction had really taken place, if 350 logs of timber had been delivered at Rangoon to Currie and Company, and had been afterwards taken to or sold at Aga Mahomed Ismail's Bankshall, it would have been easy for the Respondent to produce corroborative evidence of those facts, and that upon his unsupported testimony the Commissioner was perfectly justified in treating that item as unproved. It is to be further remarked that the accounts which were sent by the official assignee have no bearing at all upon that item, because, as Mr. Cowie has shown, they, for some reason or other, purported only to give the debit side of the account, and did not purport to show

the sums which had been received by Currie and Company from the Sherazees. Again, as to the three rafts of timber, Mirza Mahomed Ally, who is said to have sent them down, was not called. There was no evidence whatever of the receipt of these three rafts of timber by Currie and Company, and their Lordships think the Commissioner was justified in finding that there was no proof of their delivery.

Under these circumstances, their Lordships think the judgment under appeal cannot be supported, and it will be their duty to advise Her Majesty to reverse that judgment, and to direct that in lieu thereof a decree be made in favour of the Appellant for the sum found due by the Commissioner, viz., Rs. 24,898. 11. 5, with the costs of the suit below and the costs of this Appeal.