Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Robert Abbott v. John Nelson Abbott, from Her Britannic Majesty's Supreme Consular Court, Constantinople; delivered 25th July, 1870.

Present:—

LORD CAIRNS.
SIR JAMES W. COLVILE.
SIR JOSEPH NAPIER.

THE Appellant Robert Abbott and his brother John Nelson Abbott, the Respondent, entered into partnership with a Greek, named Xefteri, on the 1st of September, 1833. The business was that of general merchants; no partner was to do business on his own account; the Appellant was to live at Salonica, and the other two partners at Volo. The partnership was to last for three years; each partner was to bring in 10,000 piastres as capital; the Respondent was to receive 43 per cent. of the profits; the Appellant and Xefteri each $28\frac{1}{2}$ per cent. Xefteri left the concern in the middle of 1834, taking with him, it is said, his capital of 10,000 piastres, but it would appear from the letters of the 26th of November and the 16th of December, 1834, that the accounts between him and his co-partners were not adjusted. In 1868, thirty-four years after this time, the Appellant and Respondent were in partnership at Salonica, and differences having arisen between them, the Appellant filed a Bill or Petition in the Consular Court for a dissolution, and a dissolution was ordered on the 8th of June, 1868. Thereupon it became necessary to ascertain in what shares the profits of the business, which were very considerable, should be divided. There were no articles of partnership; there were no books or papers of the business earlier than 1856, when there had been a fire on

the premises, and the books which were extant did not afford, and it was admitted that the books which were burnt would not have afforded, any clue to the relative interests of the partners. As to the law applicable to such a case, there was and could be little controversy. If the just conclusion in point of fact from all the circumstances of the case should be that the partnership existing at the time of the dissolution between the Appellant and Respondent was a continuation of the partnership which commenced in 1833, omitting only the name of Xefteri, there would arise a strong presumption that the terms of partnership were the same as then agreed to, modified only so far as the retirement of Xefteri made a modification necessary. If, on the other hand, there had been a break in this continuity, and if afterwards the Appellant and Respondent joined as partners in a new business, and if in this new partnership no stipulation for an unequal division of profits was made, the ordinary rule of equality would have to be applied.

The learned judge of the Consular Court adopted the first of these alternatives, and the correctness of his Judgment is challenged by this Appeal.

The manner in which the case of the Appellant was stated in his Petition was as follows. He says, "That "the Plaintiff and Defendant have for many years "past traded at Salonica and elsewhere under the "firm or style of Abbott Brothers, each holding an "equal share or interest in the said partnership "business. That certain differences of a serious "nature having lately arisen between the Plaintiff "and Defendant, whereby the mutual confidence "between them has been destroyed, it has become "advisable and necessary to dissolve the said part-"nership firm of Abbott Brothers. That the "Plaintiff, wishing to dissolve the said partnership "firm under a mutual agreement, proposed to the "Defendant to effect that object without having "recourse to the aid or interference of this Honor-"able Court; but, before any steps had been taken "in furtherance of the said object, the said Defend-"ant, illegally and in breach of good faith, de-"manded a higher share than the Plaintiff of the "whole real and personal property held by the "Plaintiff and Defendant as partners in the said "firm of Abbott Brothers. That the said Defend-

"ant is not entitled to the said share or amount "so claimed by him as aforesaid."

The Answer of the Respondent to this is at page 8. He says, "I admit that the Plaintiff and "Defendant herein have for many years past traded "at Salonica and elsewhere under the firm or "style of Abbott Brothers, but I *deny that* each "has held an equal share and interest in the said "partnership business, as the contracts of partner-"ship, signed by the Plaintiff, and as the dealings "of the partners will testify. That by notices given "in the name of the said firm to their clients, "then actively engaged in business transactions "with them, the said firm has been, in fact, dis-"solved since the 18th day of February last, being "the date mentioned in such notices. That the "said Defendant by his own act consented to such "dissolution of the said partnership as last men-"tioned, and I say that any claim made by me to "my rightful share in the partnership assets was "not intended to impede or oppose such disso-"lution. I say that I was the founder of the "firm of Abbott Brothers, and that I was the "senior partner therein, and was entitled to the "larger share of the assets and profits thereof "which the Plaintiff's Petition alleges me to have "claimed."

No mention was made in his Answer by the Respondent of the partnership contract with Xefteri, and no statement was made of what was the greater share of the profits which he claimed.

In this state of the pleadings, witnesses were examined by a Commission at Salonica between the 19th and 25th of August, 1868. At a later period, namely on the 6th of November, 1868, the Appellant was examined before the Judge himself at Constantinople, but it was not until the 9th of November, 1868, at the commencement of the Respondent's evidence, that he for the first time produced the Xefteri part of the partnership contract of 1833. It is a fair inference from the testimony of Wilkinson, at pages 26 and 31, and from other parts of the evidence, that neither brother had in his possession the Xefteri contract, or had any accurate recollection of its effect until the copy referred to was obtained from Xefteri or his family; and it is difficult to suppose that if

they or either of them had supposed that this was the document regulating their rights, it would not have been obtained and referred to, if not before, at all events during, some of the negotiations for a dissolution which appear to have commenced as early as 1862.

It was contended before us, on behalf of the Respondent, that although the Respondent had not in his pleadings put in issue the Xefteri contract of partnership, or stated to what share of the profits he was entitled, yet that the Appellant when he came to be examined on the 6th of November, 1868, had himself raised a distinct issue, namely, that the partnership between himself and the Respondent had been dissolved in 1834, when Xefteri retired; that this thus became the issue to be tried between the parties, that the *onus* of proving this lay on the Appellant, and that failing, as the Respondent alleged the Appellant had failed, to prove a dissolution or cessation of the partnership at that particular time, he could not set up an interruption of it at any later date.

Their Lordships would be slow to allow a technical form of issue to be extracted from the inartificial words of a witness used at a late period of the cause when no such issue had been raised on the pleadings, and they do not read the evidence of the Appellant, taking it altogether, as doing more than stating that after the dissolution which, *quoad* Xefteri, took place in 1834, little or no business was done, and that the partnership between the brothers came to an end from inanition even before the expiration of the three years mentioned in the contract.

Their Lordships also observe that the learned Judge, who came to a conclusion on the facts favourable to the Respondent, appears to have considered that the issue which he had to try was, not whether the partnership as between all the three was dissolved on the retirement of Xefteri, but whether a partnership continued between the brothers after the three years of the Xefteri contract had expired; for he says at p. 54, "I have, "on the whole, come to the conclusion that there "was a continued partnership after the term of "the three years of the Xefteri contract had ex- "pired, and that the relative shares mentioned in

"that contract are those which must be considered to have been continued."

It is necessary now to trace the outline of the history in somewhat more of detail.

On the 12th of May, 1834, about, or shortly before the time of the retirement of Xefteri, we find the Respondent writing to a relative the letter printed at page 45. It is a letter which describes the writer as being in a most pitiable state of distress, without means or business. The Respondent was examined after this letter was put in evidence; but he has offered no explanation of or comment upon it. It is a letter which in their Lordships' opinion throws much light on the real position of the business about this time.

The narrative given by the Appellant of the state of the business at and after the retirement of Xefteri is this. At page 41 he says, "The business was very unprofitable. We all three lost almost everything;" and further on, "Both my brother and I were then in very reduced circumstances, and I once sold the case of my watch for food. In 1835–6–7, after the dissolution, I did not continue in partnership. We had no capital or stock, nor office nor books. I was not then concerned with my brother in any business." At page 42 he says, "The firm of Abbott Brothers and Co. did exist in 1834–35 and 1836, for the liquidating of outstanding debts and liabilities, not for new business. No new commercial transactions for the firm were carried on during these three years." At page 43 he says, "I have said that, after the dissolution of first partnership we had isolated transactions, on joint account, with the Defendant, not being connected with the liquidation, and on which I had to apply to the Consulate; and on these transactions I signed "Abbott Brothers." The Respondent was examined, as I have said, a few days after this, and knowing what the statements of the Appellant had been, this is the evidence which he gave. At page 43 he says, "Xefteri in July, 1834, retired from the partnership; myself and brother continued partners; he at Salonica, I at Volo. In the next two or three years the business was a very small affair;" and further on, "We had an affair with Mr. Pegacri, of Trieste. It was a partnership

"transaction. In 1835, Mr. Pegacri went to Volo "with me to purchase goods for account of Abbott "Brothers. Up to 1837, inclusive, the partnership "continued. Up to August, 1837, I was at Volo. "I had frequent communication with my brother "on business; letters are burnt—" that is burnt in the fire.

The business, therefore, he admits was a very small affair for the remainder of the three years, and he can mention one piece of business only that was done, namely that with Pegacri. Eight letters are put in written between 1834 and 1839, signed "Abbott Brothers and Company," in order to show that the firm of Abbott Brothers were doing business during these years. Three of these appear to relate to rent due for the occupation of a small paternal estate, of which more will be said presently; two of them refer to a settlement of account with Xefteri; one of them speaks of a *dispute with the same Pegacri (the name is written* Pegazzi), already mentioned; one speaks of embarking grain, whether a commercial purchase or the produce of the farms of the Defendants does not appear; and the eighth appears to relate to a lawsuit about some ship, in which correspondents of Abbott Brothers were concerned, which may have been pending for some time, and from the result of which they expected to receive a certain sum on account of their correspondents.

Dr. Prasacachi, at page 21, states that from November, 1836, to April, 1837, that is, after the expiration of the three years mentioned in the Xefteri contract, he employed the Appellant, and that he was occupied entirely with his affairs, and went to different places to buy and ship grain for him. The Appellant on the same subject says this at page 41, "In 1836, I entered the service "of Dr. Prasacachi: I acted as his agent for the "purchase of grain. He was a merchant as well as "an M.D. I was paid by commission; I did not "divide this commission with Defendant." Neither Prasacachi nor the Appellant were cross-examined as to these statements; and the Respondent, who was examined subsequently, does not deny the employment by Prasacachi, nor suggest that he was not aware of it at the time. He merely says that the work was done on commission, and that the

partnership shared or ought to have shared the commission, but he never saw it in the books, nor does he pretend that he ever asked for a share of what must have been a not inconsiderable item of business.

Their Lordships, in this obscure state of facts, are compelled to come to the conclusion that the business was languishing and dying out when Xefteri left; that anything done during the remainder of the three years was done merely to close pending transactions, that probably no formal dissolution took place between the brothers during the three years, and no settlement of accounts took place during or at the end of the three years, for there was nothing to gain by a settlement; but that after the three years the brothers considered themselves, and considered each other, free to undertake any business or employment that might be offered to either separately.

After an interval of about a year, in August, 1837, one Tassi proposed to the Appellant to obtain a grant of the monopoly of leeches from the Turkish Government up to March, 1838. The Appellant says he proposed to the Respondent to join the Appellant and Tassi in this contract, and both the Appellant and the Respondent agree that all the three did join and obtain the contract. The Appellant states that the profits were agreed to be divided, and were divided equally; and it is remarkable that, though the Respondent states that in the subsequent years the profits were divided unequally, he offers no denial to the statement of the Appellant as to the first year. Whether, however, the division was equal or unequal, their Lordships find at this point of the narrative a business wholly different from the former, beyond the purview of the original Articles, entered upon by the Appellant and Respondent with an entirely new partner, and entered upon as a speculation limited to the season of the contract; and they are of opinion that it is impossible to connect it with, or treat it as a continuation of, any previous partnership between the brothers.

A fresh concession was obtained by the same three, and a fresh partnership made to work it for 1838-39. It was, as the Respondent himself says, "a second venture." He alleges that as to

it, there was a written contract under which he, the Respondent, was to have 49⅓ per cent, the Appellant 25⅓, and Tassi 25⅓. If this were so, the share which the Respondent would claim under this contract, either before or after Tassi went out, would materially differ from his claim under the Xefteri contract, and this difference would itself negative the continuity of the Xefteri contract. But the Appellant and the Respondent are at issue as to this division, and their Lordships certainly cannot accept the evidence of Demetri Tassi, given, as it is, as proof of the contents of the written contract, which he does not produce, and for the non-production of which he does not, in their Lordships' opinion, satisfactorily account. The leech monopoly was not taken for 1839-40, and in that year the Appellant and Respondent, without Tassi, bought tithes or dimes. Then there was another venture in the leech monopoly for the season of 1840-1. The Appellant says Tassi joined in this with a smaller share, the Appellant and Respondent remaining equal; but the Respondent says Tassi was not a partner in that season, or in any season after 1839. The contracts were thenceforward continued yearly to the brothers, and both agree that there was thenceforward no written or verbal agreement. Then they began to buy land, and to do general business with great success.

Their Lordships cannot but regard these ventures, commenced in 1837—in a new business—with a new partner,—often confined to the contract of the season, upon terms which, on either version of them, were adjusted for the occasion,—as entirely inconsistent with the theory of a continuance of the Xefteri contract, and they must consider that contract, if it did not come to an end before 1837, as wholly out of the case after that year.

Their Lordships are of opinion that the Xefteri contract being out of the case, and any arrangement which there may have been with Tassi being restricted in its operation to the season for which it was made, there would be no evidence sufficient to repel the presumption of equality between the brothers; and they consider that the principle of equality which would thus be established is strongly supported by the dealings of the brothers in and with their farms or chifliks. From 1841 they

began to invest their profits in chifliks. A list of these is given in Document 3, page 47, prepared by the Respondent. This document specifies farms of great value in the aggregate, and includes one worth 20,000 piastres, which seems to have come to the brothers from their father, and to have clearly belonged to them equally. The Appellant says, and the Respondent does not contradict him, that this document was handed to him by the Respondent in 1862, when they had a dispute, and spoke of dissolving; and that the Respondent then proposed an equal division of the landed property, and to divide the bonus and assets in hand equally, but not to enter into the accounts of what each had drawn. The Respondent, in his evidence at page 44, speaks thus as to the landed property. He says, "I have been chief in all "business, and had precedence in the firm over my "brother, and I held a property called Arunjik, "held by my father, besides other farms and "estates: this land we had half and half as our "property. It was bought half and half, and the "account of these estates is treated separate." Their Lordships find it difficult to suppose that the words which I have read could have been used by a witness who wished to represent that the brothers were entitled to the chifliks in unequal shares, and yet it seems clear that the chifliks were bought out of the profits. There is no trace of farms other than those in the document numbered 3, or of any separate account of any particular farms, or of the possession by the Appellant or Respondent of any funds, other than profits, out of which farms could have been purchased. It is, moreover, clear from the evidence at pages 16, 17, 18, 19, 23, and 30 of the Record, and from that of the Appellant at page 42, that a portion of the rent of these farms was reserved in produce; and that this produce, apparently not inconsiderable, was divided equally between the brothers. There appears, also, from the evidence at page 24, to have been a speculation in mules, after the Crimean War, which were equally divided. Neeman Effendi, whose evidence at page 41 is in no way discredited, and which the learned Judge says he has no doubt was given conscientiously, speaks of occurrences and conversations between and with the brothers, which would

show that they were trading on terms of equality. All these matters, bearing as they do against the theory of the Respondent, might be explained, and various explanations of them were suggested at the Bar. But their Lordships cannot but give much weight to them, when they find the Respondent himself, although he was examined after all this evidence was before the Court, does not offer any denial or explanation, or make any comment upon them.

Their Lordships must also advert to the evidence of the Respondent himself at page 44. Line 60, he says, "The great fire was in 1856, and we began "new books; we had a meeting afterwards to make "a note of our credits, etc. The new books began "with a summary of our accounts, as well as we "could gather. We never spoke of our mutual "shares. I don't think our old books contained a "statement of the proportionate shares. The little "paternal estate of Arunjik is included in the list "of estates (3) put in by the Plaintiff. I don't "recollect when No. 4 was written. When we "talked of dissolving in 1862, we never went so "far as to talk of the proportions. I don't recol-"lect that I ever asked him (Plaintiff) for a greater "proportion. I said, in 1856, take out our con-"tracts, and liquidate. He said we had no con-"tracts. I never demanded a specific proportion "larger than his. I don't recollect how much more "I drew than my brother before the fire; each "drew as he wanted. I never sent Tazarte to ask "my brother a larger proportion than he drew." All this may be consistent with the idea that the Respondent, as a more active and influential man of business, may have hoped in a vague manner to obtain, and may have thought that he ought to be allowed, a larger share of profits than his brother, though he was unwilling to risk a dissolution by making a demand on that footing. But it is not, as their Lordships think, a course of action which would be expected from a partner who had a clear and well-defined right by contract to a preponderating share in the concern.

Their Lordships do not think that the circumstance that the Respondent drew out sums from the business considerably larger than the Appellant, can countervail the considerations to which they

have referred. Neither partner, it is admitted, drew as much as, on either theory of their rights, they were entitled to, and the Respondent did not draw on any fixed principle, or with reference to any fixed share. Each, in fact, was allowed to take what he wanted.

Their Lordships have looked with great anxiety into this case, requiring, as it does, for its decision a minute examination of obscure facts, and they would be slow to differ, as this tribunal has always been, from a careful and intelligent Judgment of the learned Judge of the Consular Court, unless they are satisfied that the decision was erroneous.

Their Lordships, however, feel that the Judgment cannot be maintained; and they differ from it with somewhat less hesitation, inasmuch as they observe that the learned Judge appears to have thought that, because no public and formal notice was given of the dissolution or termination of the Xefteri contract, some peculiar onus was thrown on the Appellant of establishing this dissolution, or termination. A public notice might be important in questions with creditors, but the present is a dispute between the partners themselves. Their Lordships will humbly recommend to Her Majesty that the Judgment under appeal be reversed, and a Decree be substituted, declaring that the Appellant and Respondent are interested in the capital and profits of the partnership in equal shares, and that the accounts of the partnership should be taken on this footing.

Nothing was said at the Bar, and nothing seems to have been said in the Court below, as to the time to which the accounts should be carried back. Probably neither party will desire to go beyond the period of the fire, and, subject to any observation which Counsel may desire to make on that head, their Lordships will direct the accounts to be taken from that time, with liberty to either party to apply to the Consular Court to have them taken on the same principle from an earlier period.

The litigation has arisen from the manner in which the parties have conducted their business, and their Lordships do not propose to recommend that there should be any costs of the Appeal.

I do not know whether Counsel for the Respondent or the Appellant have any observation to make

as to the period to which the accounts should be carried back.

Mr. Lumley Smith.—I understand your Lordships leave that to the Court below.

Lord Cairns.—What their Lordships propose to do is, after declaring that the partners are entitled in equal shares, to direct the accounts to be taken from that period when it appears there were new books made—1856, with liberty to either party, if it should become necessary to go behind that, to apply to the Consular Court to have the accounts taken from an earlier period, but on the same footing.

Mr. Marten.—On behalf of the Respondent, I have no observations to offer.