1895.
July 19.

SHAIK ALLI *v.* JAFFERJEE.

D. C., Colombo, 89.

Procedure—Trial without jury—Decision of judge on facts—Appeal therefrom—Rule of conduct of Court of Appeal as to the weight to be given to such decision—Judgment of the Supreme Court—Concurrence of the majority of the judges—Appeal to the Privy Council—Rule of Privy Council in cases of fact, and concurrent judgments—Claim for further damages—Position of respondent who has not appealed.

Where a case tried by a judge without a jury comes to the Court of Appeal, the presumption is that the decision of the court below on the facts is right, and that presumption must be displaced by the appellant.

And where a majority of the Judges of the Supreme Court concur in a finding on fact in a case depending entirely upon conflicting evidence, the rule of the Privy Council is to dismiss the appeal.

A respondent who has not appealed cannot ask the Appellate Court for anything but the dismissal of the appeal.

THE facts of the case are these. The plaintiff, after several years of residence in the Maldive Islands, returned to Ceylon in September, 1893, in a sailing vessel belonging to the defendant, and brought with him three cases of tortoise-shell. These cases were admittedly put into bags marked with the plaintiff's initials "Che. Che." After landing in Colombo plaintiff sought to obtain delivery from the defendant, but was put off from time to time with various excuses. Plaintiff, learning that the defendant was about to send the tortoise-shell away from Ceylon, brought this action against the defendant to recover them, and for damages, and for an injunction.

An interim injunction was granted on 7th November, 1893, and the action came on for trial before the District Court of Colombo, when evidence for both the parties was heard and judgment given for plaintiff on 3rd September, 1894, that "the defend-"ant do deliver to the plaintiff the three packages of tortoise-"shell now lying at the Colombo Customs, and marked

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" 'Che. Che.' in Tamil characters and 'J. E.' in English, and in " default of delivery the defendant do pay to the plaintiff the value " thereof, namely, the sum of Rs. 9,000." And it was further ordered that " the defendant do pay to the plaintiff by way of " damages the sum of Rs. 900 and his costs of the action."

The defendant appealed to the Supreme Court.

The appeal was argued on the 21st and 25th June, 1895.

Layard, A.-G. (with him *Morgan* and *Van Langenberg*), for defendant, appellant.

Ramanathan, S.-G. (with him *Sampayo*), for plaintiff, respondent.

Cur. adv. vult.

19th July, 1895. BONSER, C.J., after reviewing the evidence came to the conclusion that plaintiff was entitled to a decree for the delivery of the goods in question, but amended the decree as reported in *1 N. L. R. 118.*

The defendant in due course applied to the Supreme Court for, and obtained, a certificate under section 781 of the Civil Procedure Code that the case was one fit for appeal to Her Majesty in Council and on the 30th March, 1896, the case was heard in review by BONSER, C.J., and LAWRIE, J., and WITHERS, J.

Layard, A.-G. (with him *Morgan* and *Van Langenberg*), for appellant.

Ramanathan, S.-G. (with him *Sampayo*), for respondent.

BONSER, C.J., and WITHERS, J., affirmed the judgment in review, but LAWRIE, J., dissented. The judgments of their lordships were as follows :—

WITHERS, J.—

I am of opinion that the judgment in review ought to be affirmed. It was for the appellant to satisfy us that the judgment of the Court below was manifestly wrong. That judgment related to a pure question of fact: Did the three cases containing tortoise-shell belong to the plaintiff or defendant? The District Judge unhesitatingly found that the plaintiff is the owner of the three cases, and their contents. That is his express finding. In the earlier part of his judgment he observes : " I am perfectly satisfied " that the plaintiff packed the three cases, and that he wrote his " initials on the bags which formed the outside covering of the

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"cases containing the shells. No one who heard the evidence of "the plaintiff and of his Maldive boy, Madar Ali, would have any "doubt on this point."

Now, there is evidence which may be true or false, that the plaintiff, during his residence at the Maldives, collected these tortoise-shells, got them in the usual way from time to time by bargaining other goods for them, and that what he collected was put in these cases and placed on board ship. All that evidence may be false; but the District Judge had the witnesses before him, and had the opportunity of observing their demeanour, an advantage which is denied us. I find it impossible for my part to say that his verdict is wrong. I am therefore for affirming the judgment in review with costs.

BONSER, C.J.—

I agree. Since this case was last before me, I have seen the judgment of the English Court of Appeal in the case of the *Colonial Securities Trust Company, Limited, v. Massey and others (1896), L. R. 1 Q. B. 38*,* where a rule was laid down as to the duty of a Court of Appeal when hearing a case which has been tried by a Judge without a jury. If that rule is to be applied to the present

* Lord Esher, M. R., said: "What is the rule of conduct of the Court of Appeal when hearing an appeal on a question of fact from the judgment of a Judge trying a case without a jury? .....The Court of Appeal in Chancery acted upon this rule that they would not allow an appeal unless they were satified that the Judge was wrong. If they were in doubt at the end of the argument whether the Judge was right or wrong, since the burden of proof was on the appellant and he had not satisfied them that the Judge was wrong, they dismissed the appeal. That is the rule of conduct which we ought now to apply in this Court. The Judge in the court below may have heard witnesses; and if so the Court of Appeal would be more unwilling to set aside his judgment, especially if there was a conflict of evidence, than in a case tried on written evidence where the witnesses were not before the Judge, because of the opportunity afforded of judging how far the witnesses were worthy of credit. Where witnesses are not examined before the Judge but the case is determined on evidence taken on affidavit, or examination not before the Judge, or partly on one and partly on the other, the Court of Appeal is not hampered by the consideration that the Judge in the Court below has seen the witnesses, while the Court of Appeal has not, and the rule of conduct would not apply so strongly, but still this Court would not reverse the judgment and give a different one, unless satisfied that the Judge was wrong.

"I have frequently stated this rule, and I think it is well expressed by Lopes, L.J., in *Savage v. Adam, W. N. (95), 109 (11)*. The matter is thus stated: 'Where a case tried by a Judge without a jury comes to the Court of Appeal, the presumption is that the decision of the Court below on the facts was right, and that presumption must be displaced by the **appellant. If he** satisfactorily makes out that the Judge below was wrong, then **inasmuch as the** appeal is in the nature of a re-hearing, the decision should **be reversed. If the** case is left in doubt, it is clearly the duty of the Court of **Appeal not to disturb** the decision of the Court below.' With the rule so stated **I entirely** agree."

case, I must say that the appellant has not displaced the presumption that the decision of the District Judge on the facts is right; and I am therefore of the same opinion as I was when the case was before me in appeal.

LAWRIE, J.—

At the port of the Maldive Islands three boxes of tortoise-shell marked with plaintiff's initials were put on a ship bound to Ceylon, of which defendant was the owner. The plaintiff was a passenger. No freight was charged, none was paid by the plaintiff. The defendant had the privilege of exporting goods free from the Maldives. The plaintiff had not this privilege. Goods exported by him from the Maldives were subject to a heavy export duty. No export duty was paid by plaintiff for the tortoise-shell. In the manifest, the boxes were entered as the property of the defendant. When the ship arrived in Colombo, the plaintiff did not take the boxes on shore. He paid no import duty in Ceylon. The boxes were taken to the Custom House as the property of the defendant. It having come to the plaintiff's knowledge that the defendant proposed to ship the tortoise-shell to Calcutta, the plaintiff brought this action, asked for and got an injunction and claimed the boxes. In consequence of the injunction, these are still in the Custom House. The defendant claimed the boxes and their contents as his own.

The burden of proof lay on the plaintiff. On the evidence adduced I hold that he has not proved that the boxes of tortoise-shell belonged to him.

I am not impressed by the confidence with which the District Judge expressed himself. Mr. Conolly, when Acting District Judge of Colombo, frequently expressed himself strongly; and, in many cases in appeal, I have found that the stronger his language the weaker were his reasons.

With a sincere desire to do justice, he was, in my opinion, not a good judge of evidence. In this case, his judgment rests as much on fancies as on facts, and I feel myself more free than in the ordinary case to weigh and to appreciate the evidence for myself. My verdict is, that the plaintiff has not proved that the tortoise-shell is his property. I would set aside and dismiss the action with costs.

Against the decree of the Supreme Court affirming the judgment in review, the defendant appealed to Her Majesty the Queen in Her Privy Council.

1899.
March 24.

Present:—The Lord CHANCELLOR, Lord WATSON, Lord HOBHOUSE, Lord MACNAGHTEN, and Lord DAVEY.

Ashton appeared for appellant.

Hinde (with him *Corbet*), for respondent.

24th March, 1899. LORD DAVEY.—

This case comes before their lordships in a way which suggests to them that it has not been disposed of by the learned Judge who tried the action in a way which is altogether satisfactory. The judgment of the learned Judge is certainly open to the criticism that it is to a certain extent founded upon conjecture, and the concurrence of the majority of the Judges in the Court of Appeal really does not carry the case very much further than the judgment of the District Judge.

In these circumstances, the only course that their lordships could take would be to direct a new trial, but they cannot be sure that such a course in a case like the present, which is solely a dispute of fact and depends entirely upon the conflicting evidence of natives, would more certainly do justice between the parties than to affirm the judgment.

They will therefore adhere to the rule which they have laid down for themselves, and which they usually find it useful to follow in cases of this description, namely, not to disturb a judgment of the Court below on a question of fact on which there are concurrent judgments, and on this ground they will dismiss the appeal, and they will humbly advise Her Majesty that the appeal be dismissed, and the appellant must pay the costs of it.

Hinde, for respondent.—In this matter there is a question of damages which I should like to mention to your lordships.

Lord Davey.—You have not appealed. You cannot have any variation.

Lord Hobhouse.—You cannot ask for anything but the dismissal of the appeal. You have got all you want.

Hinde.—We got an order for delivery of the goods. We got an order for Rs. 90 to be paid by way of rent. These articles, as your lordships know, have been lying at the Customs warehouse. That rent has been going on for a period of four years, and I was going to ask your lordships to give us permission to apply to the Court in Ceylon for them to assess the damages which have arisen in consequence of delay.

Lord Davey.—We cannot give any such permission. All we can do is to dismiss the appeal.