Present : Mr. Justice Wood Renton and Mr. Justice Grenier.

1908.
June 16.

THE SURVEYOR-GENERAL *v.* ZYLVA.

D. C., Kandy, 1/15 of 1889.

Surveyor—Misconduct—Fraud—Work containing grave errors—Presumption as to plans and surveys—Treatises by experts—Ordinance No. 15 of 1889, s. 8—Evidence Ordinance (No. 14 of 1895), ss. 60 and 83.

A surveyor, although he may not be guilty of fraudulent misconduct, is liable to have his license cancelled under the provisions of section 8 of Ordinance No. 15 of 1889, if it be shown that his work contains such errors as prove him incapable of discharging his duties with advantage to the public.

A party seeking to contradict *vivâ voce* expert testimony by the opinions of a writer of a treatise must either call the author or satisfactorily account for his absence within the meaning of section 60 of the Evidence Ordinance (No. 14 of 1895).

The presumption created by section 83 of the Evidence Ordinance (No. 14 of 1895) in favour of plans and surveys purporting to be signed by or on behalf of the Surveyor-General, extends to everything necessary to be done in order to make the survey or plan a faithful drawing and measurement of the lands surveyed.

APPEAL by the defendant from an order of the District Judge (J. H. Templer, Esq.) directing that his license as a surveyor be cancelled under the provisions of section 8 of Ordinance No. 15 of 1889.

The facts fully appear in the judgments.

H. J. C. Pereira (with him *Hon. Mr. Kanagasabai*), for the defendant, appellant.

W. Pereira, K.C., S.-G., for the petitioner, respondent.

Cur. adv. vult.

1908.
June 16.

June 16, 1908.—WOOD RENTON J.—

The appellant, Mr. de Zylva, is a licensed surveyor. The respondent, the Surveyor-General, took proceedings against him in the District Court of Kandy, under section 8 of Ordinance No. 15 of 1889, claiming cancellation of his license on the grounds that he (1) had proved himself incapable of discharging his duties with advantage to the public ; and (2) had been guilty of gross misconduct as a surveyor. The learned District Judge held that both those grounds of cancellation had been established against Mr. de Zylva, and directed the cancellation of his license accordingly. Against that order the present appeal is brought.

In May, 1905, Mr. de Zylva was employed by Mr. P. D. G. Clarke, Manager of Nivitigala Estate, to survey certain lands in the villages of Howpe and Horatinella. Mr. Clarke was negotiating for the sale of those lands to the Ceylon Tea Plantations Company, and the survey was necessary for the purpose of obtaining a certificate of quiet possession from Government. It does not clearly result from the evidence that Mr. de Zylva was aware of this fact at the time when the survey was made. The survey, when completed, was, however, submitted to Government, and ultimately the Surveyor-General instituted these proceedings, on the strength of its alleged inaccurate and worthless character, for the cancellation of Mr. de Zylva's license. It is admitted that Mr. de Zylva's survey and plan showed the extent of the lands in question to be 1,434 acres 10 perches ; whereas, according to the Government survey and plan, the true extent is only 1,341 acres 17 perches. The Surveyor-General, in his petition, and in the evidence adduced at the inquiry, attacked Mr. de Zylva's methods of working in detail. But the main issues in the case are whether, in point of fact, Mr. de Zylva, in calculating an area of 1,300 or 1,400 acres, was wrong to an extent of nearly 93 acres, and, in the second place, whether an error of that description comes under one or other or both of the two grounds of cancellation laid down in section 8 of Ordinance No. 15 of 1889.

If the surveys and plans of the Surveyor-General are correct, the error was made. Section 83 of the Evidence Ordinance requires the court to presume the accuracy of such surveys and plans if they purport, as those in issue in the present case do, to be signed by or on behalf of the Surveyor-General. I think that the presumption created by this section extends to everything necessary to be done in order to make the survey or plan a faithful drawing and measurement of the land surveyed, and includes, therefore, the selection of proper bases of measurement. The presumption in question is only, however, a presumption of fact ; and Mr. H. J. C. Pereira contended that, in the present case, he had rebutted it sufficiently to entitle him to an independent re-survey of the whole area before his client's work was condemned as unskilful. I am unable to adopt this view.

The mere fact that Mr. de Zylva had gone over the ground and had arrived at different results from those of the survey office is not, under the circumstances of this case, sufficient to displace the statutory presumption. Mr. Benzie, his witness, did not personally check Mr. de Zylva's work; and in considering the weight due to his opinion as to the necessity of a re-survey, the possibility of an unconscious bias in favour of Mr. de Zylva, who was formerly his pupil, and the fact that he has admittedly no knowledge of the changes in the Ceylon survey system since 1893, have to be kept in view. The passages to which Mr. Pereira referred us in the Administration Report of Mr. Grinlinton (1898, B vii. pp. B 2, 3; 1899, B iii. p. B 2) and in Mr. Barnard's contributions to Mr. Warren's Administration Reports for 1902 (B iv. p. 10) and for 1904 (B v. p. M 18) do not, in my opinion, help the appellant, in view of Mr. Bernard's evidence in regard to them. The passages on which Mr. Pereira mainly relied are these: "An error in the triangulation," says Mr. Grinlinton, "and irregularities which are being inquired into, have led to an overlap in the survey, which will take a long time to correct, and which will prevent the issue of preliminary plans of the northern block this year." This statement relates to the Province of Sabaragamuwa. In his report on trigonometrical surveys (Warren's Administration Report, 1902, B iv., p. B 10) Mr. Barnard says: "The discrepancy in latitude at Delft between the Ceylon triangulation and the South Indian System led me to investigate the value of the original astronomical observations taken at Colombo in 1860, upon which the trigonometrical latitudes are based. The results have proved that these observations are to be considered only as a very rough approximation to the truth." In the corresponding report for 1904 (B v., p. M 18) we find the following: "The usual routine work was heavier at the beginning of 1904 than in previous years, owing to the large number of points required for the extension of the topographical surveys in Uva. This led to a certain amount of revision of the old work in that Province with the object of placing some of the minor stations on the new fixing, but without much success, on account of the inaccuracy of the old observations ..... Certain abnormal misclosures in triangles..... rendered it advisable for me to investigate the causes of such discrepancies with a more accurate instrument."

Even if they stood unexplained, I do not know that it would be fair to treat statements of this description as involving an admission on the part of the survey office of the present inaccuracy of its surveys and plans for practical purposes. But Mr. Barnard, whose good faith and whose knowledge on such subjects are not challenged, has told us that no admission of the kind was intended. The remarks made in the report of 1898, he says, "would not apply in any way to the bases selected by Mr. Dawson. They have reference to something quite different, namely, ordinary check-pole work and

1908. June 16. WOOD RENTON J.

to triangles of a lower class even than minor triangles. My remarks (in the report of 1902) are purely scientific, and are not intended to convey the impressions that a survey made on that triangulation would be erroneous or even inaccurate." "The misclosures," Mr. Barnard also says, "mentioned in my report of 1904 have merely scientific interest, and refer only to a very small number of seconds. This report only refers to a subsidiary line of triangles on the north-east portion of the Island, and has nothing to do with the present case." Mr. Barnard then produced a diagram (B 6) of the trigonometrical survey of Ceylon showing the principal triangulation of the Island, in thick lines, and proceeded: "If any of the angles depicted in the triangle with thick lines are in error, it indicates an error of the triangulation of the Island. The angles included by these thick lines are checked and re-checked and computed so often that it would be absolutely impossible that any error should remain undetected." I have quoted these passages, not as constituting affirmative evidence of the accuracy of the plans of the survey office, but as showing that the expressions of opinion in the Surveyor-General's Administration Reports, which Mr. Pereira cited, cannot be utilized by the appellant for the purpose of rebutting the statutory presumption in favour of their accuracy. I think that that presumption stands; and the evidence of Mr. Dawson, Mr. Stronach, Mr. Warren, Mr. Ridout, and Mr. Barnard justified the learned District Judge in holding, as he did, that the error imputed by the Surveyor-General to Mr. de Zylva had been committed.

Was it then an error which proved Mr. de Zylva (1) to be incapable of discharging his duties as a licensed surveyor with advantage to the public; (2) to have been guilty of gross misconduct in the discharge of his duties as a surveyor? There is nothing in the evidence which would have justified a finding of fraudulent misconduct against Mr. de Zylva; and I desire, speaking for myself, to say that, while affirming the judgment under appeal, I am far from endorsing some of the language in which it is couched, or the rapidity with which, on his own showing, the learned Judge made up his mind against the appellant. But if it be true, as the witnesses examined on behalf of the Surveyor-General declare, in the first place, that Mr. de Zylva's errors, one of which at least, viz., the miscalculation of 92–93 acres—even the lay mind feels to be startling—not only were not permissible, but were errors in the elementary principles of surveying, and, in the second place, that he must have known that that work, which he was deliberately putting forward as accurate, was work tainted with errors of this character, he has, I think, brought himself within both the conditions contemplated by section 8 of Ordinance No. 15 of 1889; he has proved himself unfit to exercise his profession with advantage to the public, and has also been guilty, even in the absence of fraud, of gross professional misconduct. Mr. Warren, Mr. Dawson, Mr. Stronach,

Mr. Ridout, and Mr. Barnard are witnesses against whose credibility no suggestion has been made, and they are undoubtedly experts in the eye of the law. The unanimity and the weight of their evidence in regard to the points that I am dealing with are not really weakened by such casual admissions as the one made by Mr. Warren in cross-examination : " I could not blame a licensed surveyor for having been guided by books such as have been shown me ; " for, if the Surveyor-General's case was well-founded, Mr. de Zylva's operations contained errors, such as a misclosure of 26 minutes in 77 bearings, for which it would be difficult to furnish any kind of justification. On the other side, there was merely the evidence of Mr. de Zylva himself and of Mr. Benzie, to whom I have already referred ; for the text books, which the appellant's counsel relied upon, were clearly inadmissible, unless he first satisfied section 60 of the Evidence Ordinance by proof that their authors were " dead " or could not " be found," or had " become incapable of giving evidence," or could " not be called as witnesses without an amount of delay or expense," which the court regarded as " unreasonable." I conceive that there is nothing in section 60 of the Evidence Ordinance to prevent the cross-examination of an expert witness as to opinions expressed in such treatises. If the witness accepts the author's view, he makes it his own ; and, apart from that, the knowledge or lack of knowledge that he displays of the writings of other experts may be of value in determining the weight that his testimony deserves. But if it is desired to go further than this, and to contradict *vivâ voce* expert evidence by the opinions of the writer of a treatise, the party proposing to adduce such counter testimony must either call the author, or satisfactorily account for his absence within the meaning of section 60 of the Evidence Ordinance. There are obvious reasons why the provisions of that enactment should be strictly enforced. The expert witness who presents himself in court can be cross-examined as to the grounds of his opinions and his qualifications for forming them. The absent author speaks from the pages of his work *ex cathedrâ*, and, as in the present case of some of the experts mentioned by Mr. Pereira, the description that he gives of himself on the title page may convey little or no meaning to a lay tribunal. In the result I am not prepared to differ from the findings of the District Judge, or as to the incidental errors in Mr. de Zylva's methods of working, the evidence in regard to which I have carefully considered, though I have not examined it here in detail either as to the main error of 92–93 acres. I would dismiss this appeal with costs.

GRENIER J.—

I agree to affirm the order appealed from. The presumption in regard to the correctness of the Surveyor-General's plans has not been rebutted by the appellant. Certainly, the appellant's evidence

1908.
June 16.

GRENIER J.

has not shaken the groundwork of the case which has been built up against him by the expert and scientific evidence to be found in the record. No imputation has been cast on the honesty or good faith of witnesses like Mr. Warren, Mr. Dawson, Mr. Barnard, Mr. Ridout, and Mr. Stronach ; and a careful consideration of their evidence show that the discrepancy of 92 acres between the appellant's survey and plan and the Surveyor-General's cannot be accounted for except on the footing that the appellant was either ignorant of the elementary principles of surveying, especially with reference to misclosures, such as have been pointed out to us at the argument, or had done his work so carelessly and negligently as to render him unfit to discharge the duties of a surveyor with advantage to the public.

I am of the same opinion as my brother on the question of the admissibility of the books on surveying which were sought to be used in evidence in the court below. They were clearly inadmissible, in view of the express provisions contained in section 60 of the Evidence Ordinance. The reasons given by my brother for their exclusion are cogent ones, and I cannot add anything to them.

The appellant's counsel pointed out to us that the District Judge had made up his mind against his client at a very early stage of the proceedings after he had recorded Mr. Dawson's evidence. I need hardly say that this was wrong, and that the District Judge should have waited until he had the whole evidence before him, and then have expressed his opinion. At the same time I find that the evidence both for the appellant and against him has been recorded with great care and with a wealth of technical details, and the appellant's case did not suffer in the slightest degree before as in consequence of the District Judge's premature expression of opinion, because everything that could possibly have been urged in support of the appeal was well and ably urged both by Mr. H. J. C. Pereira and Mr. Kanagasabai.

There can be no doubt that the configuration of the land in the Surveyor-General's plan and survey is the same as that in the appellant's ; and it goes without saying that the discrepancy of 92 acres is too large and serious to be lightly accounted for. The appellant's case is, however, that his survey and calculations as to the extent are correct, and the Surveyor-General's are all wrong. The appellant has signally failed to establish his proposition and thus rebut the presumption created by section 60 of the Evidence Ordinance. To my mind there would not have been this large discrepancy of 92 acres if the appellant knew his work, and was competent to discharge his duties as a surveyor. His incompetency has been fully established by the evidence, and I would, therefore, affirm the order of the court below, and dismiss this appeal.

Appeal dismissed.