1960 *Present :* Basnayake, C.J., and Sansoni, J.

GUNAWARDENE, Appellant, *and* EDIRISINGHE and another, Respondents

S. C. 561/58—D. C. Galle, 1649/S

Appeal—Question of fact—Power of appellate court to reverse trial judge's conclusion.

An appellate court may reverse the trial judge's conclusion on a pure question of fact if the reasons given by the trial judge are not satisfactory, or if it unmistakably so appears from the evidence.

APPEAL from a judgment of the District Court, Galle.

N. E. Weerasooria, Q.C., with *W. D. Gunasekera*, for plaintiff-appellant.

E. B. Wikramanayake, Q.C., with *M. T. M. Sivardeen*, for 2nd defendant-respondent.

June 16, 1960. BASNAYAKE, C.J.—

This is an action to recover a debt due on a promissory note from the 1st and 2nd defendants who are brother and sister. The 1st defendant did not seek to resist the claim. He said he received Rs. 5,000 from the plaintiff at his house in Baddegama. He supported the evidence of his elder sister as to the circumstances in which she came to sign the promissory note as a witness. The 2nd defendant sought leave to defend the action and of consent leave was granted. The 1st and 2nd defendants along with the two witnesses to the promissory note, one of whom is their elder sister, went to the house of the plaintiff and requested him to lend them Rs. 5,000. The plaintiff loaned that sum to the 1st and 2nd defendants, and the 2nd defendant paid back Rs. 500 as part payment on the note. In support of his claim the plaintiff gave evidence and called two witnesses. One of them, the elder sister of the defendants, a person

[1] *(1918) 21 N. L. R. 86.*

seventy years of age and who signed the promissory note as a witness, says: "The plaintiff handed over the money to the 1st defendant and the 1st defendant handed over that money to the 2nd defendant. The 1st defendant counted the money after he got it". She explains how she came to be a witness to the promissory note at the request of the defendants, who came to her house to see their mother who was ill, and invited her to go with them to Baddegama. The other witness a proctor's clerk describes how the defendants came in a car with their elder sister to his house and took him to the plaintiff's house. He says that Rs. 5,000 was paid in his presence and that he signed as a witness to the note.

The 1st defendant who was called by the defence supported the plaintiff's case. The 2nd defendant in her evidence denied the transaction, and alleged that a blank promissory note she had signed had been filled in by the 1st defendant. She, at first, was not sure of her signature, and when asked whether she had signed the note said:

> "I have signed it at the bottom of it. I cannot remember whether I signed the promissory note 'A' on the stamp. I signed at the bottom left-hand corner and also at the bottom right-hand corner but I cannot remember whether I signed it on the stamp. (Shown the signature on the stamp.) I cannot say definitely that the writing on the stamp is that of mine or that it is my signature. Nor can I deny that it is not my signature. I cannot definitely say that it is my signature. I have nothing more to say that it is my signature. (Witness is referred to the date on the stamp.) It bears the date '11.8.55'. I cannot say whether these figures have been written by me. The date on the top right-hand corner is not in my handwriting: but it is in my brother's handwriting. Except for the signature on the note, the body of the note has been filled up by my brother. The writing on the body of the note is similar to the writing of my brother the 1st defendant. I have no experience or knowledge about the writing of promissory note. I know that to sign a blank promissory note is dangerous."

An examination of the evidence of the 2nd defendant does not satisfy us that she is a witness who could be relied on, and her evidence cannot be preferred to the consistent evidence given by the plaintiff, her elder sister, and her brother the 1st defendant. We are unable to agree with the learned trial Judge that, in the circumstances of this case, and having regard to the nature of the evidence given by the 2nd defendant, the plaintiff's evidence should be rejected. In regard to the plaintiff's evidence the only observation that the learned trial Judge makes is that the "plaintiff did not give his evidence in a convincing manner". The plaintiff is a total stranger to the defendants. No reason is urged why he should conspire with the 2nd defendant's brother and sister and the other witness to the promissory note to make a false claim.

Learned counsel for the respondent submitted that this appeal was on a pure question of fact and that this Court should not reverse the trial Judge's conclusion. In support of his submission he referred

us to the case of *Powell v. Streatham Manor Nursing Home* [1] and to the observations made therein that the appellate Court "will not depart from the rule it has laid down that it will not over-rule the decision of the Court below on a question of fact in which the Judge has had the advantage of seeing the witnesses and observing their demeanour, unless they find some governing fact which in relation to others has created a wrong impression." We agree with the observations made in that case as a general rule, but there are exceptions to it. This Court is a Court of appeal for the correction of errors of both fact and law committed by a subordinate Court from whose decision an appeal lies (s. 36 Courts Ordinance). It has before it a verbatim record of the evidence together with all the documents placed before the trial Judge. The Judge of first instance is also required by section 173 of the Civil Procedure Code to record his observations as to the demeanour of the witnesses who give evidence before him. True it is that the trial Judge has had the advantage of seeing and hearing the witness—an advantage which we do not have. But subject to that qualification the Court has before it all the other material on which the Judge of first instance arrived at his conclusions of fact.

In England the Appellate Court is not in every case in the advantageous position that we are in. That circumstance should not be overlooked in applying some of the English *dicta*. In that country too there are circumstances in which the appellate Court does review findings of fact. Those are stated in a series of decisions as well known as that cited by counsel. I shall here refer to some of them. In the case of *S. S. Hontestroom v. S. S. Sagaporack* [2] Lord Sumner suggested an approach to the question which I think is useful for our purpose although he was there dealing with an appeal from the Admiralty Court. He said :

> "The material questions to my mind are : (1) Does it appear from the President's judgment that he made full judicial use of the opportunity given him by hearing the viva voce evidence? (2) Was there evidence before him, affecting the relative credibility of the witnesses, which would make the exercise of his critical faculties in judging the demeanour of the witnesses a useful and necessary operation? (3) Is there any glaring improbability about the story accepted, sufficient in itself to constitute 'a governing fact which in relation to others has created a wrong impression', or any specific misunderstanding or disregard of a material fact, or any 'extreme and overwhelming pressure' that has had the same effect?"

The next case is *Yuill v. Yuill* [3] where Lord Greene, Master of the Rolls, said :

> "We were reminded of certain well-known observations in the House of Lords dealing with the position of an appellate court when the judgment of the trial Judge has been based in whole or in part

[1] *(1935) A. C. 243.* [2] *(1927) A. C. 37 at p. 50.*
[3] *(1945) 1 All E. R. 183.*

upon his opinion of the demeanour of witnesses. It can, of course, only be on the rarest occasions and in circumstances where the appellate court is convinced by the plainest considerations that it would be justified in finding that the trial judge had formed a wrong opinion. But when the court is so convinced it is, in my opinion, entitled and indeed bound to give effect to its conviction. It has never been laid down by the House of Lords that an appellate court has no power to take this course. Puisne Judges would be the last persons to lay claim to infallibility, even in assessing the demeanour of a witness. The most experienced judge may, albeit rarely, be deceived by a clever liar or led to form an unfavourable opinion of an honest witness or may express his view that his demeanour was excellent or bad, as the case may be. . . . I may further point out that an impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question. If it can be demonstrated to conviction that a witness whose demeanour has been praised by the trial judge has on some collateral matter deliberately given an untrue answer, the favourable view formed by the judge as to his demeanour must necessarily lose its value."

Lord Thankerton analysed the question and reduced what had been said before into the form of three propositions in the case of *Watt* or *Thomas v. Thomas* [1]. They are as follows :—

"I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.

II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

The instant case is one which comes within the third of the above rules.

[1] *(1947) 1 All E. R. 583 at 587.*

Apart from the rules laid down by the Courts in England other jurisdictions have also considered the matter. In the case of *Islip Pedigree Breeding Centre and others v. Abercromby* [1] the Court stated :

> " . . . . . if specific facts found by a Judge of first instance necessarily lead to results which were demonstrably impossible, or so improbable that they could not reasonably be accepted, an appellate tribunal would be justified in reaching the conclusion that the findings of fact were open to challenge and that the evidence should be examined afresh."

In *Forseth v. Prudential Trust Co.*[2] the Court stated :

> " . . . . it is not only an appeal Court's right, but its duty, to disagree with the learned trial Judge on his findings of credibility where he has failed to use the advantage afforded him of having seen the witnesses and observed their demeanour in the witness-box or where he has failed to properly evaluate the evidence."

We are of the opinion that the learned trial Judge is wrong in holding against the plaintiff. We therefore set aside his judgment and direct that judgment be entered for the plaintiff as prayed for in his plaint with costs.

The appellant is entitled to the costs of the appeal.

SANSONI, J.—I agree.

Appeal allowed.