1918.

Present : Bertram C. J. and De Sampayo J.

FALALLOON *v.* CASSIM.

351—D. C. Puttalam, 2,468

Unnecessary extension of scope of trial deprecated—Cross-examination—Records of previous litigation—Evidence Ordinance, ss. 52, 146, 153, 154, *and* 155—*When Court of Appeal may revise findings of fact.*

It is not permissible to tender in evidence records of previous litigation in which a litigant or a witness may have been previously engaged, with a view to showing that he is of such a character as to render probable or improbable any conduct imputed to him. A witness may be cross-examined with reference to previous litigation so as to shake his credit by injuring his character. But his answers to those questions must be accepted, and they cannot be either impeached or confirmed by the attacking party by tendering in evdence the record of the case in question. In any case it is not competent for any party to put in evidence the entire body of proceedings and papers of another action indiscriminately. The Court cannot do this, even though the parties desire it. Nor is it legitimate to tender in evidence the opinion expressed by the Judge who tried the case. Reference may no doubt be made in re-examination to a deposition or document forming part of the record, or even to the opinion expressed by a Judge, for the purpose of enabling a witness to explain any answer given in cross-examination. But the Court should narrowly watch any attempt to encumber its record by the illegitimate incorporation of the proceedings of previous litigation.

While a Court of Appeal will always attach the greatest possible weight to any finding of fact of a Judge of first instance based upon oral testimony given before that Judge, it is not absolved by the existence of these findings from the duty of forming its own view of the facts, more particularly in a case where the facts are of such complication that their right interpretation depends, not only on any personal impression which a Judge may have formed by listening to the witnesses, but also upon documentary evidence, and upon the inferences to be drawn from the behaviour of these witnesses, both before and after the matters on which they give evidence.

THE facts are set out in the judgment.

Samarawickreme, *F. H. B. Koch*, and *Cooray*, for appellants.

A. St. V. Jayawardene, *A. Drieberg*, and *Brito-Muttunayagam*, for respondents.

Cur. adv. vult.

August 22, 1918. BERTRAM C.J.—

This was a case, the principal parties to which are an uncle and nephew, who, together with a third member of the family, were co-owners of sixteen lands in the Puttalam District, and who had

entered into an agreement for the partition of these lands. The partition deed set out the various lands, and divided them into portions of two-thirds and one-third, specifying in each case the situation of the portion allotted to either party (north or south, east or west, as the case might be), and leaving the actual dividing line to be drawn by a licensed surveyor, to be appointed, in the first instance, by the first defendant, or, if he failed to appoint a surveyor within three months, by the plaintiff. The first defendant appointed a surveyor, and a partition was effected. This partition has been challenged by the plaintiff, on the ground that it is not in accordance with the partition deed, and therefore not binding upon him. The points on which the partition is criticised are mainly two:—

(a) That it was effected without notice to the plaintiff as required by the deed.

(b) That, for the purposes of the partition, the extent of the various lands dealt with was determined by the actual title as shown by the documents, and not, as the true construction of the deed is said to require, by the land in actual occupation.

The principal questions for the Court, therefore, were, firstly, whether notice had been given of the partition; and secondly, what was the true construction of the deed on the points indicated. On these apparently simple questions it has been thought necessary to investigate, not only the family history and differences of the parties, but also the character and disposition of the first defendant, his record as a litigant and witness in matters wholly unconnected with this action, and the competency, professional record, and personal honesty of the surveyor who carried out the partition. The magnitude of the evidence taken is such that, whether for this or for other reasons, the District Judge did not feel himself able to deliver judgment until five months after the argument.

I should like, in the first place, to deprecate such unnecessary extensions of the scope of trials, and, in particular, to suggest that when it is thought necessary to cross-examine a litigant about previous litigation in which he may have been a party or a witness, more strict regard should be had to the provisions of the Evidence Ordinance. It is not permissible to tender in evidence records of previous litigation in which a litigant or a witness may have been previously engaged, with a view to showing that he is of such a character as to render probable or improbable any conduct imputed to him. This evidence is excluded by section 52 of the Evidence Ordinance. A witness may no doubt be cross-examined with reference to previous litigation under section 146, so as to shake his credit by "injuring his character." But his answers to those questions must be accepted, and they cannot be either impeached or confirmed by the attacking party by tendering in evidence the record of the case in question. This cannot be done in order to contradict him by reason of section 153. The evidence cannot be

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tendered in order to corroborate the effect of any admission he may have made, because this is not one of the methods of impeaching the credit of a witness which are authorized by section 155. In any case it is not competent for any party to put in evidence the entire body of proceedings and papers of another action indiscriminately. The Court cannot do this, even though the parties desire it. (See section 154 of the Civil Procedure Code.) Nevertheless, this course was adopted in the present trial. Nor is it legitimate to tender in evidence the opinion expressed by the Judge who tried the case. The opinion of the Judge, whether in a civil or in a criminal case, is not the same thing as a conviction in a criminal case. Proof of previous convictions is specially provided for in cases of cross-examination to credit by the first exception to section 153. But the opinion of the Judge as to the conduct of a witness in a previous trial is no more relevant for the matters under investigation in a subsequent trial than would be an opinion on the same matters expressed by an eminent witness, or, indeed, a comment in a newspaper. Reference may no doubt be made in re-examination to a deposition or document forming part of the record, or even to the opinion expressed by a Judge, for the purpose of enabling a witness to explain any answer given in cross-examination. But the Court should narrowly watch any attempt to encumber its record by the illegitimate incorporation of the proceedings or parts of the proceedings of previous litigation in which witnesses have taken part. To allow this to be done is to add a new and unnecessary terror to the witness box.

The view of the case taken by the District Judge upon a mass of evidence thus collected was that the first defendant, being a man of harsh, overbearing, and unscrupulous character, and consequently likely to ride roughshod over any person with whom he was not on cordial terms, although aware of the provisions requiring notice of the survey, deliberately resolved to set it at nought, and to conduct the survey without any notice at all to the plaintiff; that, further, for this purpose, he suborned the evidence of the surveyor, and that this surveyor, whether in conspiracy with the first defendant or out of pure officiousness, deliberately concocted in advance a piece of documentary evidence calculated to cast credit on the evidence which it was supposed that the plaintiff would give in support of his case; that this surveyor, in pursuance of the same design, carried out partitions which were throughout inequitable and unfair; that, further, these divisions were not only inequitable and unfair, but also inaccurate. The learned Judge, therefore, in spite of the fact that these lands had already been surveyed by two surveyors, and in part also by a third, has directed this work to be done over again by a fourth surveyor, and proposes that the Court shall itself demarcate the divisions in accordance with this surveyor's report.

The conclusions thus adopted by the learned District Judge are represented to us as being findings of fact, or as involving findings of fact, which we ought not to disturb. With regard to this contention, it is sufficient to say that, while a Court of Appeal will always attach the greatest possible weight to any finding of fact of a Judge of first instance based upon oral testimony given before that Judge, it is not absolved by the existence of these findings from the duty of forming its own view of the facts, more particularly in a case where the facts are of such complication that their right interpretation depends, not only on any personal impression which a Judge may have formed by listening to the witnesses, but also upon documentary evidence and upon the inferences to be drawn from the behaviour of these witnesses, both before and after the matters on which they gave evidence. The authoritative character of findings of fact is often insisted upon, and attention to this point has been recently drawn by a judgment of the Privy Council in the case of *Fradd v. Brown & Co.*[1] It is well, therefore, that the qualifications of this principle as laid down by other authorities should not be lost sight of. Thus, in *The Glannibanta* [2] the Court said: "Now, we feel the great weight that is due to the decision of a Judge of first instance whenever, in a conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect."

And in the case of *Coghlan v. Cumberland*,[3] Lindley M.R., in delivering the judgment of the Court, said: "Even where the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to re-hear the case, and the Court must reconsider the materials before the Judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it, and not srhinking from over-ruling it, if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the Judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses

[1] *(1918) 20 N. L. R. 282.*

[2] *(1876) 1 P. D. 283*

[3] *(1898) 1 Ch. 704.*

from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the Court in differing from the Judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen." See also the cases of *Bigsby v. Dickinson* [1] and *Jones v. Hough*.[2]

It was suggested that in this respect the Supreme Court ought to be guided by different principles from the English Court of Appeal, on the ground that appeals to the Supreme Court are not expressly declared to be in the nature of a re-hearing; but no satisfactory authority was cited for any such supposed contention. On the contrary, sections 39 and 40 of the Courts Ordinance give to this Court as extensive powers and capacities as those enjoyed by any Court in England. I propose, therefore, to examine the facts, and to explain what, in my opinion, is the standpoint from which they should be regarded.

Even the conclusions of the learned District Judge as to the manner and demeanour of witnesses should in this case be received with a certain amount of caution. Thus, in very strong terms, he expresses a severe view of the character of the first defendant. That view is based partly no doubt on manner and demeanour, but partly also on matters which it is difficult to understand the necessity for his examining, and which he could hardly be considered as having an adequate opportunity of examining in this case. On this it may be well to note that the first defendant's nephew, the plaintiff in this case, who on the view taken by the learned Judge was over-reached and over-ridden by his uncle both in this and other matters, speaks of his uncle in these terms: "The first defendant belongs to a highly respectable family in Puttalam; he is much respected; even I respect him." With regard to the learned Judge's characterization of the surveyor, Mr. Kirthesinghe, it may be convenient that at this point also I should deprecate the vehemence with which the learned Judge has expressed his opinion, and the unnecessary aspersions which he has thought fit to cast upon the character of this gentleman. To say that "he practically admits to a lie," because he has forgotten the precise manner in which a document had been forwarded some years before the date when he was speaking, is wholly gratuitous. The learned Judge says that "he was untruthful, vacillating, and inaccurate," that almost all his answers to questions, except when he could not help giving a

[1] *(1876) 4 Ch. D. 24.*

[2] *(1879) Ex. D. 115.*

direct one, were " I don't know," " I can't remember," " It may be," or " I think. " I have already commented upon the slender basis for the finding of untruthfulness. If the answers of the witness were such as the learned Judge imputes to him, this fact does not appear from the very full note which the learned Judge has taken of his evidence. As to his inaccuracy, although there were in his plans certain minor inaccuracies on such points as computations and the entering of the numbers of title plans, there is not a single substantial point, so far as actual surveying is considered, on which Mr. Kirthesinghe's plans have been found to be inaccurate. He is no doubt open to criticism for want of businesslike methods with regard to the keeping of accounts and the preservation of letters; as a correspondent he was dilatory and inexact; his memory is unreliable; he was incautious in accepting plausible suggestions made to him on cross-examination, without realizing where they would lead him. But the impression which the reading of his evidence has made upon me is that of a conscientious witness, who on all matters of fact was careful not to make an unqualified assertion unless he could speak with certainty, and was ready frankly to admit any mistakes or misconceptions for which he might have been responsible. The view that was pressed upon us, and which was apparently adopted by the learned Judge, was that Mr. Kirthesinghe was a most unscrupulous person, because, being a professional witness, he had deliberately given untrue evidence in support of the case of his employer. It appears to have been overlooked that there is another view of the case; and that is, that, Mr. Kirthesinghe being a professional witness, his evidence on any question of fact to which he is in a position to speak ought to receive special weight, and that what he says on any point of controversy is more likely to be true than the evidence of the witnesses on either side who have a direct interest in the result of the case. It is a singular thing that, if Mr. Kirthesinghe were really the unscrupulous person he is alleged to be, the difference between his surveys and those of the plaintiff's surveyor are of so inconsiderable a character as to be hardly worth taking into account, and in some cases are to the advantage of the plaintiff. I may also here remark, in anticipation of the subsequent conclusions of my judgment, that, in my opinion, so far from being inaccurate and unfair, Mr. Kirthesinghe's surveys may properly be taken as the basis of a demarcation to be ordered by the Court.

I will now address myself to what I have indicated as being the real questions in the case ..... [His Lordship proceeded to discuss the evidence.]

DE SAMPAYO J. concurred.

Judgment varied.