application of the action for the tort of deceit. The plaintiff alleged that on the faith of the defendant's false and fraudulent representation that he was a single man and free to marry she had gone through the form of marriage with the defendant. She claimed general damages as well as certain expenses incurred. Stanley J., whilst holding that the circumstances gave rise to a cause of action in deceit, decided he could not grant general damages or exemplary damages. This appears to derive support from certain authorities bearing on the more orthodox type of misrepresentation case.[99]

E.I.S.

APPEALS FROM A JUDGE WITHOUT A JURY: SOME NOTES

In Queensland appeals from a Magistrate are by way of re-hearing (Rule 183 of *The Magistrates' Court Rules*), as are also appeals to the Full Court from judgments or orders of Judges (R.S.C. O.70 r. 1). Such re-hearing is a matter of justice and judicial obligation (*Hontestroom* v. *Sagaporack*, [1927] A.C. 40). However, it is very clear that the appellate court should attach considerable weight to the opinion of the Judge who saw the witnesses and heard their evidence and consequently where oral evidence has been heard on both sides the appellate court is very reluctant to reverse the Judge's findings.

The object of the writer is to show, however, that the degree to which the court of appeal will interfere does vary according to both the type of case and the type of evidence.

(1). *Consistorial cases.*

In *Watt* v. *Thomas*, [1947] A.C. 484, Lord Thankerton said (at p. 488):

"It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case and, it may be, the individual case in question. It will hardly be disputed that consistorial cases form a class in which it is generally most important to see and hear the witnesses, and particularly the spouses themselves, and, further, within that class, cases of alleged cruelty will afford an even stronger example of such an advantage . . . and the interaction between the spouses in their daily life cannot be adequately judged except by seeing and hearing them in the witness box."

In consistorial cases, then, the appellate Court is most reluctant to interfere with the trial Judge's findings.

(2). *Collision Cases.*

In this class of case the findings of the trial Judge may be falsified by some objective fact in relation to the collision itself. The principles are clearly stated by Lord Goddard C.J. in *Lofthouse* v. *Leicester Corporation*, (1948) 64 T.L.R. 604,—before the Court of Appeal:

". . . In these running-down cases . . . the Court ought not to interfere . . . unless it can be shown clearly that (the Judge) did not take all the circumstances and evidence into account, or that he has misapprehended certain of the evidence or that he has drawn an inference which there is no evidence to support. I have known cases where this

99 *Lumley* v. *Gye* (1853) 2 E. & B. at 230, see Arnold on *Damages*, 2nd Ed, p. 238.

Court has interfered because it has thought that the Judge who tried the case has decided how the accident happened not on the evidence given, but on how he thought that the accident probably happened."

(3). *Admiralty Cases.*

This is a class of case which is similar to the ordinary collision case. The Judge, in these cases, is expected to appreciate the untrustworthiness of evidence that runs counter to the Preliminary Act in an important particular—see *Hontestroom* v. *Sagaporack* (*supra*). In that case Lord Sumner said (at p. 45) :

"If you come finally upon a manoeuvre of the '*Sagaporack*' which is requisite to save the '*Hontestroom*' from blame but is not to be found in the Preliminary Act; I can well understand that you would cry : 'What need have we of further testimony ? Let there be judgment for the defendant.' "

Further, as to tests of the credibility of a nautical tale "calculations are invaluable, but they cannot be infallible." (*Hontestroom* v. *Sagaporack* (*supra*), at p. 49).

(4). *Cases based solely on Credibility of Witnesses.*

Where the question is one of credibility, where either story told in the witness box may be true, the Court is reluctant to interfere unless the Judge is clearly in error (*Powell* v. *Streatham Manor Nursing Home*, [1935] A.C. 264). However, if the reasons given by the trial Judge are not satisfactory the matter will then become at large for the appellate court (*Watt* v. *Thomas* (*supra*), at p. 488). Further, it is an important factor if counsel can point to a crucial error in the Judge's inferences (*per* Scott L.J. in *Joseph Eva Ltd.* v. *Reeves*, (1938) 2 All E.R. 115, at p. 121). Again, even though the trial Judge accepts a man as a truthful witness, such witness may have reconstructed the incident and "it is right therefore to test it in the light of the probabilities and the known facts of the case." (*Grant* v. *Sun Shipping Co. Ltd.*, [1948] A.C. 549, at p. 565, *per* Lord Du Parcq). In this regard it is important to remember the rule that a witness who has deposed to a state of facts reconcilable with the facts of the case is not to be disbelieved where he has not been cross-examined on the particular point. This principle is stated by Lord Herschell L.C. in *Browne* v. *Dunn*, (1893) 6 R. 67, at p. 70, who regards it as "absolutely essential to the proper conduct of a cause."

However, it must be clear that the trial Judge's decision is one based on the veracity of the witnesses. "It not infrequently happens that a preference for A's evidence over the contrasted evidence of B is due to inferences from other conclusions reached in the Judge's mind rather than from an unfavourable view of B's veracity as such. In such cases it is legitimate for an appellate tribunal to examine the grounds of those other conclusions and the inferences drawn from them, if the materials admit of this ; and, if the appellate tribunal is convinced that these inferences are erroneous, and that the rejection of B's evidence was due to the error, it will be justified in taking a different view of the value of B's evidence " (*per* Viscount Simon in *Watt* v. *Thomas* (*supra*), at pp. 486-487). The importance of documentary or other real evidence as a yard-stick in cases of conflicting testimony is too well known to be re-stated here.

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