more common than for a constable to say, 'Can you account for yourself last night?'" I must concur in the judgment.

H. C. OF A. 1912.

HOUGH v. AH SAM.

Appeal allowed. Order appealed from discharged, and appeal to Supreme Court dismissed. Conviction restored.

Solicitors, for appellant, *Unmack & Thomas.*
Solicitor, for respondent, *W. E. B. Solomon.*

N. McG.

[HIGH COURT OF AUSTRALIA.]

EDWARDS . . . . . APPELLANT;
PLAINTIFF,

AND

THE CURATOR OF INTESTATES ESTATES AND ANOTHER . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1912.

PERTH, *Nov.* 4, 5.

Griffith C.J., Barton and Higgins JJ.

Practice—Appeal—Finding on question of fact—Parol evidence—Credibility of witnesses.

The Judge of first instance has the best opportunity of judging as to the credibility and demeanour of the witnesses, and his finding on a question of fact, as to which there was a direct conflict of parol evidence, will not be interfered with by a Court of Appeal.

Appeal from the Supreme Court of Western Australia dismissed.

APPEAL from the Supreme Court of Western Australia.

H. C. OF A. 1912.

EDWARDS v. CURATOR OF INTESTATES ESTATES.

The appellant brought an action in the Warden's Court claiming that she was entitled to be registered as sole proprietor of a certain gold mining lease. Her case was that she had entered into a verbal agreement with one Jaeger (who has since died, and whose estate is being administered by the Curator of Intestates Estates), whereby she agreed to "back" him, that is, to pay him £2 a week and supply him with food while he was prospecting for gold, on condition that in the event of his discovering anything, he should take up a lease and register it in the appellant's name, she on her part agreeing to pay him one quarter of all proceeds; that Jaeger having discovered gold and pegged out a lease, which he registered in the joint names of himself and the appellant in equal shares, had refused to transfer his share to her. The Warden, after hearing the evidence on both sides, found against her.

An appeal by her from the Warden's decision to the Supreme Court was dismissed.

From the decision of the Supreme Court the appellant now appealed to the High Court.

Keenan K.C. and *H. Parker*, for the appellant. Sec. 262 of the *Mining Act* 1904 (W.A.) (3 Edw. VII., No. 15) means that the appeal shall be a fresh trial: *Federal Gold Mine Ltd.* v. *Ennor* (1). Defendant's counsel did not cross-examine the plaintiff's witnesses on some very material facts alleged by them.

[GRIFFITH C.J. referred to *Smith* v. *Cock* (2).]

Jaeger agreed to the arrangement with the plaintiff, and then, when he found gold, he tried to make a fresh arrangement, whereby he would get a larger share of the proceeds than that which he had agreed with the appellant to accept. Where there has been a preponderance of evidence in favour of the appellant, the Court of Appeal will reverse the judgment of the lower Court. The fair inference is that an arrangement was made by which Jaeger was to be the plaintiff's agent for taking up leases on the terms that he should have a fourth interest.

Hensman, for the respondent, was not called on.

(1) 13 C.L.R., 276.

(2) (1911) A.C., 317, at p. 323; 12 C.L.R., 30.

GRIFFITH C.J. This is the third occasion during the present sittings of the Court on which we have been asked to reverse the findings of a Judge of first instance upon questions of fact, the Judge having had the opportunity of seeing the witnesses, and noting their demeanour. Such attempts are seldom successful. The rule has been so often laid down in this Court that it is not necessary to re-state it at length. There was a case in Victoria a few weeks ago where this Court did exercise its jurisdiction in that way, but that was because it thought that facts established by indisputable evidence showed that the witnesses on whose testimony the Judge of first instance relied must have been mistaken as to a date which was the one relevant matter—*Craine* v. *Australian Deposit and Mortgage Bank* (1). In this proceeding, the case which the plaintiff set up was that the defendant was her agent for the purpose of acquiring gold mining leases on the terms that every lease he acquired should be issued in her name, and she should be a trustee for him of a one-fourth interest. Now, an agreement of that sort, where the property may be of a very large value, ought to be proved by clear evidence and not by loose conversations of ambiguous meaning. A point was taken at the hearing that such an agreement must, under the *Mining Act*, be in writing, but it is not necessary to express any opinion on that point, which seems to me to be an arguable one. In this case the evidence of the alleged agreement is contained in these words of the plaintiff's evidence: "Jaeger (the defendant) asked me to back him"—that is, I suppose, support him while he was prospecting for gold. "I said I would for a fortnight or three weeks. I would give him £2 per week, and tucker, water, and tent, and if he found anything I should pay him one quarter of any proceeds obtained." That is all.

An agreement of this sort, to use the words of Sir John *Romilly* M.R., in the case of *Grant* v. *Grant* (2), "must be clear" and "unequivocal." I should hesitate from that evidence, if there were no more in the case, to say that there was a clear and unequivocal agreement that any leases which the defendant might acquire should be the property of the plaintiff. But it is not necessary to pursue that matter further; for the defendant

(1) 15 C.L.R., 389.

(2) 34 Beav., 623, at p. 625.

H. C. OF A. 1912.

EDWARDS v. CURATOR OF INTESTATES ESTATES.

Griffith C.J.

denied that any such agreement was made, and the Warden, who is an officer to whose judgment very large interests are entrusted by the law of Western Australia, and who has powers as large as those of a Supreme Court Judge, having heard the witnesses, gave judgment for the defendant. Now we are asked to give judgment for the plaintiff. It is impossible for us to do so without saying that the Warden ought to have believed the plaintiff and disbelieved the defendant. A number of circumstances were referred to by Mr. *Keenan* as corroborating the plaintiff's version, but every one of them is equally consistent with the defendant's version. The matter therefore rests on a direct conflict of testimony between the plaintiff and the defendant, and we cannot disturb the Warden's finding.

The appeal must be dismissed.

BARTON J. This case must be decided upon the principles by which Courts have been guided in declining to disturb the decisions of Judges of first instance as to the credibility of oral evidence. From what appears on paper, no doubt the Warden might very well have come to a decision either way. I should be sorry, upon the evidence as it stands printed, to have to come to any conclusion between the witnesses, because I should be without the advantage that a personal observation of their demeanour would have given me. Two or three matters have been pointed out by Mr. *Keenan* as increasing the probability that the appellant's version of the transaction is the true one, but they seem to me not to be of sufficient import to entitle us to say that the Warden, the Judge of first instance, was clearly wrong in his conclusion. *Rooth* J. acted upon principles which are well understood as applicable to matters of this sort. Even if the Warden's decision appeared at first sight to be erroneous, still it was impossible that all the materials that were before him should have been before *Rooth* J., and that learned Judge was therefore not in a position to affirm that the decision was wrong. We are in no better position than he was, for this was entirely a matter of credibility, depending very largely indeed on the demeanour of witnesses and the conclusions derivable from an observation of them face to face. In this respect the Warden

had opportunities which were not open to *Rooth* J., and are equally denied to us. We are therefore unable to apply tests which could be, and no doubt were, applied by the Warden to the witnesses under his observation; nor can we perceive, nor could *Rooth* J. perceive, to any satisfactory extent, how the evidence of any of the witnesses was in any way weakened or impaired upon cross-examination. That is the difficulty with which we are confronted. Had there been documents strongly supporting the version of the appellant, the case would have been very different.

For these reasons I agree that the appeal should be dismissed.

HIGGINS J. Apart from any difficulty as to certainty of the alleged trust, and as to the absence of a writing under the *Statute of Frauds*, the question is—Was there an agreement as alleged? I am not at all sure that I should have found as the Warden did, for there are certain circumstances which might tend strongly to corroborate the plaintiff, as Mr. *Keenan* has shown in his careful and ingenious argument.

But it must be assumed that the Warden, who saw the parties, did not believe the plaintiff. There was evidence both ways, and the Warden seems not to have believed the plaintiff. The Warden, perhaps, was impressed with the view, and the very correct view, as laid down in *Lewin on Trusts*, 12th ed., p. 189, that "Parol evidence, where admitted" (to prove a trust) "must prove the fact very *clearly*." I may note, too, that in the agreement which was tendered to Jaeger by the solicitor of Mrs. Edwards there are certain expressions, which are to a slight extent, but to a sufficient extent, inconsistent with the trust alleged by her now. The agreement tendered says: "For such services he is to receive one fourth share in the leases;" whereas now Mrs. Edwards says that she was to get all the leases, and he was to get a fourth share in the proceeds only.

I agree with the decision.

Appeal dismissed with costs.

Solicitors, for the appellant, *Gawler, Hardwick & Forman*, for *H. S. W. Parker*, Perth.

Solicitors, for the respondent, *Nicholson & Hensman*, Perth.

N. McG.