"All, all are gone, the old familiar faces.
I feel like one who treads alone
Some banquet hall deserted,
Whose guests are fled, whose garlands dead,
And all but he departed."

In my judgment, this appeal must be dismissed with costs here and below.

McDONNELL, Ag. J. and SAWREY-COOKSON, J. concurred.

Appeal dismissed.

WILSON v. LEWIS

Full Court (Purcell, C.J., Sawrey-Cookson, J. and McDonnell, Ag. J.): February 14th, 1922

[1] **Civil Procedure — appeals — matters of fact — trial by judge alone — presumption that decision on facts correct — appellate court to disturb findings only if certain that trial judge failed to consider material circumstances or obvious inconsistencies in evidence:** When an appeal is taken from the decision of a judge without a jury, there is a presumption that the trial judge's decision on the facts was correct since only he has the opportunity to judge the relative credibility of witnesses; an appellant who claims that the decision was against the weight of the evidence must therefore displace this presumption and may do so if he can show that the trial judge clearly failed to take account of particular material circumstances or of obvious inconsistencies in the evidence; if the appeal court remains in any doubt it should not disturb the judge's findings of fact (page 44, lines 3—11; page 44, line 27 — page 45, line 9).

[2] **Civil Procedure — appeals — point not taken below — if objection not made when possible in lower court, may not be raised for first time on appeal:** An appeal court will not permit a party to raise an objection, such as one concerning the admissibility of evidence, for the first time on appeal when he failed to take the opportunity in the lower court to obtain judgment on the matter (page 43, lines 25—31).

The respondent brought an action concerning certain property against the appellant in the Supreme Court.

During the proceedings in the Supreme Court the respondent produced in evidence a copy of a deed of indenture relating to the property in dispute. At the time the appellant did not challenge the admissibility of the document although he did object that no notice of it had been given, but then waived the objection. The court (Purcell, C.J.) gave judgment for the respondent, indicating

that it considered the evidence for the appellant to be wholly unreliable.

The appellant appealed contending that the deed of indenture was inadmissible evidence which should not have been received by the trial judge and that the decision was contrary to the weight of the evidence and should therefore be reversed.

The appeal was dismissed.

Cases referred to:

(1) *Colonial Securities Trust Co. v. Massey*, [1896] 1 Q.B. 38; (1896), 73 L.T. 497, *dicta* of Lord Esher, M.R. applied.

(2) *Kay v. Marshall* (1841), 8 Cl. & Fin. 245; 8 E.R. 96, *dicta* of Lord Cottenham, L.C. applied.

(3) *Khoo Sit Hoh v. Lim Thean Tong*, [1912] A.C. 323; (1912), 106 L.T. 470, applied.

McDONNELL, Ag. J.:

In this case three grounds of appeal have been filed — of these three the third has been abandoned and can in consequence be ignored.

Of the other two grounds the first is that the learned Chief Justice in the court below wrongly received in evidence the office copy of a deed of indenture in reference to the property in dispute produced and tendered by the plaintiff — arguments were addressed to us by counsel for the appellant on this point, but I am of the opinion that we are governed by the ruling of Lord Cottenham, L.C., in the case of *Kay v. Marshall* (2) where he stated (8 Cl. & Fin. at 261; 8 E.R. at 102) that the House of Lords — "will not permit parties, upon appeal, to raise an objection which they did not think proper to raise before, and on which they did not obtain the judgment of the Court below."

The notes of evidence show that the appellant's counsel objected to the document being received owing to there being no notice given to the opposite party under s. 19 of the General Registration Ordinance, 1905, and that the objection was waived.

There is no record on the notes — by which I hold we are bound — of the present objection having also been taken. I am of opinion therefore that this ground of appeal must fall to the ground on the authority which I have just cited.

The second ground of appeal is that the decision of the trial judge was contrary to the weight of evidence. As to this I would

cite the authority of Lord Esher, M.R. in *Colonial Securities Trust Co. v. Massey* (1) [1896] 1 Q.B. at 39; 73 L.T. at 498):

> " 'Where a case tried by a judge without a jury comes to the Court of Appeal, the presumption is that the decision of the Court below on the facts was right, and that presumption must be displaced by the appellant. If he satisfactorily makes out that the judge below was wrong, then inasmuch as the appeal is in the nature of a rehearing, the decision should be reversed: if the case is left in doubt, it is clearly the duty of the Court of Appeal not to disturb the decision of the Court below.' "

I can find nothing here to displace the presumption referred to nor can it even be said that the case is left in any doubt. The fact that at the close of the case the learned Chief Justice ordered that the whole of the papers in the case should be impounded and that the notes of evidence should be forwarded to the Law Officers of the Crown is a clear indication of the view which he took of the evidence given in the court below on behalf of the appellants in this court and, in this connection, I will cite one more authority from the judgment of Lord Robson in *Khoo Sit Hoh v. Lim Thean Tong* (3) ([1912] A.C. at 325; 106 L.T. at 470):

> "The case was tried before the judge alone; it turned entirely on questions of fact, and there was plain perjury on one side or the other. Their Lordships' Board are therefore called upon, as were also the Court of Appeal, to express an opinion on the credibility of conflicting witnesses whom they have not seen, heard, or questioned. In coming to a conclusion on such an issue their Lordships must of necessity be greatly influenced by the opinion of the learned trial judge, whose judgment is itself under review. He sees the demeanour of the witnesses, and can estimate their intelligence, position, and character in a way not open to the Courts who deal with later stages of the case. Moreover, in cases like the present, where those Courts have only his note of the evidence to work upon, there are many points which, owing to the brevity of the note, may appear to have been imperfectly or ambiguously dealt with in the evidence, and yet were elucidated to the judge's satisfaction at the trial, either by his own questions or by the explanations of counsel given in the presence of the parties. Of course, it may be that in deciding between witnesses he has clearly failed on some point to take

account of particular circumstances or probabilities material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact, but except in rare cases of that character, cases which are susceptible of being dealt with wholly by argument, a Court of Appeal will hesitate long before it disturbs the findings of a trial judge based on verbal testimony."

None of the arguments addressed to us satisfy me that this is one of those rare cases contemplated in that judgment and I see no reason to cavil at the conclusion come to upon the evidence by the learned Chief Justice.

I therefore give judgment for the respondent with costs.

PURCELL, C.J. and SAWREY-COOKSON, J. concurred.

Appeal dismissed.

COMMISSIONER OF POLICE v. MONTUSE

Supreme Court (Purcell, C.J.): March 7th, 1922

[1] **Road Traffic — licensing of drivers — learner drivers — learner authorised to drive without licence only if licensed driver accompanying him aware that he is unlicensed learner:** The provisions of the Motor Traffic Regulations, 1919, reg. 16, which permit an unlicensed learner to drive a motor vehicle when accompanied by a licensed driver, only apply when the licensed driver is aware that he is being driven by an unlicensed learner (page 46, line 22 — page 47, line 15).

The respondent was charged in the police magistrate's court with the offence of driving without a licence contrary to s. 6 of the Motor Traffic Ordinance, 1918.

The respondent, an unlicensed learner driver, drove a motor vehicle while accompanied by a licensed driver who believed that the respondent was in fact licensed to drive.

The respondent was charged with driving without a licence. The magistrate dismissed the summons on the ground that the respondent, being accompanied by a licensed driver, was authorised to drive since he thus fell within the terms of the Motor Traffic Regulations, 1919, reg. 16(a).

On appeal, the appellant contended that reg. 16 could only apply if the licensed driver who accompanied the learner was aware that he was being driven by an unlicensed learner.