1897.
September 16.

PUNCHIRALA *v.* PUNCHI BANDA.

D. C., Kegalla, 856.

Evidence—Action for damages for injury to person—Depositions of witnesses at trial of defendant for such injury—Evidence Ordinance, 1895, ss. 3, 33, and 58—Civil Procedure Code, ss. 167, 168, and 169—Pleas of provocation and justification—Retorsion of injury.

A District Judge cannot, even with the consent of parties, depart from the provisions of the law as to how evidence should be given and recorded, and the judgment of the Court must be based upon facts declared by law to be relevant and duly proved; and so where, in an action for damages for injury to the person, each party, without objection by the other, put in evidence depositions of witnesses at the trial of the defendant for such injury—*Held*, that the Court was wrong in accepting such depositions as evidence in the case.

In an action for compensation for injury done, if the defendant's conduct was not an excessive retorsion of the injury he received, he is not liable to pay compensation.

THE facts of the case sufficiently appear in the judgment.

Rudra, for appellant.

Jayawardene, for respondent.

16th September, 1897. WITHERS, J.—

This is an action to recover damages for injury to the person. The injury was alleged to be a severe one. In the answer it was denied that the injury was a severe one, and it was further pleaded that the injury was provoked. The evidence of the defendant, who was examined as a witness in his own behalf, shows that he intended to plead justification as well as provocation—defences which are well known in the Roman-Dutch Law to actions of this kind.

No issues were settled by the Judge, and the procedure adopted has no precedent that I am aware of. It is quite ingenious in its departure from the law of the Code and any law before that.

After the examination of the plaintiff as a witness in his own behalf and that of an unimportant witness on his side, the plaintiff's proctor put in copies of the depositions of witnesses (including one of the plaintiff) taken at the trial of the defendant on a charge of voluntarily causing grievous hurt to the plaintiff. Having put these copies in without objection by the other side the plaintiff's proctor closed his case. The defendant was then put into the box, and after he had given evidence his advocate put in copies of the depositions of the witnesses for the defence in the criminal trial. Upon this material the District Judge gave the [illegible]ent appealed from.

That these depositions were not *per se* evidence of the assault, and the circumstances under which it was committed, no one contested.

"Evidence," according to the 3rd section of our Evidence Act, "means and includes all statements which the Court permits or "requires to be made by witnesses in relation to matters of fact "under inquiry," and such statements are called oral evidence.

The 167th and 168th sections of the Civil Procedure Code require that the evidence of the witnesses shall be given orally on oath or affirmation in open Court in the presence and under the personal direction and superintendence of the Judge. By section 169 of that Code the evidence of the witnesses shall be taken down in writing in the English language by the Judge.

These rules were plainly violated.

There are of course well known exceptions to this rule.

By section 33 of the Ceylon Evidence Ordinance of 1895 it is enacted that "evidence given by a witness in a judicial proceeding " * * * is relevant for the purpose of proving in a sub- "sequent * * * proceeding * * * the truth of the "facts which it states when the witness is dead or cannot be found, "or is incapable of giving evidence, or is kept out of the way by "the adverse party, or if his presence cannot be obtained without "an amount of delay or expense which under the circumstances "of the case the Court considers unreasonable, provided that the "proceeding was between the same parties, &c., and that the "questions in issue were substantially the same." Now there was nothing to show that it was impossible or inexpedient to summon any of these witnesses before the Court to be examined in the presence of the District Judge, and even if it was impossible or inexpedient the questions at issue were not substantially the same. Provocation and justification were matters for the defence in the criminal court. The primary question at issue in the criminal proceedings was the question, Did the accused voluntarily cause grievous hurt to the prosecutor ?

Further, the judgment in the criminal case would be no evidence of that issue in the civil case. Now, is such evidence admissible by reason that both parties waived objection to it being received ? I think this question ought to be answered in the negative. The Judges of our Courts have the conduct of civil cases from the time that the parties submit themselves to the jurisdiction of their courts. It is the Court that settles the issues to be tried and determined ; it is the Court that amends the pleadings. The Court may require the proof of facts admitted by the parties (see section

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58 of the Evidence Ordinance). The Court may for grave cause permit a departure from the course of trial prescribed in the Civil Procedure Code (section 166).

The Judge has large powers of examining parties and witnesses and ordering the production of documents, yet for all that the judgment of the Court must be based upon facts declared by this Ordinance to be relevant and duly proved (see section 165 of the Evidence Ordinance).

This being the position of Judges in Ceylon it is to the public interest that even in civil proceedings they should be watchful of the way the Law of Evidence is administered.

To them the words of C. B. Pollock in his judgment in the case of *Barbat v. Allen and another* (*21 L. J. Ex. p. 155*) may well be applied :—" If a Judge is bound to receive evidence because the " parties agree to it, I do not see why if they were to agree that a " witness should give his evidence unsworn, or that a person might " be examined who has no sense of religion, those persons might " not be examined. But the consent of parties will not entitle " them to have an affidavit read which is not inadmissible. I " shall always insist on testimony coming i the form in which it is " legally binding, and shall not receive any other even with consent " .....I therefore think that the Judge is at least in his discretion " entitled to insist that the law of England shall be administered, " and when any departure from it is proposed to say to the parties " ' You shall not make a law for yourself.' " All this notwithstanding we have to consider the question whether we should leave the judgment undisturbed or send the case back for a new trial.

Section 167 of the Ceylon Evidence Ordinance of 1895 enacts :— " The improper admission or rejection of evidence shall not be " ground of itself for a new trial or reversal of any decision in any " case if it shall appear to the Court before which such objection " is raised (as it was before us by the appellant's counsel) that " independently of the evidence objected to and admitted there " was sufficient evidence to justify the decision."

Putting aside the evidence improperly admitted there was only the evidence of the plaintiff and the defendant. The defendant admitted having struck the plaintiff with the butt of his gun, but he swore to circumstances which, if believed, satisfied the pleas of provocation and justification. It cannot be said in this case, it seems to me, there was sufficient evidence to justify the decision. Besides, the Judge found that the defendant had received great provocation from the plaintiff. If the defendant's conduct was not an excessive retorsion of the injury he received, he is not liable to pay compensation.

"*Nam ut in realibus, sic et in verbalibus, quod quis ad sui defen-*
"*sionem dixerit, id jure dixisse existimatur. Cui non absimile si*
"*quis lacessitus injuriam retorserit, cum compensatæ eo modo videantur*
"*injuriæ, quatenus civiliter agi potuisset, et retorsio injuriæ non*
"*habeat injuriam, dum non est injuria, pati quod feceris, ac ignos-*
"*cendum est ei, qui voluit se ulcisci provocatus. Sic ut hic quædam*
"*fit injuriæ cum injuria, delicti cum delicto pari compensatio.*"
Voet 47, 10, 20.

The Judge did not find what constituted the great provocation, so that we are unable to decide whether the *retorsio injuriæ* was a complete answer to the claim, or only went in mitigation of damages. In my opinion the case must go back for a new trial. There will be no order as to costs.

The issues to be tried in the Court below should be these :—

(1) How did the defendant injure the plaintiff ?

(2) Was the injury committed in defence of an attack on his person or property, or on the person or property of his brother, so as to be justified in law ? If so, the defendant will have judgment.

(3) Did the plaintiff wilfully provoke the defendant's act, and was the act in excess of the provocation ? If it was not in excess, the defendant will have judgment.

(4) If the retorsion of injury was excessive, what compensation should be adjudged ?

If the Judge considers there should be no mitigation of damages, he will decide what the full compensation should be, having regard to all the circumstances of the case.

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I agree, and would add only this, that very possibly the irregularity would not have occurred if the chief clerk of the Court had regarded, as I think he should have done, the deposition of each witness before the Police Magistrate to be a separate exhibit in itself, requiring a separate Re. 1·50 stamp, instead of allowing the depositions of three witnesses for the defence to be received on one stamp and five witnesses for the plaintiff on another.

Possibly had the District Judge been also the Police Magistrate who heard the witnesses and recorded their depositions on the criminal charge, there might have been some reason for this departure, especially if the civil trial had followed so hard upon the criminal investigation that the Judge retained a full recollection of the witnesses when under examination ; and one can see in this how expedient it may sometimes be to make part of the criminal punishment in such cases a fine which can be applied in

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compensation and avert civil litigation of the future. But even then, unless the Magistrate had such a special intent from the first, it is easy to see that the depositions necessary to decide the criminal issue might not be full enough to reach all those matters required to determine the fact and extent of the civil liability, and thus where compensation was not made at the first by such procedure, but was sought subsequently as here, it would be necessary that the witnesses should be examined *de novo*.