MUTTUSAMY PILLAI *v.* PONNEN KANKANI.

D. C., Kandy, 8,064.

Practice—Conduct of trial—Tender of evidence—Judge's refusal to admit it—Necessity for recording refusal and reasons therefor—When such refusal is good ground for granting a re-hearing of case.

A party accepting a Judge's ruling or opinion as regards the relevancy of evidence which he proposes to offer, without making any effort to produce it, takes the risk upon himself of losing the case for want of such evidence.

If a Court refuses to take any evidence tendered, counsel should not submit to such refusal, but should either call the witnesses, propose the questions to be put to them, and have the reasons for the Judge's refusal recorded, or should ask him to record that he would not entertain any evidence on the point in question.

THIS was an action by the payee against one of two makers of a joint and several promissory note.

The defendant pleaded payment and satisfaction by payment to the superintendent of Templestowe estate, in consideration of whose advances to the defendant on the security of the plaintiff the note in suit was made. Issue being joined, the defendant led evidence in support of his plea and closed his case. Thereupon the proceedings recorded showed that plaintiff was called and his case closed. The District Judge upheld the plea of payment and dismissed plaintiff's action.

Plaintiff appealed. In his petition of appeal he stated the plaintiff's counsel "offered to prove" that the note in question was given for a debt due by the defendant alone, and that the note had no connection with the other maker's advance account on Templestowe, which did not commence till almost a year after the date of the making of the note ; and the appellant complained that the District Judge refused to admit such evidence on the ground of irrelevancy. These allegations in the petition of appeal were supported by an affidavit, and the District Judge admitted their correctness.

Dornhorst, for appellant, argued on the merits and pressed for a re-hearing of the case in the Court below.

Wendt, for defendant.

Cur. adv. vult.

19th March, 1895. WITHERS, J.—

[After dealing with the merits of the case, said :—]

Mr. Dornhorst invited our attention to his application for leave to his client to call rebutting evidence and to prove that the payment deposed to by Allagan was for an estate matter between himself and the deceased Welayan, and had nothing to do with the note sued on, which was for a money consideration between himself and the defendant, and which was simply backed by the said Welayan as a security.

We reserved the consideration of his application. We find ourselves unable to accede to Mr. Dornhorst's application, and so we affirm the judgment according to our first intention. We do so for the simple reason that defendant's Proctor should not have submitted to the District Judge's refusal to take the evidence which he proposed to call on behalf of his client, the nature of which appears not in the record but in the affidavit, and which the District Judge advised himself he should not take because of its irrelevancy.

The defendant or other witness should have been called, and the questions proposed to be put to him recorded, with reasons for refusing them to be put, or at least the plaintiff's Proctor

should have asked the District Judge to record that he would not entertain any evidence directed to a certain point.

A party must not take the District Judge's opinion and make no effort, simply on the chance of securing a judgment without evidence on his side, and then, if he loses, apply to this Court to send the case back for him to take the active measures which in his own interest he should have taken at the trial below.

LAWRIE, A.C.J.—

[After commenting on the facts of the case, said :—]

The plaintiff called no witnesses to corroborate his statements and to contradict the evidence given by the witnesses for the defendant. He says he told the District Judge that he had witnesses in attendance to prove that the note in question was given for a debt due by the defendant alone in respect of transactions which took place on and before 21st July, 1892, and that the note had no connection with deceased maker's advance account on Templestowe, which did not commence until June, 1893. This evidence was not called by the plaintiff, he says (in an affidavit presented at the hearing in appeal), because the District Judge thought such evidence would be irrelevant. Now, if the plaintiff accepted this ruling or opinion, he took the risk of the District Judge deciding against him. He could not split the trial in two and take his chance of the Judge's finding for him on the evidence before the Court; and if the judgment turned out to be against him, to ask for a re-hearing to call witnesses whom he abstained from calling at the trial.

It is different when a District Judge makes an order refusing to allow certain questions to be put. Against such refusal an appeal is competent; but no order was made here : the plaintiff acquiesced in the opinion of the Judge, and he closed his case, and after some days' consideration the Judge decided against him. In these circumstances, I am not disposed to allow a re-hearing, and on the evidence before me I think the judgment for the defendant is right.