1936 *Present :* **Akbar S.P.J. and Koch J.**

SINNETAMBY *v.* SHANMUGAM.

404—D. C. Jaffna, 26,893.

Evidence—Removal of Judges pending suit—Judge acting on evidence recorded—Decision depending on the credibility of witnesses—Irregular procedure—Courts Ordinance, s. 89.

Where a Judge is removed pending a suit and another Judge takes up the case, he should not act on the evidence recorded except where such evidence is of a formal character. He should summon the witnesses afresh where the decision depends on the credibility to be attached to them.

***Samaraweera v. Jayawardene* (4 *N.L.R.* 106) followed.**

APPEAL from a judgment of the District Judge of Jaffna.

H. V. Perera (with him *Nadesan*), for plaintiff, appellant.

Nadarajah, for defendant, respondent.

May 13, 1936. AKBAR S.P.J.—

This is an action for the recovery of a sum of money on a promissory note, endorsed to the plaintiff for collection. The parties went to trial on several issues of fact, namely, whether the note was given in blank as security for a cheetu club transaction, whether the payee had authority to fill up the note, and whether any money was due on the note.

A trial of this sort must depend to a large extent on the impression created in the mind of the Judge by the evidence at the time the witnesses gave the evidence. But what happened in the trial of this case was extraordinary. The trial began on June 8, 1931, before one Judge, when the issues were framed and the defendant gave evidence. He was partly cross-examined that day and the cross-examination was continued on the second day of trial, namely, June 30, 1931.

On the third day of trial, viz., April 29, 1932, the case came on before another Judge, who recorded that the parties had agreed that he should

proceed with the trial on the issues framed by his predecessor and that he should act on the evidence already recorded. The defendant was further cross-examined and his case closed. The plaintiff then gave evidence and he was examined and cross-examined on three further dates. The trial was resumed on August 24, 1934, before a third Judge who continued the trial, with a brief record that the parties had agreed to his reading the evidence already recorded and then finishing the trial.

The plaintiff was briefly cross-examined further before him and two other witnesses who had witnessed the note were also examined before him. The judgment appealed from is that of the third District Judge. He has given his judgment without having had an opportunity of hearing the defendant and also the plaintiff for the greater part of his evidence. I cannot understand how any Judge can decide the questions of fact arising in this trial on the procedure adopted in this case. The two later Judges seem to have acted on the bare agreement of the parties. Under section 89 of the Courts Ordinance (even if it did apply to a change of Judges of the kind which occurred in this case) a discretion is given to the second Judge either to act on the evidence recorded and to record further evidence or to resummon the witnesses already examined and commence afresh. The proceedings show that the succeeding Judges in this case did not exercise their minds on this point but simply continued the trial on the agreement of the parties. In the case of *Samaraweera v. Jayawardene*[1] Bonser C.J. commenting on a similar procedure adopted in that case said as follows:—"When the case got back to the District Court another District Judge was sitting. He, instead of hearing the plaintiff and his witnesses over again so that he might be able to form an opinion as to their veracity, took up the case where it had been left by his predecessor and heard the defence, and then dismissed the action. Now, in taking up the case and acting on the evidence already recorded, the District Judge was within the powers conferred upon him by section 89 of The Courts Ordinance, which expressly provides that this course may be taken in the case of the removal of a Judge while the suit is pending; but that ought never to be done except in the case of merely formal evidence. In a case such as this, where the decision depends altogether upon the credit to be given to the plaintiff and his witnesses, it is preposterous for a Judge who has not heard the plaintiff and his witnesses to decide on their veracity and trustworthiness, when he has the means in his power of judging for himself by calling and examining them."

The judgment of the District Judge in this case shows what an impossible task it was to which he had addressed himself. In these circumstances it is impossible for Court of Appeal to affirm or reverse the judgment of the third trial Judge.

The judgment and decree will be set aside and the case sent back for a new trial on the issues framed and the costs incurred so far will be costs in the cause. I wish to add that it is possible that the agreement that the Judge should act on the evidence already recorded by his predecessors did actually alter the position of the Judge into that of an arbitrator, but as this point was not argued before us, I express no opinion on it.

Sent back.

[1] *4 N. L. R. 106.*