Present : Jayewardene A.J. 1925.

UKKU MENIKA *v.* APPUHAMY.

211—C. R. Badulla, 4,556.

Decisory oath—Undertaking by plaintiff and his witnesses—Failure of one witness to take the oath—Dismissal of action.

An undertaking to refer the decision of an action to the test of an oath may provide that the oath be taken by a party to the action, a witness, or by a party and a witness.

APPEAL from a judgment of the Commissioner of Requests, Badulla. The facts appear from the judgment.

H. V. Perera, for plaintiff, appellant.

R. C. Fonseka, for defendants, respondent.

October 27, 1925. JAYEWARDENE A.J.—

In this case the plaintiff sued the defendants for declaration of title to a portion of a field called Gedera-arawa. The defendants filed answer claiming the portion in question as a part of their land Narangahawatta.

On the day of trial, after a good deal of evidence had been recorded, the defendants challenged the plaintiff, Geneterala, *ex* Arachchi, and the Arachchi of Morahela to take their oaths at Kataragama Dewala " that the plaintiff cultivated the land in dispute as a paddy field till he planted it with plantains and other plants about five years ago."

The *ex* Arachchi and the Morahela Arachchi were the plaintiff's witnesses. The challenge was accepted by all three. If the oath was taken, judgment was to be entered for the plaintiff as prayed for, with costs. If the oath was not taken, the plaintiff's action was to be dismissed, with costs. The oath was to be taken on the very day the challenge was made and accepted. The plaintiff and the Morahela Arachchi took the oath, but Geneterala, *ex* Arachchi, declined to do so. Thereupon the learned Commissioner dismissed the plaintiff's action, with costs, in terms of the agreement of the parties.

The plaintiff appeals, and on his behalf several contentions are raised. It is said that the plaintiff, or at least Geneterala was under a mistake of fact, as the latter did not understand clearly the terms of the oath he had to take, and that as the agreement did not provide for a contingency like the present, where one of the three persons agreeing to take an oath fails to do so, the case

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JAYEWARDENE A.J.

Ukku Menika v. Appuhamy

should have been decided on evidence. Counsel also proposed to read an affidavit in support of his appeal. I refused to allow him to do so. I do not believe that there was any mistake. It was not suggested in the lower Court that Geneterala's acceptance of the challenge was due to any misapprehension on his part. It is made for the first time in appeal. The terms of the oath were clear. The defendants agreed to be bound by the oath if it was taken by all the three persons named by them. If all these three persons had not agreed to take the oath, the defendants' challenge would not have been accepted, and the suggestion to have the case decided on oath would have fallen through, and the case would have been fought out on evidence. If the plaintiff had suggested that if any of the persons failed to take the oath the case should be tried on evidence, I am sure the defendants would have withdrawn their challenge. I do not think there is any substance in the plaintiff's contention.

It has been held in the case of *Tirugnasambanthapillai v. Namasivayampillai*[1] that where a party to an action undertakes to take a decisory oath and agrees at the same time that the action should be decided in a particular way according as he takes or does not take the oath, judgment may be entered in terms of the agreement. I do not think it makes any difference whether the decisory oath is to be taken by a party to the action, or by a witness or witnesses, or by a party to the action and a witness. See section 9 (1) of the Oaths Ordinance, 1895.

Such an agreement is in every way a lawful one, and has to be considered an adjustment of the action under section 408 of the Civil Procedure Code in view of the judgment cited above. The dismissal of the plaintiff's action is right, and the appeal must be dismissed, with costs.

Appeal dismissed.

[1] *(1925) 26 N. L. R. 344.*