1913.

Present : Pereira J.

TISSERA *v.* ANNAIYA.

402—C. R. Chilaw, 15,586.

Decisory oath—Oath should be recorded in writing at the time the oath is taken—Oaths Ordinance, s. 9.

Section 9 of the Oaths Ordinance, 1895, enacts that the person authorized to administer a decisory oath should "take and record in writing the evidence of the person to be sworn."

Held, that when the evidence given by the person is incorporated into the oath, the terms of the oath should be taken down and recorded at the time and place the oath is made.

THE facts appear from the judgment.

The evidence of the interpreter was as follows:—

B. de Silva, Court Interpreter. sworn.—I proceeded to the church. Parties were present. The oath was duly taken as challenged at the altar, which is the usual way of swearing. I recorded his oath and produced it (marked X).

Cross-examined.—I wrote the statement X after returning to Court. Defendant wanted plaintiff to swallow something which the sacristan had in his hand. Plaintiff did not consent to do so.

Re-examined.—It was defendant who wanted this, not the sacristan. I administer oaths regularly. I never heard of such a formality. The oath was taken at 6 A.M. I recorded it at 11. I had no ink at the church.

The report of the interpreter was in these terms:—

X.—I, Michael Tissera, swear on Kotapitiya church that the full amount of the note has not been paid by defendant.

MICHAEL TISSERA, Plaintiff.

The oath was taken in my presence at the Kotapitiya church by placing his hands on the altar.

3—9—13. B. DE SILVA, Interpreter.

J. S. Jayewardene, for the defendant, appellant.—The oath was not recorded in writing at the time it was taken. It was held in *Dharmasena v. Sudumana et al.* [1] that the failure of the person appointed to administer the oath to take and record in writing the evidence of the person then and there was a fatal irregularity.

Balasingham, for the plaintiff, respondent.—In *Segu Mohamadu v. Kadiravail Cangany* [2] the Full Bench did not consider the failure to record the words sworn to at the time of swearing a fatal irregularity.

[1] *(1912) 15 N.L.R. 377.* [2] *(1908) 11 N. L. R. 277.*

The Judges held that the proper thing to do was to record in writing at the time, but did not consider the irregularity fatal to the judgement. In *Dharmasena v. Sudumana et al.*[1] Chief Justice Lascelles said : " I am by no means satisfied that justice has been done in this case, apart from any technical question. " In the present case it was not challenged at any stage of the case that the plaintiff swore as reported. The only complaint was that the oath was not properly taken, as the plaintiff did not swallow holy water. The interpreter says that it is not usual to swallow holy water. It is not open to the plaintiff to get the judgment set aside by pointing out a technical irregularity without showing that he was prejudiced thereby. Judges often embody admissions of parties in the judgments without recording it at the time they were made. A party should not be allowed to ask that the judgment be set aside without showing that he did not make the admission.

Cur. adv. vult.

November 12, 1913. PEREIRA J.—

In this case the defendant agreed to be bound by a certain oath to be taken by the plaintiff at the Kotapitiya church in terms of section 9 of the Oaths Ordinance, 1895, and the Court Interpreter was apparently authorized to administer the oath. Under sub-section (2) of section 9 of the Ordinance it is necessary that the person authorized to administer the oath should " take and record in writing the evidence of the person to be sworn. " In the present case it so happened that the evidence to be given by the plaintiff was incorporated into the oath to be taken by him. It was therefore necessary that the person authorized to administer the oath should take down and record the terms of the oath in the same way that evidence would be taken and recorded. Now, the only way to " take and record " evidence is to record it as it emanates from the mouth of the witness. The recording at one place of a statement made by a witness at a different place and time, from the mere memory of the person recording, can hardly be said to be to " take and record " evidence, although perhaps there is no objection to a bare oath being taken at one place and the evidence given under the sanction thereof being taken and recorded at another place and time. In the present case the oath into which, as observed above, the evidence to be given by the witness was incorporated was taken in the church at 6 A.M. There was then no contemporaneous record made. The evidence embodied in the oath was recorded by the Court Interpreter from memory at 11 A.M. in Court. In my opinion this was by no means a compliance with the requirements of section 9 of the Ordinance. I think that the *dicta* of the Judges in the cases cited in the course of the argument of the appeal (*Dharmasena v. Sudumana*,[1] *Mohamadu v. Kadiravail*[2]) support this view.

[1] *(1912) 15 N. L. R. 377.*

[2] *(1908) 11 N. L. R. 277.*

1913.

PEREIRA J.

Tissera v. Annaiya

I set aside the order appealed from and remit the case to the Court below for further hearing and adjudication.

The appellant is entitled to his costs in appeal. Costs in the Court below will abide the result.

Set aside.