1909.
July 19.

Present : Mr. Justice Wood Renton.

FERNANDO *v.* PERERA.

C. R., Panadure, 8,803.

Oaths Ordinance (No. 9 of 1895)—Agreement to take the oath—Subsequent refusal—Procedure.

Where a party to a suit agrees to take an oath under the Oaths Ordinance (No. 9 of 1895), and afterwards refuses to take such oath, the procedure laid down in section 9 of the said Ordinance must be followed.

THE plaintiff sued the defendant on a debt bond dated May 2, 1905, for Rs. 125, with interest at 30 per cent., the plaintiff claimed altogether Rs. 250. The defendant pleaded that the plaintiff had agreed to deduct Rs. 30 from the amount of the bond, and also to charge interest at the rate of 12½ per cent.

On the day of trial the following proceedings took place :—

" Parties present and ready.

" Mr. Guneratne, for plaintiff.

" Issues :—

" Did the plaintiff agree to deduct Rs. 30 from the amount appearing on the bond ?

" Did the plaintiff agree to accept reduced rate of interest at 12½ per cent. ?

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"Defendant challenges plaintiff to swear at Awasa Temple on the image of Vishnu that he did not agree to deduct Rs. 30 from the amount, and that plaintiff did not agree to accept reduced rate of interest at 12½ per cent. Plaintiff accepts.

"To be sworn on Sunday, March 7. Defendant to deposit necessary expenses of swearing before then."

The Court Interpreter, who was appointed to administer the oath, reported that the plaintiff failed to attend, as directed, to take the oath. Thereupon the Commissioner (G. F. Roberts, Esq.) upheld the defence, and entered judgment for the amount admitted by the defendant.

The plaintiff appealed.

T'ambayah (with him *H. A. Jayewardene*), for the plaintiff, appellant.

R. L. Pereira, for the defendant, respondent.

Cur. adv. vult.

July 19, 1909. WOOD RENTON J.—

This case raises an interesting question under "The Oaths Ordinance, 1895" (No. 9 of 1895). The appellant sued the respondent to recover the amount of a debt bond for Rs. 125, with interest at 30 per cent. The respondent alleged that the appellant had agreed to deduct from the amount of the bond a sum of Rs. 30, and also to take interest at the reduced rate of 12½ per cent., and averred his readiness to pay the amount due under that agreement. At the hearing two issues were framed :—

(1) Did the appellant agree to deduct Rs. 30 from the amount appearing on the bond ? and

(2) Did he agree to accept interest at the reduced rate of 12½ per cent. ?

The respondent thereupon challenged the appellant to swear at Awasa Temple on the image of Vishnu that he did not enter into the agreement, the effect of which I have already stated. The appellant accepted this challenge, and the Court fixed the date at which the oath was to be taken. The appellant made default, and there is evidence justifying the conclusion at which the Commissioner of Requests arrived that his default was wilful. The failure of the appellant to take the oath was clearly proved by Mr. Gunawardene, the Interpreter of the Court, who was apparently charged with the duty of administering it ; but, although the appellant himself was examined immediately after Mr. Gunawardene, and stated that he was prepared to take the oath then, he was asked no questions in regard to the issues in the case, and the Commissioner of Requests, without taking any evidence as to the agreement on which the respondent relied, proceeded at once to give judgment in favour of the respondent on the basis of that agreement. I do not think that this procedure can be justified under Ordinance No. 9 of 1895.

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It has been pointed out by Sir Joseph Hutchinson C.J. in the case of *Seyu Mohamadu v. Kadiravail Kangany*,[1] and I agree, that, since the enactment of that Ordinance, challenges of the description with which we have to deal in the present case must be taken to be regulated by its provisions. The effect of those provisions, as regards the point now in issue, may, I think, be summarized thus. If the party challenged agrees to take the oath, and takes it, the evidence given is conclusive, not necessarily of the case, but of the "matter stated." In many instances "the matter stated" would, no doubt, dispose of the case at once. If, however, the party challenged "refuse" to take the oath, or fail to take it under circumstances tantamount to a refusal, he is not to be compelled to do so, but the fact and the grounds (if any) of his refusal are to be recorded, and may be taken account of by the Judge in disposing, as it then becomes his duty to dispose, of the case on the merits. Had the present appellant originally declined to accept his opponent's challenge, there can, I think, be no doubt but that the procedure, which I have thus outlined, would have had to be adopted. Does it make any difference that the refusal was preceded by an acceptance? In my opinion it does not. The term "refuse" in section 9, sub-section (4), of Ordinance No. 9 of 1895, is quite general; there is nothing in the language of the sub-section itself to restrict it to an original refusal; and if it be so restricted, the Ordinance contains no provision applicable to such a case as the present. Under these circumstances I think that we ought to adopt that construction of the enactment which will avoid a *casus omissus*, and enable Ordinance No. 9 of 1895 to regulate, as the Legislature must have intended, the entire procedure in regard to these judicial oaths. I have already construed section 9, sub-section (4), of the Ordinance in this sense in the case of *Sinnetamby v. Vallinatchy*,[2] which differs from the present case only in the circumstance that the subsequent refusal was almost *uno ictu* with the original acceptance; and I find that the same view has been taken in India in the construction of the closely analogous provisions of section 12 of Act X. of 1873 (*Majan v. Pathukutti*,[3] *Vasudeva Shanbog v. Naraina Pai* [4]).

I am not prepared, however, to treat the present appellant with indulgence. I must set aside the decree under appeal. But I send the case back for further inquiry and adjudication on the basis of its being governed by section 9, sub-section (4), of Ordinance No. 9 of 1895, and on the issues already framed. The evidence already taken, including that as to the appellant's default to abide by the challenge which he had accepted, may stand. All costs must be costs in the cause.

Appeal allowed; case remitted.

[1] *(1908) 11 N. L. R. 279.*
[2] *(1906) 10 N. L. R. 62.*
[3] *(1907) 17 Madras Law Journal 545.*
[4] *(1879) I. L. R. 2 Mad. 356.*