[FULL BENCH.]

1908.
August 21.

Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Wood Renton, and Mr. Justice Grenier.

SEGU MOHAMADU *v.* KADIRAVAIL CANGANY.

D. C. Badulla, 2,145.

Oaths Ordinance (No. 9 of 1895), s. 9 (2)—Record of evidence by person appointed to administer oath—Report that oath had been administered according to order—Primâ facie evidence—Sufficiency—Objection.

The defendant in an action consented to judgment being entered against him, if the plaintiff and certain of his (plaintiff's) witnesses would swear in the mosque to the truth of certain statements. The District Judge recorded the statement, and it was signed by both parties. The Interpretor of the Court was appointed to administer the oath, and he reported that "this day at 3 P.M., in terms of the order in the above case, I administered oath to the parties concerned in the presence of one another and in the presence of the officiating priest." On the day appointed for the parties to appear the defendant did not take any objection to the report as being insufficient, and judgment was entered for plaintiff.

Held (by HUTCHINSON C.J. and GRENIER A.J., *dissentiente* WOOD RENTON J.), that the report of the officer appointed to administer the oath afforded sufficient *primâ facie* evidence that the oath had been administered in terms of the order of Court; and that, in the absence of any objection by the defendant, judgment was rightly entered for the plaintiff.

HUTCHINSON C.J.—In every case of an order for the taking of an oath under Ordinance No. 9 of 1895 the Court should direct the person appointed to administer it to record in writing at the time it is administered the words sworn to, setting them out in his report, and not merely referring to the order.

Held (by WOOD RENTON J.), that the provisions of section 9 (2) of Ordinance No. 9 of 1895, which require evidence given under that section to be recorded in writing by the person appointed to administer the oath, are peremptory; and judgment should not be entered in the absence of any record in writing by the person appointed to administer the oath of the evidence given by the witnesses.

[1] *(1900) I. L. R. 28 Calcutta 253.*

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APPEAL by the defendant from a judgment of the District Judge. The facts are fully stated in the judgments.

Van Langenberg, for the first defendant, appellant.

Bawa, for the plaintiff, respondent.

Cur. adv. vult.

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The plaintiff claimed in this action a sum of money due from the two defendants on a promissory note. Judgment was given against the second defendants in default of appearance. The first defendant appeared and denied the signing of the note, but he admitted the signing of a note in blank, which was to be filled up with the correct amount found due when certain accounts were looked into, and upon which, in fact, only a small balance was due, and said that the note so signed in blank was the note now sued upon.

On the day of trial, March 11, 1908, the defendant's proctor said that before framing issues the defendant was willing that judgment should be entered against him, provided (1) plaintiff will swear in the mosque that he is satisfied with the truth of the entries in his books; (2) Meera Lebbe (plaintiff's attorney) will swear in the mosque that the first defendant put his mark to the note and that both defendants received the consideration; and (3) Meera Lebbe (a witness) will swear in the mosque that he saw the first defendant put his mark and both receive the money. The oath was to be taken in the mosque behind the jail in the presence of Mr. Abdul Rahaiman (the Interpreter) on Friday, the 13th, between 1 and 4 P.M. The District Judge has recorded this statement, and it is signed on the record by both parties.

On the 13th the Interpreter reported to the Court that he went that day at the appointed hour and found the parties there present, except the witness Meera, and that in Meera's absence the defendant objectd to the other two swearing. The defendant was willing to have another date fixed, and the District Judge fixed the 27th. On the 27th the Interpreter was absent on business, and the taking of the oath was postponed to April 3; on the 3rd it was postponed to the 10th; and on the 10th the Interpreter reported that "this day at 3 P.M., in terms of the order in the above case, I administered oath to the parties concerned in the presence of one another and in the presence of the officiating priest." Upon that the Court entered judgment for the plaintiff; and the defendant appeals.

On the 13th the defendant had presented a petition to the Court asking that the plaintiff should be required to swear that he was not in his boutique on the day the note was alleged to have been signed, and that his attorney Meera had not made a certain statement to him; and on the 27th he presented a similar petition. The District Judge seems to have taken no notice of these petitions. The

defendant contends that he did not consent to the taking of the oath on April 10; and it seems that he did not, but that he wished that the plaintiff should swear to something different from that which was prescribed in the agreement of March 11. He had no right, however, to alter the terms of that agreement; and I think that the date for taking the oath was not an essential term of the agreement. But there remains the question whether the oath was duly taken.

The appellant urges that the agreement was made under the provisions of section 9 of Ordinance No. 9 of 1895. That section enacts that if any party offers to be bound by an oath in a form common amongst or held binding by persons of the race or persuasion to which he belongs, if it is made by the other party or a witness, the Court may ask the other party or witness whether he will make the oath; if he agrees, the Court may administer it, or may authorize any person to administer it, and to take and record in writing the evidence of the person to be sworn and return it to the Court; and the evidence so given shall, as against the person who offered to be bound, be conclusive proof of the matter stated. There was no express reference in this case to the Ordinance; the settlement of disputes by an oath taken in a particular form by one party on the challenge of the other is a practice of immemorial antiquity; but I think that since this enactment came into force the procedure in all such cases should be regulated by the enactment, and no doubt the parties so intended in this case.

It was said during the argument that agreements of this kind were common, especially in Village Tribunals. After the argument I wrote to the Government Agent of the Western and Central Provinces to inquire as to the practice in the Village Tribunals with regard to such agreements; and I have received replies, with the records of several cass in Village Tribunals, which were decided on the taking of an oath in pursuance of such agreements. The procedure in all cases where the oath is not taken in Court is this: the words to which the party is to swear are recorded by the President; the parties go to the church or mosque or temple, where the words are sworn to; no questions are put to the party swearing; the Court then takes on oath the evidence of the officer who was present that the oath was taken; and then gives judgment. It is not customary for the officer authorized to administer the oath to record in writing what takes place; and although it is said that he reports to the Court that the oath was taken in the words written in the order of the Court I cannot find in any of the cases sent to me any record of any such report in writing. This practice is not sanctioned by the Ordinance, which requires the person authorized to administer the oath " to take and record in writing the evidence of the person to be sworn and return it to the Court. "

In the present case the officer who was authorized to administer it reported in writing to the Court as I have stated above; but the

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appellant objects that that is not a sufficient record of the evidence of the person sworn. The Court, in its order appointing the officer in whose presence the oath was to be taken, records the very words of the oath, and he reports that he administered it in the terms of the order. In D. C., Ratnapura, 1,374,[1] this Court held that a similar report was sufficient. The Ordinance does not make the report conclusive as to the fact of an oath having been taken, or as to its having been taken in the presence of the parties, or as to the words sworn to, but enacts that the evidence so given shall, as against the person who offered to be bound, be conclusive. If that person were to deny that the report was true, or (as in this case) were to deny that he was present, the Court could take the oral evidence of the officer or of others who were present; but *primâ facie*, I think the report is sufficient.

I think, however, that in every case of an order for the taking of an oath under the enactment the Court should direct the person appointed to administer it to record in writing at the time it is administered the words sworn to, setting them out in his report, and not merely referring to the order.

In the present instance I should hold the report to be *primâ facie* sufficient. And as the defendant did not appear in Court and make any objection on the day appointed—the 10th, the day to which the further hearing had been adjourned on the 3rd—I should dismiss this appeal with costs.

WOOD RENTON J.—

In this case, which raises an interesting and important question of practice, I have the misfortune to differ in the result from the rest of the Court. The respondent sued the appellant and one Adaikkalam Kangany in the District Court of Badulla on a promissory note for Rs. 460.79. alleged to have made by them in his favour. Judgmnet was entered against Adaikkalam Kangany by default; and on the same day, March 11, 1908, the appellant's proctor stated that his client was willing to submit to judgment, provided—and here I propose to quote the journal entry in full—"Plaintiff (*i.e.*, respondent) will swear in the mosque that he is satisfied with the truth of the entries in the books: Meera Lebbe (attorney), that first defendant (*i.e.*, appellant) put his mark to the note, and both defendants received the consideration at the time: Meera Lebbe (witness), that he saw first defendant put his mark and both receive the money. The oath to be taken in the mosque (behind the jail) in the presence of Mr. Abdul Rahaiman, on Friday, 13th instant, between 1 and 4 P.M." The District Judge added the following note to this entry:—"For report on 14th instant." The oath was not, in fact, taken till April 10. Between March 11 and that date there had been several postponements, for one cause and another, of the ceremony; and the appellant had presented a petition

[1] *S. C. Min., March 20, 1907.*

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to the District Judge praying that the point as to which the respondent was to swear should be modified, and stating, in effect, that if this prayer was not granted, he withdrew his submission to the arbitrament of the oath. I do not consider it necessary to deal with the allegations in the petition in detail, for I think that they disclosed no case which would have justified the Court in permitting any such withdrawal. I assume for the moment that the present case comes under the Oaths Ordinance (No. 9 of 1895). That Ordinance prescribes (section 9, sub-section 4) the procedure to be followed where a party refuses to take the special statutory oath or affirmation, but it contains no provision for the revocation of consent by the party who offers to be bound by such an oath or affirmation and, so far as I am aware, there is no local decision precisely in point. The question whether and under what circumstances revocation of consent should be permitted has, however, been considered in India under Act X. of 1873, of which "The Oaths Ordinance, 1895," is an almost literal reproduction. In *Lekhraj Singh v. Duhlma Kuar* [1] the parties had agreed to have the case decided by the oath of a third person after local inquiry. Stuart C.J. held that this was really a reference to arbitration which would have been valid if all the defendants had agreed to it, but that, in the absence of such consent, it was illegal. But Oldfield J. added that, assuming the agreement in question to come under Act X. of 1873, it was revocable before the referee had made his award. In *Ram Narain Singh v. Babu Singh*,[2] however, this latter dictum was not followed, the Court holding that revocation of consent to be bound by an oath in a particular form under section 9 of Act X. of 1873 ought not to be allowed, except "on the strongest possible grounds." A more serious difficulty, however, is raised by what actually transpired at the time of, and subsequently to, the taking of the statutory oath in the present case. The relevant journal entries are these:—

"April 10, 1908.—Parties absent. *Vide* Mudaliyar's report. Enter judgment as prayed for."

"April 10, 1908.—Decree entered against first defendant."

The effect of these entries is that the learned District Judge, on receiving Mr. Abdul Rahiman's report, straightway, on the strength of that report, and in the absence of the parties, gave judgment against the first defendant. The report is in the following terms:—

"Sir,—I beg to report that this day, at 3 P.M., in terms of the order in the above case, I administered oath to the parties concerned in presence of one another and in the presence of the officiating priest.

"April 10, 1908. A. S. Abdul Rahaiman."

[1] *(1880) I. L. R. 4 all. 302.*

[2] *(1895) I. L. R. 18 all. 46.*

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The question that we have now to decide is whether, on these materials, the learned District Judge was entitled to enter judgment against the appellant. I think that he was not, and I propose to give my reasons as briefly as possible.

(1) The present case comes under " The Oaths Ordinance, 1895. " Both sides were represented by proctors, and understood it in that sense. Moreover, apart from any question as to the intention of the parties, I should say that an offer by one litigant to submit to judgment if the others swears to certain facts in a mosque is an offer to be bound by an oath in a particlar form within the meaning of sections 8 and 9 of the Ordinance. I think that any oath taken under circumstances which invest it with a peculiar sanction provided that it satisfied the other conditions indicated in section 8, would fall under these sections, even if there was nothing distinctive in the words of the oath itself. We have not, therefore, to consider here the legal effect of an agreement between parties to stake their dispute on the result of something in the nature of an ordeal undergone by one or other or both of them. The result of such an ordeal, conducted without the knowledge or privity of the Court, could always, I suppose, be made the basis of a judgment by consent. Whether the Courts would allow, or consciously be any party to, the determination of a lawsuit by the application of some test bearing a strong analogy to a wager—*e.g.*, to cite an illustration mentioned in the argument, if the plaintiff stood on one leg for half an hour—is a point that can be formally decided when a necessity for its determination arises.

(2) If the case comes under " The Oaths Ordinance, 1895, " and the oath is administered out of Court, the person authorized so to administer it must " take and record " the evidence in writing, " and return it to the Court. " This is expressly required by section 9, sub section (2). It is only to " evidence so given " that section 9, sub-section (3), attaches the privilege of being " conclusive proof of the matter stated." The sole form in which, under the Ordinance, such " matter " can be " stated " to the Court is in the written return for which section 9 (2) provides. Moreover, it is, I think, noteworthy that the failure to make such a return is not included among the irregularities which, under section 10 of the Ordinance, do not invalidate the proceedings or render the evidence inadmissible. That section refers only to irregularities in the form of taking or administering the oath. It is unnecessary and inadvisable to attempt to lay down any general rule as to the form in which evidence given out of Court under the provisions of section 9 (2) of the Oaths Ordinance, 1895, should be recorded. I suppose that it is in the Gansabhawa Tribunals that recourse is had to these provisions most frequently, and with the greatest measure of success, and it is not to be expected that evidence taken under such auspices should be written down with the fullness and the precision that one

would look for at the hands of a trained professional Judge. But, in my opinion, it is not sufficient for the Commissioner of the Court, if I may describe him by that name, merely to report, as in the present case, that he administered the oath in terms of the order prescribing it. Some contemporaneous record there must be of what was said under the sanction of that oath. If the special oath were, as under section 9 (2) if may be, administered by the Judge himself in Court, there could, I suppose, be no question that it was his duty to record in writing the evidence given in pursuance of it at the time when it was given. I do not see that that duty is any the less incumbent upon a Commissioner to whom the Judge has delegated it; and the more accurately and completely it is discharged by Court or Commissioner, the more surely will the important and salutary provisions of the Oaths Ordinance be made effectual. Frequently the sanction of a special oath is the only means by which the Court can get at the truth. Unless the evidence given under that sanction is carefuly taken down, the door is left open for every sort of evasion of the results of the reference to the oath. I respectfully dissent from the view expressed by the Supreme Court in D. C., Ratnapura, 1,374,[1] that section 9 (2) of Ordinance No. 9 of 1895 is sufficiently complied with, *primâ facie* or otherwise, by a return that the oath has been administered "as directed by the Court." None of the other local decisions that I have been able to find are in point. But the available information as to the history in Ceylon of the procedure which the Ordinance consecrates is not inconsiderable. The delation of disputes to oath of party is probably as ancient as civilization, and has in all ages been made the subject of legislative recognition and regulation. We see it in the *jus jurandum* of Roman (*Inst. IV., 13, Dig. XII., 2*) and Roman-Dutch (see *Nathan, Com. Law, S. A., IV., S. 2190*) Law, and in the *serment décisoire* of the French Code Civil (Arts 1358 *et seq.*) and of most of the continental Civil Codes formed after the French model (*e.g.*, the Italian, Art. 1364, the Spanish, Art. 1236, and the Portuguese, Arts, 2523, 2524). In Ceylon the regulation of the decisory oath commenced early under British rule. A Proclamation of 1819 (No. 5 of 1819) prohibited the administration of extraordinary oaths. "No. 5 of 1819," says Sir Charles Marshall (*Judgments, p. 142*), "was introduced from a conviction that the practice of admitting on particular occasions oaths or rather imprecations differing from the usual appeal to the Deity, such as that sometimes resorted to by the Cingalese, of swearing on the heads of their children (*cf. Hatingira v. Andirissa* [2]), would only bring into disrepute and contempt the obligation of the ordinary oath, without producing any greater degree of veracity in what is deposed under the sanction of extraordinary ones." This prohibition was maintained by the 26th rule of practice under Ordinance No. 6 of 1834, which first provided for

[1] *S. C. Min. March 20, 1907.*

[2] *(1900-01) 1 Browne 106.*

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the introduction of the English rules of evidence into Ceylon. Rule 26 also directed that " all witnesses shall be sworn according to the form prescribed by the rites of the religion which they respectively profess." Sir Charles Marshall states (*Judgments, p. 106*) that prior to Ordinance No. 6 of 1834 " oaths by parties decisory and others, " had been abolished, and as late as 1875 (see *Deonis de Zoysa v. de Abrew* [1]) Morgan C.J. held that the Courts ought not to recognize them except as the basis of a judgment by consent. Ordinance No. 3 of 1842 allowed the substitution of a solemn affirmation for an oath in certain cases. Ordinance No. 9 of 1895 consolidates the law as to oaths and affirmations. In its 8th and 9th sections it makes provision for the giving of evidence, which may or may not be of a " decisory " character, under the sanction of a particular form of oath, thus combining the " decisory oath " and the special religious or ceremonial oath of the old procedure. I do not think that anything in the nature of an ordeal comes within the purview of the Ordinance of 1895. It is an enactment regulating the giving of evidence; and I think that the provisions which require such evidence to be recorded in writing are peremptory. The report that we have received since the argument from the Government Agent of the Western Province shows that the law is already understood and applied in that sense by the Village Tribunals within his jurisdiction. " The evidence, " he says, " is taken and recorded in writing at the time and place where the oath is administered. In the Central Province, on the othr hand, no record is made. I am strongly of opinion that we should enforce what seems to me to be the plain letter of the Statute Law, and that the practice of the Village Tribunals in the Western Province should be approved. Although the point now before us was not taken in the Court below or in the petition of appeal, it arises on the face of the record, and we have at our disposal all the materials necessary for its decision.

I would set aside the decree appealed against, and send the case back for a new trial on evidence given either in the ordinary way, or, if the parties so desire, under the provisions of sections 8 and 9 of " The Oaths Ordinance, 1895," as I have tried to interpret them. The appellant should have the costs of this appeal. All other costs should abide the event.

GRENIER, A.J.—

I have had the advantage of reading the judgment of my Lord and my brother Wood Renton in this case, and as the facts have been fully stated in their judgments, it becomes unnecessary for me to recapitulate them. Undoubtedly the procedure in all cases where parties agree to abide by the decisory oath should be governed by the Oaths Ordinance, and I agree with the rest of the Court in holding so. At the argument of the appeal I was strongly of opinion that

[1] (*1875*) *Ram. 1872-76.*

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the objection raised by the appellant's counsel, founded on the non-observance of the strict letter of the provisions contained in section 9 (2) of the Oaths Ordinance, was, in the circumstances of this case, of so technical a nature that it should not be allowed to prevail, and I am of the same opinion still. I agree with my Lord that *primâ facie* the report is sufficient, especially when, as pointed out by him, the defendant did not appear in Court and make any objection on the day appointed for the purpose. The practice adopted by me in the District Court of Colombo under the Oaths Ordinance was to swear the officer authorized to administer the oath in the presence of the parties in open Court after the oath agreed upon had been taken, and then record his evidence as to the nature of the oath that he had administered and the words used by the party taking the oath.

If no objection was raised by the challenging party, judgment would be entered as previously agreed upon. It certainly would be advisable to conform strictly to the provisions of section 9 (2); but the report sent in this case contained *primâ facie* proof in writing that the oath had been administered in terms of the order of Court, and I fail to see in what way the defendant has been prejudiced by the evidence of the persons to be sworn not having been formally taken and recorded in writing.

Appeal dismissed.

I would dismiss the appeal.