Present : Lascelles C.J.

1912.

DHARMASENA v. SUDUMANA et al.

268—C. R. Chilaw, 15,155.

Decisory oath—Oath must be recorded in writing by person appointed to administer oath.

The failure of the person appointed to administer a decisory oath to take and record in writing the evidence of the person sworn or affirmed is a fatal irregularity.

LASCELLES C.J.—If the person charged to administer the oath is allowed at a later stage to appear in the Court and give evidence *ex parte* from his recollection of what was said on oath, it is obvious that the intention of the Ordinance will not have been carried out.

THE facts are set out in the judgment.

R. L. Pereira, for the plaintiff, appellant.—The interpreter who was appointed to administer the oath did not record the oath taken in writing at the time the oath was administered. That omission is a fatal irregularity. See *Segu Mohamadu v. Kadiravail Kangany.*[1] The oath in this case was not taken at the altar, but in the compound of the church.

Samarawickrema, for the defendants, respondents. The case cited does not hold that a written report is essential. The person who administered the oath has given sworn evidence in Court soon after the oath was administered, when the fact was fresh in his mind, that the oath was taken.

It would be idle to contend that he should have himself put his evidence in writing. If his written report may be admitted, his sworn testimony should carry greater weight.

Pereira, in reply.—The plaintiff was not present when the interpreter gave his evidence, and did not have an opportunity to cross-examine him.

August 5, 1912. LASCELLES C.J.—

This is a case in which the claim in the action was for damages for injury to a fence. The entry in the journal under date July 3 is as follows: " Case settled. Fourth defendant to swear that the portion of fence twenty-eight fathoms referred to did not belong to plaintiff at time of removal. To take oath at Badiruppuwa

[1] *(1908) 11 N. L. R. 278.*

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church to-morrow at 5.30 P.M." It appears that on the following day, that is, on the 4th, the oath was taken by the fourth defendant; and on the 5th, the next day, the interpreter appeared in Court and was examined on oath *ex parte*, and he deposed that he administered the oath to the parties in this case, and that the fourth defendant had sworn that when he pulled up the twenty-eight fathoms of barbed wire the fence did not belong to the plaintiff; and he also deposed that he, that is, the fourth defendant, took the oath at Bandiruppuwa church.

The substantial objection to the procedure is that sub-section (2) of section 9 of " The Oaths Ordinance, 1895, " has not been complied with. The section, dealing with decisory oaths, provides that the Court may authorize any person to administer the oath, and to take and record in writing the evidence of the person to be sworn or affirmed and return it to the Court. Now, there is no doubt but that in this case the procedure prescribed by the section has not been complied with; and the only question that I have to consider is whether the failure of the interpreter to take and record the evidence of the persons sworn or affirmed is a fatal irregularity. In my opinion the irregularity is fatal to the proceedings. The case here is a much stronger one than the case of *Segu Mohamadu v. Kadiravail Kangany*,[1] because there was no contemporaneous report of the evidence made at all. All that happened was that the interpreter appeared in Court the day after he had administered the oath and recorded the substance of the evidence in a very perfunctory manner. I think it would be straining the language of the Ordinance unduly to allow this procedure as a compliance with the Ordinance. The object of the procedure is to have a distinct, complete, and intelligible record of the evidence given under the sanction of the oath. If the person charged to administer the oath is allowed at a later stage to appear in the Court and give evidence *ex parte* from his recollection of what was said on oath, it is obvious that the intention of the Ordinance will not have been carried out. The loose way in which the statement on oath has been reported has left room for the statement in the petition of appeal that, as a matter of fact, the oath was not taken in the church at all, but in the compound of the church; and the language reported to have been used by the fourth defendant seems to me, to point to the fact that he gave his evidence in a very guarded and reserved way. I am by no means satisfied that justice has been done in this case, apart from any technical question. I would set aside the judgment in the case, and direct the case to be tried in the ordinary course. The appellant is entitled to the costs of the appeal.

Set aside.

[1] (1908) *11 N. L. R. 278.*