June 20, 1911

Present : Lascelles C.J. and Middleton J.

SIMAN *v.* SILUNDUHAMY *et al.*

85—*D. C. Matara,* 1,438.

Oaths Ordinance, No. 9 of 1905—Agreement to take the oath—Subsequent refusal—Procedure.

Where a party to a suit agrees to take the decisory oath and then changes his mind, he is in the same position as a person who had originally refused to do so ; in such a case the Court should record the fact of the refusal to take the oath and any reason assigned for the refusal, and then proceed to try the case in the ordinary course.

THE facts are set out in the judgment of Lascelles C.J.

Allan Drieberg, for the appellant.

A. St. V. Jayewardene, for the respondents.

June 20, 1911. LASCELLES C.J.—

This is a testamentary action in which two of the heirs take exception to certain items in the account of the administrator, namely, an item of Rs. 25, which the administrator claims to have expended out of his own pocket for funeral expenses, and a further item of Rs. 51. Now, when the objections were heard in Court, an agreement was arrived at to refer the matters in dispute to the decisory oath of the parties ; and it was agreed that if the administrator should swear in the temple that he had spent his own money to the extent of Rs. 25 for funeral expenses, the amount should be included, otherwise not, and also that if he swore that Rs. 51 was due from one Pedris, the amount should be included in his accounts. Now, having agreed to be bound by the decisory oath, the administrator changed his mind, and announced his change of mind to the Court, and ultimately he did not appear to take the oath at the time and place appointed for the purpose. The District Judge has held that, inasmuch as the administrator has failed to take the oath in question, he is not entitled to the items in his account that were in dispite. Now, this is a matter which turns on the construction of section 9 of the Oaths Ordinance of 1895. There are two cases in which this section has been discussed, namely, *Fernando v. Perera*[1] and *Sinnetamby v. Vallinatchy.*[2] In both these cases Mr. Justice Wood Renton discussed the point now under consideration, namely,

[1] *(1909) 12 N. L. R. 206.*

[2] *(1906) 10 N. L. R. 62.*

as to what ought to be the result where a person, who has originally agreed to take an oath, has subsequently changed his mind and refused to take the oath. Mr. Justice Wood Renton, in the first of the cases to which I have referred, came to the conclusion that the person who having first agreed to take the oath and then changed his mind is in the same position as a person who had originally refused to do so, and that the proper course in such a case was that the Court should record the fact of the refusal to take the oath and any reasons assigned for the refusal, and then proceed to try the case in the ordinary course. If we agree with the principle laid down in this case, the appeal is bound to succeed so far as it relates to the two disputed items in the administrator's account. Personally, I always have been of opinion that these two judgments contain the most logical explanation of section 9 of the Oaths Ordinance, and they possess the advantage of laying down a complete rule of procedure ; whereas, on the other hand, if we construe sub-section (4) of section 9 so as to refer only to the case where the party originally refused to take the oath, there is a *casus omissus.* I would follow the judgments in the two cases which have been cited, with the result that the appellant is entitled to succeed so far as it concerns the two items in the administrator's account ....

I would allow the appeal so far as it relates to the items of Rs. 51 and Rs. 25, and I think the appellant is entitled to the costs of this appeal

MIDDLETON J.—

I agree. I think that the construction given to section 9 of Ordinance No.9 of 1885 by my brother Wood Renton in the two cases of *Sinnetamby v. Vallinatchy*[1] and *Fernando v. Perera*[2] is a correct one. If further authority is needed it is to be found in the case of *Iyanohamy v. Carolis Appu,*[3] in which Chief Justice Bonser came to a similar decision, and on which my brother Wood Renton founds his decision practically in *Sinnetamby v. Vallinatchy.*

As regards sub-section (4), section 9, I think here the note that has been taken down by the Judge with regard to the facts concerning the refusal may subsequently become relevant upon the hearing of the evidence to decide the actual issue which had been referred to the decisory oath, and then the Judge can, if he is satisfied that the reason given by the person who had agreed to take the oath and subsequently refused to do so is inadequate and a mere quibble, as Chief Justice Bonser said in his judgment, take that fact into consideration upon the decision of the case.

I agree that the appeal should be allowed with costs.

Appeal allowed.

[1] *(1906) 10 N. L. R. 62.* [2] *(1909) 12 N. L. R. 206.* [3] *(1900) 4 N. L. R. 78.*