1906.
November 7.

Present: Mr. Justice Wood Renton.

SINNETAMBY v. VALLINATCHY et al.

C.R., Batticaloa, 11,445.

"Oaths Ordinance, 1895," ss. 8 and 9—Refusal of plaintiff to take decisory oath after having agreed to take it—Dismissal of action in consequence.

Where a party agreed to be bound by a decisory oath and then failed to take it, and where the form of oath nor its nature was stated,—

Held, that the case fell under sub-section (4) of section 9 of the Oaths Ordinance, No. 9 of 1895, and that the Commissioner should therefore have proceeded to record the reason for the refusal as therein provided.

THIS was an action on a promissory note, in which the endorsee sued the makers. The makers denied the endorsement, and pleaded payment to the payee. On the day of trial all that transpired was as follows:—

23rd August, 1906. Parties present save first defendant.

D. W. Kadramer, for the plaintiff.

Guruswamy (with him *Kandappa*), for defendants.

Guruswamy is prepared on behalf of his client to let judgment be entered, if plaintiff would take a decisory oath.

The plaintiff is prepared to do so.

G. W. WOODHOUSE,
Commissioner.

The plaintiff has failed to take the oath. The action is dismissed with costs.

G. W. WOODHOUSE,
Commissioner.

The plaintiff appealed.

E. H. Prins, for appellant.—The dismissal is wrong. It is not shown what the oath offered was. This is important, for the Ordinance in section 8 provides against oaths which are repugnant to justice or decency, and which affect third persons. The Supreme Court has condemned as forbidden an offer " to swear on another's head " [see *Hatingira v. Andrissa* (1)]. Nor is it stated where the oath was to be taken. In *Banda v. Banda* (2) it was held that it was wrong to dismiss plaintiff's action by reason of his failure to attend at a place where the defendant has elected to swear. The refusal here is not merely arbitrary, as referred to in *Narain Singh v. Babu Singh* (3). The appellant seems to have had good ground for withdrawing. The case would therefore fall under sub-section

(1) (1900) 1 *Browne* 106. (2) 1 *Tambayah* 35. (3) *I. L. R.* 18, *All.* 46.

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(4) of section 9 of the Ordinance. If that be so, the dismissal is wrong, for the Commissioner should have recorded as part of the proceedings "the nature of the oath or affirmation proposed, the fact that he was asked whether he would make it and that he refused it, together with any reason which he may assign for his refusal." The witnesses, too, should have been called [*Iyanohamy v. Carolis Appu* (1)].

Redlich, for respondent.—No objection seems to have been taken as to the oath offered. Even the petition of appeal is silent as to this objection. When parties to civil suits agree to be bound by an oath, it is conclusive. So held by Lawrie J. in *Mohideen v. Nambirale* (2). The plaintiff's refusal after having first consented should not be listened to, and his action is therefore rightly dismissed.

Prins, in reply.

7th November, 1906. WOOD RENTON J.—

In this case the plaintiff, appellant, as endorsee of a promissory note for the sum of Rs. 120, has sued the defendants, who are the makers. In the answer the defendants admit the making of the note, but they deny the endorsement to the appellant, and plead, further, payment in full to the plaintiff, and that the appellant was himself well aware of this fact. When the case came on to trial the defendant's counsel stated that he was prepared to allow judgment to be entered against them, "if"—and here I am following the very words of the Requests Court record—"plaintiff would take a decisory oath." The learned Commissioner then proceeds to record the fact that the plaintiff was prepared to take the oath in question, and he (the Commissioner) signs this entry. Immediately below his signature he makes two further entries, which are as follows:—

"The plaintiff has failed to take the oath."

"The action is dismissed with costs."

All the entries to which I have referred are under the same date, and so far as I can see the whole transaction took place at the same time and in open Court. It appears to me—and the point was in fact conceded here by counsel for the respondents—that this is the only interpretation which the entries of the record, as they stand, will bear. There is nothing stated as to the Court having ordered the decisory oath to be tendered in any other way than in the Court itself. Under these circumstances, I have to consider the application of the Oaths Ordinance of 1895, which regulates proceedings of this kind. In virtue of that Ordinance, the Court is empowered in any judicial proceeding to tender to any party or witness, who is willing to be bound by it, an oath or affirmation which is common

(1) (1900) 4 *N. L. R.* 78. (2) (1896) 2 *N. L. R.* 147.

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amongst, or held obligatory by, persons of the race or persuasion to which he belongs. If the oath so tendered by the Court is accepted by the party or witness, it is the duty of the Judge, after the oath or affirmation has been ordered, to record the evidence which it is intended to safeguard; and the Ordinance goes on to provide that evidence so given shall be conclusive proof against a party or witness of the matter which he states. On the other hand, if the oath tendered has been refused—and my interpretation of the statute on this point is covered by judicial decision (*vide* the case of *Iyanohamy v. Carolis Appu*, which is reported in 4 *N. L. R.* 78)—it is the duty of the Court simply to record as part of the proceedings the nature of the oath or affirmation proposed, and the fact that it was tendered and refused, together with any grounds which the party or witness may choose to assign for such refusal. There is no power under that section to enter judgment against the party who, or whose witness, was responsible for the refusal. In my opinion, the whole proceedings of the learned Commissioner of Requests in the present case have been at variance with both the letter and the spirit of the Ordinance. I think that, even if the party or witness to whom an oath is tendered accepts it, it is desirable that the nature of the oath and the circumstances under which it is administered, as well as the evidence which is given under its sanction, should be recorded, for if these cases come up in appeal we ought to be in a position to see that the oath or affirmation tendered in fact does really satisfy section 8 of the Ordinance of 1895. But where the decisory oath is refused (and I think this observation applies also to a case of a person who at first agreed to be bound by the oath, and afterwards, before he has taken it, withdraws his consent), it seems to me that the Court has no option. The case must then be heard on its merits, and the refusal of the party or witness to take the decisory oath is only an element, of which account should be taken in weighing the value of his evidence.

I set aside the judgment and decree appealed against, and send the case back for re-trial. It will be competent for the defendant's counsel, if so advised, to renew at the second trial his former proposed reference to a decisory oath. If such an offer is made, the learned Commissioner of Requests should follow the procedure which the Ordinance lays down, and which I have also ventured to put before him in the course of this judgment. If there is no offer to be bound by a decisory oath, the case must be tried and determined in the usual way. I think the appellant should have all costs of the appeal and in the Court below.

Appeal allowed: case remanded.