1900.
July 6.

IYANOHAMY *v.* CAROLIS APPU.

P. C., Balapitiya, 20,312.

Procedure—Ordinance No. 9 of 1895, s. 9—Oath proposed by complainant—Refusal of defendant to take such oath—Right of Magistrate to adjudge against defendant without hearing witnesses.

If under section 9 of Ordinance No. 9 of 1895 a defendant refused to take the oath proposed by the complainant, a Magistrate cannot decide the case against the defendant without hearing the witnesses cited. He should record the fact that the defendant refused to take the oath and, when he comes to weigh the evidence heard, he may take that fact into consideration.

IN this case of maintenance, after the Police Magistrate had heard several witnesses for the applicant, the applicant informed the Court that she was willing to allow the case to go against her if respondent would swear on the *Jataka Pota*, a book held sacred by the Buddhists, that the children are not his. The respondent agreed to take that oath.

The Police Magistrate then ordered as follows:—

"As this is a case as much of a civil nature as of criminal, I "allow the oath under section 9 of Ordinance No. 9 of 1895. "Respondent to swear on the full-moon day on the 12th instant in "the Totagamuwa Vihare, keeping his hand on the *Jataka* book, "that he is not the father of the applicant's two children. If he "does so, the applicant's case will be dismissed. The interpreter "will administer the oath. Case to be mentioned on 13th."

On the 13th June the interpreter reported that the priest of the vihare refused to allow the swearing to take place within the place where the images of Buddha were kept, but that the swearing might be done in the outer verandah or at the dewale. The respondent, however, refused to swear anywhere than inside the vihare.

The Magistrate thereupon ordered the respondent to pay to the applicant Rs. 4 a month as maintenance, being of opinion that the refusal of the respondent to swear at the outer verandah of the dewale was an obvious attempt to evade the spirit of the order made by him.

The respondent appealed.

Van Langenberg, for appellant.

A. Drieberg, for respondent.

1900.
July 6.

BONSER, C.J.—

In this case the Magistrate has taken a mistaken view of the Ordinance No. 9 of 1895. The appellant was defendant in a maintenance application. The mother of two children sought to obtain an order of maintenance for them, alleging that the appellant was their father, and that he neglected to maintain them. She gave evidence and, after some witnesses had been called, the woman said that she was willing to allow the case to go against her if the defendant would swear on the *Jataka Pota* that the children were not his. The Magistrate recorded that the defendant was willing to take this oath, and made the following order:—" The defendant to swear on full-moon day, the 12th instant, " in the Totagamuwa Vihare, keeping his hand on the *Jataka* " book, that he is not the father of the two children. If he " does so, applicant's case will be dismissed. The Mudaliyar " Interpreter will administer the oath. Applicant will pay his " expenses." He then adjourned the case to Wednesday, the 13th. On that day the parties attended again, when it appeared that the priest had refused to allow the swearing to take place within the room where the images of Buddha were kept. He was willing—and the applicant was willing—that the oath should be taken in the outer verandah, and the applicant was also willing that the defendant should swear at the dewale or at any other place which the priest would allow, but the defendant refused to swear anywhere but inside the vihare, which the priest forbade. The Magistrate characterized this as a piece of quibbling on the defendant's part to avoid the necessity of taking the oath, and made an order against him. Assume that the defendant was quibbling, yet that did not justify the Magistrate in deciding against him without hearing what he and the witnesses cited to attend had to say in defence. All that the Magistrate was justified in doing was to record the fact that the defendant refused to take the oath, with his reasons therefor. No doubt when he came to weigh the evidence, if he was satisfied that the reason given by the defendant was inadequate and a mere quibble, and that the defendant was really afraid to take a solemn oath, he might take that fact into consideration. But he must hear what both sides and their witnesses have to say before he decides the case.

The case must, therefore, go back for the hearing to be continued.