1923.

Present : Schneider J.

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268—P. C. Kandy, 8,218.

Criminal Procedure Code, s. 306 (4)—Order dismissing application for maintenance in the belief that defendant had taken the decisory oath—Order vacated by consent of defendant's proctor—Objection taken at trial that the Magistrate had no jurisdiction to vacate the order.

Where a Magistrate made an order dismissing an application for maintenance it is open to him to vacate that order upon the consent of both parties.

THE facts are set out in the judgment.

Fonseka, for defendant, appellant.

Garvin, for the applicant, respondent.

May 29, 1923. SCHNEIDER J.— 1923.

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This is an appeal by the defendant who was sued for maintenance of an illegitimate child by the child's mother. The application came on for hearing on February 17, 1923, when there appears to have been an agreement that if a certain oath were taken at the Maligawa by the defendant and his witnesses, the application was to stand dismissed. Otherwise an order for maintenance was to be entered. A return to the report was to be made on the 19th, but the report appears to have been made on the 17th, and so far as the record shows, in the absence of the parties, the Police Magitrate, acting upon this report and thinking that the conditions had been reasonably fulfilled, dismissed the application. But it was subsequently brought to his notice that the returnable date of the report was on the 19th, and further that the oath had not been rightly taken. Mr. R. W. Jonklaas, who appeared for the defendant rightly consented to the order of dismissal being vacated. The record shows that on March 10 the parties were present, and the trial was fixed for March 24. On that day the trial was postponed for April 7, as the defendant was not ready owing to the illness of a witness whom he required. When the trial was taken up on April 7, Mr. George de Silva appeared for the defendant and urged that it was not open to the learned Police Magistrate to vacate his order of February 17. The Magistrate who made the order on February 17 and vacated it was Mr. Whitehorn. The trial was taken up on April 7 before Mr. Stevens. Mr. Stevens over-ruled Mr. Silva's objection, holding that the order of February 17 had been made under a misapprehension, and further that Mr. R. W. Jonklaas had stated to him that the order dismissing the application had been vacated of consent. Mr. Stevens was about to proceed to inquire into the case on its merits, when Mr. George de Silva stated that he was not ready to go on with the trial and moved for a postponement. This was refused for the good reason that the trial had been twice postponed, once to suit the convenience of the defendant. Upon this the record is " Mr. de Silva and the defendant leave the Court premises and decline to take part in the proceedings." The learned Police Magistrate, in my opinion, very rightly proceeded with the trial, and made the order from which this appeal is taken. In regard to the appeal I need only say that there are no reasons whatever for my interfering with the order of the Magistrate directing that the defendant should pay Rs. 3 a month for the maintenance of the child. The evidence is all one way, and there is no reason why that evidence should not be accepted and acted upon. Counsel for the appellant cited section 306 (4) of the Criminal Procedure Code, and contended that according to the provisions of that section it is not open to a Police Magistrate to alter or review his judgment. It seems to me that the

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language of section 306 which sepaks of an acquittal and conviction appears to confine that section to strictly criminal cases. It has been pointed out in a very large number of cases that proceedings under the Maintenance Ordinance are not purely of a criminal nature, and that the Ordinance only adopts the procedure prescribed for Police Courts in order to provide a speedy means of obtaining relief under the provisions of the Ordinance. I would, therefore, take the view that section 306 of the Criminal Procedure Code does not apply to the order made by the Magistrate on February 17, 1923. In the circumstances the question therefore arises whether it was open to the Magistrate to vacate that order upon the consent of both parties. Proceedings on general principles I see no reason why he should not, because the claim is a purely civil matter. Proceedings in the case clearly show that the defendant's proctor, Mr. Jonklaas, had consented to the vacating of the order of February 17. The record shows more. It shows that on March 10 the defendant himself accepted that to be the position, and consented to the case being fixed for trial on April 7. In view of these facts, it seems to me that Mr. George de Silva's contention was rightly rejected by the Magistrate.

I wish to state that it seems to me that Mr. de Silva's and the defendant's conduct in leaving the Court at the juncture they left the Court was not at all respectful to the Court.

I dismiss the appeal, with costs.

Appeal dismissed.