

for the enforcement of the recovery of income tax or land revenue. It seems to me that, had the Legislature intended to impose upon the Magistrate the duty of judicial inquiry and finding, it would have used appropriate words. In the absence of such words I find it impossible to believe that the Legislature intended to confer upon the youngest and most inexperienced officer a function of trying such a question, for instance, as the legality of the imposition of a tax.

In my opinion the duty imposed on the Magistrate is purely ministerial, and provides the means whereby the recovery of the taxes could be enforced by a legal authority. This petition is therefore dismissed.

Before Mr. Justice Knox and Mr. Justice Aikman.

QUEEN-EMPRESS v. NANNI AND OTHERS.*

Act No. XLV of 1860 (Indian Penal Code), sections 268, 290—Public nuisance—Soliciting for purposes of prostitution.

Held that the soliciting for purposes of prostitution of passers by on a public road is not a public nuisance as that term is defined in section 268 of the Indian Penal Code.

THIS was a reference made under section 438 of the Code of Criminal Procedure by the Sessions Judge of Shahjahanpur. Three persons, prostitutes, being on a public road in Shahjahanpur about midnight, accosted a person who was going along the road and solicited him to go with them. The person thus accosted, being a Reserve Inspector of Police, caused the three women to be taken into custody, and they were tried for and convicted of the offence punishable under section 290 of the Indian Penal Code, *viz.*, a public nuisance. The accused applied for revision of their convictions and sentences to the Sessions Judge, who, being doubtful whether the acts complained of could properly be regarded as constituting a public nuisance, as that term is defined in section 268 of the Indian Penal Code, referred the case to the High Court. On this reference the following orders were passed.

KNOX, J.—This is a reference by the Sessions Judge of Shahjahanpur. The District Magistrate at Shahjahanpur has convicted three persons, prostitutes, of an offence which he

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* Criminal Reference No. 345 of 1899.

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considered they have committed under section 290 of the Indian Penal Code. The evidence against them shows that all three came out on to a public road, and, thinking that a Reserve Inspector of Police, who was passing by, was a soldier, called out to him and solicited him to go back with them. The District Judge before whom the case was taken in an application in criminal revision was doubtful whether an annoyance caused in a public place to a single person could be brought under the definition of a public nuisance, on the ground that it might have been any member of the public to whom the annoyance was caused. He has accordingly submitted the case to this Court under section 438 of the Code of Criminal Procedure. Section 290 renders punishable what are known as public nuisances in the Indian Penal Code. The definition of public nuisance is to be found in section 268. A person is guilty of a public nuisance when (omitting that part of the section which does not refer to the present case) he does an act which must necessarily cause annoyance to persons who may have occasion to use any public right. Acts of a similar kind, and more particularly the act of loitering or importuning for the purpose of prostitution, can be provided against in Cantonments by the Cantonments Act of 1889. Further, a Municipal Board may, under Act No. XV of 1883, make rules for prohibiting, preventing, and punishing such acts within the Municipality as may, in the opinion of the Board, cause, or tend to cause, annoyance to persons who have occasion to use a public right. The language used in Act No. XV of 1883 at once shows the difference between the powers given to a Municipal Board and the powers given to Magistrates under section 290 of the Indian Penal Code. In the latter case the act done is only punishable when it is an act which must necessarily cause annoyance to persons who have occasion to use any public right. We are not at the present moment considering acts or omissions which are the cause of common injury, danger, or annoyance to the public, or to the people in general, who dwell or occupy property in the vicinity. The difficulty in the present case lies in the words "must necessarily" which occur in section 268. The Magistrate was satisfied that in the present case annoyance was caused, at least so we learn from the remarks which he

has sent up to this Court along with the reference, and there can be no doubt that annoyance is frequently caused by acts of this kind. We are not satisfied that the act of the women in this case was one which must necessarily have caused annoyance. If the act, of which these women were found guilty, was an act entirely without a remedy, it might be necessary to call attention to the absence of all remedy. All that need be done in the present case is to say that the Sessions Judge is so far right when he says that the act does not fall within section 290 of the Indian Penal Code. The conviction will have to be set aside, and the fines, if paid, be refunded to the person or persons who paid them.

AIKMAN, J.—I am of the same opinion. In my judgment persons who are exercising the right of passing along a public road ought to be protected from being importuned for the purpose of prostitution. Within the limits of Cantonments such protection may be afforded by rules framed under section 26, clause 23, of the Cantonments Act of 1889; similarly within the limits of Municipalities, protection may be afforded by rules framed by Municipal Boards under the provisions of section 55, clause 1, of Act No. XV of 1883. But the sole question we have to deal with now is, whether the conduct of petitioners amounted to a public nuisance as defined in section 268 of the Indian Penal Code. I entirely concur with my learned brother in holding that it did not. The conviction and sentence must therefore be set aside.

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Before Mr. Justice Knox and Mr. Justice Aikman.

QUEEN-EMRESS v. KHEM.*

Act No. XLV of 1860 (Indian Penal Code) section 193 Criminal Procedure Code, section 164—Statement made in the course of a "Judicial proceeding"—Statement made before a Magistrate under section 164.

Held, that where a witness had made one statement on oath or solemn affirmation before a third class Magistrate under section 164 of the Code of Criminal Procedure, and again another and totally inconsistent statement at the trial of the case before a Magistrate of the first class he might properly

*Criminal Appeal No. 848 of 1898.