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1899, and they do not allege that they tendered any rent after that date. The suit was not brought until ten months' rent had become due after that date, and, therefore, under the terms of the lease set up and admitted by the defendants themselves, they are liable to ejectment. Upon this ground alone I would decree the claim for ejectment and would agree with the order proposed by my learned brother.

BY THE COURT:—

The order of the Court is that the appeal is decreed, the decree of the Court below is varied, and the plaintiffs' claim is decreed in full with costs in all Courts.

Appeal decreed.

REVISIONAL CRIMINAL.

1904
February 12.

Before Mr. Justice Knox and Mr. Justice Aikman.

EMPEROR *v.* GHULAM MUSTAFA.*

Criminal Procedure Code, section 122—*Act No. X of* 1873 (*Indian Oaths Act*) *section* 4—*Security for good behaviour—Inquiry into fitness of surety—Power of Magistrate in such inquiry to take evidence upon oath.*

Held that a Magistrate in inquiring under the provisions of section 122 of the Code of Criminal Procedure into the fitness of a surety tendered in obedience to an order under Chapter VIII of the Code, has power to record evidence upon oath or solemn affirmation. *Queen-Empress* v. *Prithipal Singh* (1) and *Emperor* v. *Tota* (2) referred to.

The applicant in this case, Ghulam Mustafa, offered himself as a surety for one Nawab Husain who had been ordered by the Joint Magistrate of Allahabad to find security for good behaviour. When Ghulam Mustafa appeared in Court the Joint Magistrate administered an oath to him and examined him with a view to ascertain his fitness as a surety. Amongst other things Ghulam Mustafa was asked whether he had ever been previously convicted of an offence under section 262 read with section 408 of the Indian Penal Code. Ghulam Mustafa was on three occasions questioned as to his previous conviction and on each occasion he stated that he had not been so convicted. These statements were made on solemn affirmation. The

* Criminal Revision No. 6 of 1904.

(1) Weekly Notes, 1898, p. 154. (2) Weekly Notes, 1903, p. 36.

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conviction in question was, however, proved, and Ghulam Mustafa was thereupon put upon his trial for an offence under section 193 of the Indian Penal Code. He was convicted and sentenced to 3 months' rigorous imprisonment. He appealed to the Sessions Judge by whom his appeal was dismissed. Against this conviction and sentence and the order of the Judge upholding them, Ghulam Mustafa applied in revision to the High Court, where the principal ground taken was that the proceeding in the course of which the alleged perjury was committed was not a "judicial proceeding" within the meaning of the Indian Penal Code. The Magistrate thereof was not empowered to administer an oath and section 193 of the Code could not apply to a false statement made in the course of such a proceeding.

Mr. *E. A. Howard*, for the applicant.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

KNOX and AIKMAN, JJ.—This is an application for the revision of an appellate judgment of the learned Sessions Judge of Allahabad confirming the conviction of the applicant Ghulam Mustafa under section 193 of the Indian Penal Code and a sentence of three months' rigorous imprisonment passed thereon. It appears that one Nawab Husain was ordered under the provisions of section 110 of the Code of Criminal Procedure to furnish security for his good behaviour. The applicant Ghulam Mustafa tendered himself as one of the sureties Nawab Husain was ordered to furnish. Section 122 of the Code of Criminal Procedure provides that a Magistrate may refuse to accept any security offered under the chapter on the ground that for reasons to be recorded by the Magistrate such surety is an unfit person. When deciding as to whether the surety offered was to be accepted, the Magistrate administered an oath to Ghulam Mustafa and asked him whether he had been previously convicted of an offence under section 262 read with section 408 of the Indian Penal Code and sentenced to rigorous imprisonment for six months, on the 18th of September 1869. The applicant was on three occasions questioned as to his previous conviction and on each occasion he stated that he had not been so convicted.

These statements were made on solemn affirmation. It may be here mentioned that the Magistrate refused to accept Ghulam Mustafa as surety on the ground of his previous conviction, but, as it appeared that Ghulam Mustafa had since that conviction served Government for many years and earned a pension of Rs. 30, and that there was nothing else against his character, this Court in the exercise of its revisional powers ordered the Magistrate to accept Ghulam Mustafa as a surety. The learned counsel who appears in support of this application has argued very strenuously and ably that the Magistrate had no authority conferred by law to hold the inquiry which he did hold as to the fitness of the surety, and that he was therefore incompetent to administer an oath or solemn affirmation to the applicant. After giving this plea our careful consideration we are of opinion that it cannot be sustained. Section 122 of the Code of Criminal Procedure referred to above confers on a Magistrate the power of deciding whether a surety is or is not a fit person, and it imposes a duty on him, *i.e.*, that of recording his reasons, when he decides to refuse the surety on the ground of the surety being an unfit person. Referring to section 4 of the Indian Oaths Act of 1873, we find it provided that courts which have by law authority to receive evidence are authorized to administer oaths and affirmations in discharge of the duties, or in the exercise of the powers imposed or conferred upon them by law. It was in the exercise of a power conferred and a duty imposed by section 122 that the Magistrate was acting, and this being so we are of opinion that it was competent to him to administer a solemn affirmation. In the case of *Queen Empress* v. *Prithipal Singh* (1) it was held that when a Magistrate decides whether a surety is or is not a fit person, he is to do so upon evidence. This case was followed in *Emperor* v. *Tota* (2). We are bound therefore to hold that the Magistrate had power to record evidence on oath in the exercise of the power and duty conferred and imposed on him by section 122 of the Code of Criminal Procedure. It was further contended by the learned counsel that the false statement was not on a point material to the decision of the question before the Court. Assuming for

(1) Weekly Notes, 1898, p. 154 (2) Weekly Notes, 1903, p. 36.

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the purpose of argument that the materiality of the statement is an element in the offence of giving false evidence as defined in section 191 of the Indian Penal Code, we cannot say that the statement in question was not material to the inquiry which the Magistrate was making. Whether it ought to have influenced his decision is another matter. It was also argued that the applicant had no criminal intent in making the false statement. If the statement was false to his knowledge, as it is now admitted to have been, it follows that in deliberately denying three times his previous conviction he did intentionally give false evidence.

For these reasons we are of opinion that there are no legal objections to the conviction. We were addressed on the question of sentence. We think that looking to the applicant's subsequent history it is to be regretted that the Magistrate allowed such a stale charge to be dragged to light, and that he would have shown a wiser discretion had he, according to the principle embodied in section 148 of the Evidence Act, refused to allow the question to be put on the ground that it related to a matter which had happened thirty years before and was so remote in time that it ought not to influence his decision as to the fitness of the surety. The applicant was apparently ashamed to admit an incident in his early years which he had apparently outlived, and having once denied his conviction he foolishly adhered to his denial. We are of opinion that under the circumstances stated the punishment was inordinately severe and we reduce the sentence to the term which has already been suffered. The result of this order is that the bail upon which the applicant has been released will be discharged.