cover offences under section 418, 419 and 420 of the Indian Penal Code which are included with section 417 in the same group in schedule II to the Criminal Procedure Code, a similar extension must be allowed to the terms "theft" and "dishonest misappropriation." The former must be held to cover offences under sections 380, 381 and 382 of the Indian Penal Code and the latter offences under section 404 of the Indian Penal Code. But such a construction is impossible in face of the fact that the legislature has specifically mentioned "theft in a building" (section 380, Indian Penal Code), in section 562 of the Criminal Procedure Code in addition to simple theft (section 379). The inference is irresistable that "theft in a building" was not intended to be included in the term "theft," and we cannot give a narrow interpretation in the case of "theft" and a wide one in the case of "cheating."

The view we have taken is in accord with that expressed by a Bench of the Bombay High Court in *Emperor* v. *Ramjan Dadubhai*(1). The only authority to the contrary is that of a single Judge in *Harnarain* v. *Ramji Das*(2), from which we must respectfully dissent.

We set aside the Order of the Subdivisional Magistrate and direct him to dispose of the case according to law.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Napier.

PARAMASIVA UDAYAN (PLAINTIFF), APPELLANT,

v.

KRISHNA PADAYACHI AND ANOTHER (DEFENDANT), RESPONDENTS.*

1917, November, 21.

Evidence Act (I of 1872), sec. 68—Attesting witness, meaning of—Writer of a document, whether can be regarded as an attesting witness.

The writer of a document who signed the same as a scribe, can be regarded as an attesting witness, if he saw the signing of the document by the executant.

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(1) (1915) 16 Cr.L.J., 781. (2) (1915) 12 A.L.J., 465.

* Second Appeal No. 262 of 1916.

PARAMASIVA UDAYAN v. KRISHNA PADAYACHI.

Veerappudayan v. *Muthukaruppan Thevan* (1913) 24 M.L.J., 534 *Ayyasami Iyengar* v. *Kylasam Pillai* (1915) 26 I.C., 409 and *Ranu* v. *Laxman Rao* (1909) I.L.R., 33 Bom., 44 referred to.

Badri Prasad v. *Abdul Karim* (1913) I.L.R., 35 All., 254 and *Ram Bahadur Singh* v. *Ajodhya Singh* (1916) 20 C.W.N., 699, dissented from.

SECOND APPEAL against the decree of H. O. D. HARDING, the District Judge of Trichinopoly, in Appeal No. 101 of 1915, preferred against the decree of R. KRISHNASWAMI AYYAR, the Principal District Munsif of Kulittalai, in Original Suit No. 1562 of 1913.

The material facts appear from the judgment.

T. V. Muthukrishna Ayyar for the appellant.

M. D. Devadoss and *T. A. Anantha Ayyar* for the respondents.

The judgment of the Court was delivered by

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—In this case, the deed of mortgage sued on was attested by two witnesses and was signed by the scribe as the writer thereof. One of the attesting witnesses is dead and the plaintiff has not taken steps to examine the other witness who is said to be still alive. He has, however, examined the writer of the document who deposed that he saw it executed. The Courts below have held that this proof is not sufficient and have dismissed the suit.

We are unable to agree with them. The fact that a person calls himself a scribe is not proof that he was not an attesting witness as well. It may be that the writer left the place immediately after he had written the document and before it was signed by the executant. In such a case, he cannot be regarded as an attesting witness. The essence of attestation is that the person must have seen the document executed. The question is one of qualification but not of the use of any set phraseology. There is plenty of authority for the proposition that a scribe can also be an attesting witness. *Veerappudayan* v. *Muthukaruppan Thevan*(1) was relied on for the appellants. That decision lays down that the fact that a scribe wrote the endorsement after the document was executed and attested was some evidence in favour of regarding him as an attesting witness. This was followed by a Bench in which one of us sat in

(1) (1913) 24 M.L.J., 534.

Ayyasami Iyengar v. *Kylasam Pillai*(1). It would greatly depend upon the facts of each case whether a scribe is also an attesting witness. As pointed out in *Ranu* v. *Laxman Rao*(2), the time and place of the scribe's endorsement may show that he did not witness the execution. Under such circumstances, to examine him as an attesting witness may give room to perjured evidence being let in. As regards *Badri Prasad* v. *Abdul Karim*(3), relied on by the learned vakil for the respondent, there can be no doubt that the decision was right on the facts found. The scribe signed his memorandum before the document was executed. If that decision lays down that under no circumstances can a scribe be an attesting witness, we are unable to agree with it. Mr. Justice CHAMIER who was a party to this judgment took part in the decision reported in *Ram Bahadur Singh* v. *Ajodhya Singh*(4), as Chief Justice of the Patna High Court. In this case the learned Judge expresses himself more uncompromisingly than in the Allahabad judgment. Mr. Justice JWALAPRASAD while concurring with the Chief Justice on the facts of the case points out that a scribe is not necessarily debarred from being an attestor. In *Raj Narain Ghose* v. *Abdur Rahim*(5), the same view was taken of the position of a scribe. We do not think *Shamu Patter* v. *Abdul Kadir Ravuthan*(6) is opposed to this view. In this country, less attention should be paid to the name by which a person chooses to style himself than to the character he fills. It will be a question in each case, whether a scribe was intended to witness the execution of a document. That is a matter for the trial Court. We must therefore hold that the *apriori* conclusion come to by the Courts below that because a person had called himself a scribe, he was incapable of being regarded as an attesting witness is not a proposition which we can accept.

We must therefore reverse the decrees of the Courts below and remand the case for trial to the Court of first instance in the light of the above observations. Further evidence may be taken. Costs will abide the result.

K.R.

(1) (1915) 26 I.C., 409.
(2) (1909) I.L.R., 33 Bom., 44. (3) (1913) I.L.R., 35 All., 254.
(4) (1916) 20 C.W.N., 699. (5) (1901) 5 C.W.N., 454.
(6) (1912) I.L.R., 35 Mad., 607 (P.C.).