1887

RAJESWARI KUAR v. RAI BAL KRISHAN.

violation of it. They therefore think that the decree appealed from should be affirmed, and the appeal dismissed with costs, and they will humbly advise Her Majesty to that effect.

*Appeal dismissed.*

Solicitors for the appellant—Messrs. *Oehme and Summerhays.*

Solicitors for the respondent—Messrs. *T. L. Wilson and Co.*

---

1887
*August 6.*

# EXTRAORDINARY ORIGINAL CRIMINAL.

*Before Sir John Edge, Kt., Chief Justice.*

QUEEN-EMPRESS *v.* RIDING AND OTHERS.

*Criminal Procedure Code, s. 509.—Deposition of medical witness taken by Magistrate tendered at sessions trial.—Magistrate's record not showing, and evidence not adduced to show, that deposition was taken and attested in accused's presence.—Deposition not admissible in evidence—Act I of* 1872 (*Evidence Act*), *s.* 114, *illustration* (*e*).

Before the deposition of a medical witness taken by a committing Magistrate can, under s. 509 of the Criminal Procedure Code, be given in evidence at the trial before the Court of Session, it must either appear from the Magistrate's record or be proved by the evidence of witnesses to have been taken and attested in the accused's presence. It should not merely be presumed, under s. 114, illustration (*e*) of the Evidence Act (I of 1872) to have been so taken and attested.

THIS was a trial at the Criminal Sessions of the High Court before Edge, C.J., and a jury, of three soldiers named Riding, Adair and Linehan, upon charges of robbery, under sec. 395 of the Penal Code. In the course of the case for the prosecution, it appeared that through some oversight the Assistant Surgeon, who had examined the complainant, and who had given evidence before the committing Magistrate as to the injuries said to have been inflicted by the prisoners, had not been served with a summons, and was therefore not present for the purpose of giving evidence.

The *Public Prosecutor* (Mr. *G. E. A. Ross*) for the Crown accordingly tendered in evidence, under s. 509 of the Criminal Procedure Code, the deposition of the Assistant Surgeon which had been taken by the Magistrate.

This deposition was signed by the Assistant Surgeon and by the committing Magistrate. The record contained no statement as to whether or not the deposition had been taken and attested in the

presence of the prisoners. No evidence was forthcoming as to whether it had been so taken and attested or not.

Mr. *C. Ross Alston*, for the prisoners, objected to the deposition being received in evidence.

EDGE, C. J., said that he was of opinion that the deposition was inadmissible in evidence. Under s. 509 of the Criminal Procedure Code, it was essential that the deposition should have been "taken and attested by a Magistrate in the presence of the accused." Since the prosecution was bound to prove every step of the case against the prisoners, before such a deposition could be admitted it must either appear on the Magistrate's record, or must be proved, by the evidence of witnesses, to have been taken and attested in the prisoners' presence. His Lordship had been referred to s. 114, illustration (*e*) of the Evidence Act; but that section did not direct the Court to presume the existence of facts likely to have happened, such as the regular performance of judicial acts, but left the Court free to make the presumption or not according to its discretion. This being a criminal case in which, as he had said, the prosecution must prove every step of its case, he did not think it proper or expedient to act on a presumption that the requirements of s. 509 had been complied with, and he therefore ruled that the deposition should not be admitted (1)

(1) S. 80 of the Evidence Act under which the Court is bound, subject to certain conditions, to presume that evidence recorded by a Judge or Magistrate was "duly taken," was not referred to in either the argument or the judgment in this case; but it would doubtless have been held inapplicable. Though, as a general rule, all evidence must be taken in the presence of the accused, there is nothing in Chapter XXV of the Criminal Procedure Code ("of the mode of taking and recording evidence in inquiries or trials") or elsewhere which expressly requires a Magistrate to *attest* depositions in the accused's' presence. Such attestation therefore does not fall within the scope of the presumption provided for by s. 80, and if required for any special purpose, such as that of s. 509 of the Criminal Procedure Code, must be established *aliunde*. Assuming the deposition to have been duly taken, so as to be good evidence *quoad* the proceedings before the Magistrate, it could not be given in evidence at a future inquiry without satisfying the further condition of attestation in the presence of the accused; and there is no provision in the Evidence Act (apart from s. 114) under which the fulfilment of this condition could be presumed.