

long ago as 1869 their Lordships of the Privy Council said that mere attestation of an instrument by a person did not necessarily import concurrence by him. It might no doubt be shown by other evidence that when he became an attesting witness he fully understood what the transaction was and that he was a concurring party to it, but from the mere subscription of his name that inference did not necessarily arise [*Raj Lukhee Dabia v. Gokool Chundar Chowdhry* (1)] and it has been held, in several cases by different courts in India, that the question whether the attestation of a document should be held to imply assent is a question of fact, and must be determined with reference to the circumstances of each case, see for example *Deno Nath Das v. Kotiswar Bhattacharya* (2) and *Mewa Singh v. Bhagwant Singh* (3).

We must, therefore, accept the finding that Budhai is not proved to have assented to the transactions in question and it follows that it is not proved that there was such assent on the part of the reversionary body as to raise a presumption that the mortgages were made for purposes binding on the reversioners.

The appeal fails and is dismissed with costs.

*Appeal dismissed.*

## REVISIONAL CRIMINAL.

*Before Mr. Justice Piggott.*

EMPEROR. v. MUKHTAR AHMAD AND ANOTHER.\*

Act No. XLV of 1860 (*The Indian Penal Code*), sections 332, 323—*Public servant in the execution of his duty as such—House search by Excise Inspector without a warrant—Assault on Inspector.*

An Excise Inspector in searching the house of a person, under the suspicion that he would find cocaine there, committed many irregularities. He had no warrant authorising him to make the search, he had brought only one search witness and he directed a constable to scale the outer wall of the house. The accused assaulted and beat him. Held, that the Inspector and the constables were not acting in the discharge of their duties as public servants and the accused were not guilty of an offence under section 332 of

\* Criminal Revision No. 144 of 1915, from an order of G. C. Badhwar, Additional Sessions Judge of Saharanpur, dated the 22nd of January, 1915.

(1) (1869) 13 Moo. I. A., 209.

(2) (1913) 21 I. C., 367.

(3) (1909) 5 I. C., 252.

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the Indian Penal Code, but were guilty of an offence punishable under section 323 of the said Code. *Queen-Empress v. Dalip (1)* followed,

THE facts of this case were as follows :—

One D.D.C. Das, an Excise Inspector, suspected that the accused Mukhtar Ahmad had cocaine concealed in his house. The Inspector without a search warrant and with only one search witness went to search the house of Mukhtar Ahmad. On finding the front door of the house closed, he directed a constable to scale the outer wall and effect a burglarious entry into the house. The Inspector and his men were resisted and beaten by Mukhtar Ahmad, and Amir Ahmad. The latter were convicted under section 332 of the Indian Penal Code from which order they filed an application in revision to this Court.

Mr. G. P. Boys, for the applicants.

The Assistant Government Advocate, (Mr. R. Malcolmson) for the Crown.

PIGGOTT, J.—Mukhtar Ahmad and Amir Ahmad have been convicted by a Magistrate on the charge of having caused hurt to an Excise Inspector, one Mr. D. D. C. Das, and certain constables in the discharge of their duties as public servants, and have been sentenced to imprisonment and fine. The conviction and the sentences have been affirmed by the Sessions Judge on appeal. It seems to me that the courts below have assumed, but cannot be said to have judicially determined, that the persons who were hurt were acting at the time in the discharge of their duties as public servants. They have dealt with the plea of private defence set up on behalf of the accused persons and have excluded that plea by reason of the provisions of section 99 of the Indian Penal Code. This finding implies that the Excise Inspector and the constables were resisted at a time when they, being public servants, were acting in good faith under colour of their office. That is not the same thing as a finding that they were acting in the discharge of their duties as public servants. The distinction was pointed out by a Bench of this Court in *Queen-Empress v. Dalip (1)*. So far as my examination of the record goes I do not find myself able to arrive at the conclusion that the Excise Inspector and the constables were acting in the discharge of their

duties as public servants. Mr. Das, who was engaged in searching the house of Mukhtar Ahmad, accused, on suspicion that he might find there cocaine, committed a number of irregularities in conducting this search. He had no warrant authorising him to make this search; he brought with him only one search witness (section 103 of the Code of Criminal Procedure), and nothing in sections  $\frac{102}{48}$  of the same Code justified him in directing a constable to scale the outer wall and effect a burglarious entry into the house. Following the precedent set by the reported decision of this Court, which I have already quoted, I set aside the conviction of Mukhtar Ahmad, and Amir Ahmad, under section 332 of the Indian Penal Code and in lieu thereof, convict them of the offence of causing hurt under section 323 of the same Code. I reduce the sentence to one of imprisonment for such period as they may have already undergone, together with a fine of Rs. 15 each. Any fine in excess of this amount which has been paid by applicants will be refunded. The accused need not surrender and their bail-bonds are discharged.

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*Order modified.*

## MISCELLANEOUS CRIMINAL.

*Before Mr. Justice Piggott.*

DHARAM SINGH AND ANOTHER v. JOTI PRASAD\*

*Criminal Procedure Code, section 206 et seq.—Discharge—Practice—Power and duties of Magistrate inquiring into case triable by the Court of Session.*

When a Magistrate has heard the evidence of the prosecution with entire disbelief, when he considers himself in a position to show that the prosecution witnesses are totally unworthy of credit, and *a fortiori* when, after examining certain witnesses named on behalf of the accused, he has come to the conclusion that evidence given by them is reliable and disproves that given by the prosecution he is well within his discretion in discharging the accused. *Fattu v. Fattu* (1), *Sheo Bux v. King-Emperor* (2) and *In re Bai Parvati* (3) referred to.

THIS was an application for transfer, under section 526 of the Code of Criminal Procedure, of a case pending in the court of the District Magistrate of Saharanpur arising out of an application under section 436 of the Code of Criminal Procedure

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\* Criminal Miscellaneous No. 8 of 1915.

(1) (1904) I. L. R., 26 All., 564. (2) (1904) 9 C. W. N., 829.

(3) (1911) I. L. R., 35 Bom., 163.