which is least likely to have been inserted inadvertently or by mistake and must therefore be accepted as a more reliable guide for identifying the subject-matter of the dispute. I am therefore of opinion that the decision of the lower court is correct.

The result is that the appeal fails and is dismissed with costs.

Srivastava, J.

Appeal dismissed.

APPELLATE CRIMINAL

Before Mr. Justice C. M. King, Chief Judge and Mr. Justice Bisheshwar Nath Srivastava

KING-EMPEROR (COMPLAINANT-APPELLANT) *v.* CHANDRA-BHAL AND ANOTHER (ACCUSED-RESPONDENTS)*

1934 *October*, 26

United Provinces Excise Act (IV of 1910), section 71—Excisable articles found in a house—Presumption of guilt against occupant of house, whether always justified.

In order to raise the presumption of guilt against an accused under section 71 of the Excise Act (U. P.), it must be made out that he was in possession of the excisable article. A person in the occupation of a house cannot be presumed to be in possession of everything found inside the house. Whether such a presumption should be raised in any particular case or not must depend upon the facts and circumstances of each case. *Abdul Rahman* v. *Emperor* (1), *King-Emperor* v. *Ismail* (2), and *King-Emperor* v. *Kashi Nath* (3), distinguished. *Bashir Ahmad Khan* v. *King-Emperor* (4), *King-Emperor* v. *Farrukh Husain* (5), and *Bahadur Dube* v. *King-Emperor* (6), relied on.

Where some excisable articles were found in a heap of *bhusa* stacked in a room in a house in which a guest was sleeping while the tenant of the house was sleeping in another room it cannot be said that the tenant of the house was in possession of the excisable articles and the presumption under section 71 of the United Provinces Excise Act cannot be raised against him.

*Criminal Appeal No. 132 of 1934, against the order of S. M. Zakir, Excise Magistrate, 1st class of Lucknow, dated the 6th of March, 1934.

(1) (1928) 26 A.L.J., 414.
(2) (1929) 27 A.L.J., 609.
(3) (1930) 28 A.L.J., 249.
(4) (256) 22 O.C., 256.
(5) (1920) 24 O.C., 294.
(6) (1925) 12 O.L.J., 388.

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KING-EMPEROR v. CHANDRABHAL

The Government Advocate (Mr. *H. S. Gupta*), for the Crown.

Mr. *D. N. Bhattacharji*, for the accused.

KING, C.J. and SRIVASTAVA, J.:—This is an appeal filed on behalf of the Local Government under section 417 of the Code of Criminal Procedure against the order dated the 6th of March, 1934, of a Magistrate of the first class in the Lucknow district acquitting Chandrabhal and Jagannath, who were charged of an offence under section 60(*a*) of the United Provinces Excise Act (IV of 1910) for being in possession of $22\frac{1}{2}$ chhataks of charas. The facts of the case which are not in dispute are that Chandrabhal was expelled from Cawnpore under the Goonda Act and took up his residence in a rented house in Lucknow. A few days before the 16th of January, 1934, Jagannath came from Cawnpore to Lucknow and put up with Chandrabhal. The Excise Inspector in charge of the city circle, having received information that Chandrabhal and Jagannath were smuggling excisable articles, arranged a raid on their house, and the raid was carried out at midnight on the 16th of January, 1934. The house consists of two rooms one behind the other. Chandrabhal was sleeping in the front room and Jagannath in the room at the back. Some bhusa was stacked in the back room, and on a search being made two tins containing $22\frac{1}{2}$ chhataks of charas were found concealed in two corners of this room under the *bhusa*. Chandrabhal and Jagannath both denied all concern with the said tins and the charas contained therein. The learned Magistrate was of opinion that in the circumstances it was impossible to say which of the two persons had concealed the two tins under the *bhusa*. He therefore held that in the absence of any evidence to connect either or both the accused with the aforesaid tins it was not possible to hold either of them guilty. The present appeal was filed against both Chandrabhal and Jagannath, but as Jagannath has been absconding and has not been found,

the learned Government Advocate has confined the appeal to Chandrabhal alone.

The only question arising in the appeal is whether in the circumstances of the case, as stated above, it is possible to make any presumption about Chandrabhal having been in possession of the charas at the time when the tins containing it were recovered from under the *bhusa*. Reliance has been placed upon the provisions of section 71 of the United Provinces Excise Act which provides that in every prosecution under section 60 it shall be presumed, until the contrary is proved, that the accused person has committed an offence punishable under that section in respect of any excisable article for the possession of which he is unable to account satisfactorily. This section does not seem to advance the case of the Crown because in order to raise the presumption of guilt against an accused under this section it must be made out that he was in possession of the excisable article. It has been argued that a person in the occupation of a house must be presumed to be in possession of everything found inside the house. We are unable to hold that there can be any such absolute presumption. Whether such a presumption should be raised in any particular case or not must depend upon the facts and circumstances of each case. In the present case Jagannath, who is a Lodh by caste, was not even a relation of Chandrabhal, who is a Brahman, and was staying in the house only temporarily as a guest of Chandrabhal. The tins were found concealed underneath the stack of *bhusa*. In such circumstances it is quite possible that Jagannath might have brought the tins into the house and concealed them there without Chandrabhal having had any knowledge of it. We are therefore of opinion that it cannot be said that merely because the tins were found in the house tenanted by Chandrabhal therefore he must necessarily be deemed to be in possession of the charas contained in the said tins.

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King, C.J. and Srivastava, J.

Reliance has been placed by the learned Government Advocate on three decisions of the Allahabad High Court reported in *Abdul Rahman* v. *Emperor* (1); *King-Emperor* v. *Ismail and others* (2) and *King-Emperor* v. *Kashi Nath and another* (3). In the first of these cases it was remarked that under section 71 of the Indian Excise Act "a presumption is drawn as to the commission of an offence when a person is proved to be the owner of the house in which cocaine is found." With all respect to the learned Judge who decided that case we think that the remark is not quite in accordance with the terms of section 71. The section deals only with a presumption arising from the possession of the excisable article. It does not lay down that the owner of a house must be presumed to be in the possession of any excisable article found in the house. Of course in any particular case, if there are no circumstances to the contrary, a Court may be justified in making such a presumption based upon the facts of that case. As we have already pointed out the circumstances of the present case are such that in our opinion no such presumption can be justified. The second case was a case in which two brothers and a cousin were in joint occupation of a house and had been carrying on joint business. Cocaine was found in the room jointly occupied by them in their presence and they entirely failed to account satisfactorily for the possession of it. In the last of the cases above mentioned cocaine locked in a box and other material like weighing scales, etc. were found in a room in the occupation of two brothers. It was held that in view of the recovery of so many articles with cocaine in considerable quantity it must be presumed that both the brothers had knowledge of the presence of those things there. Thus we are of opinoin that the cases referred to by the learned Government Advocate are distinguishable on the facts from the present case.

(1) (1928) 26 A.L.J., 414. (2) (1929) 27 A.L.J., 609.
(3) (1930) 28 A.L.J., 249.

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The view taken by us is in consonance with the decisions of the late Court of the Judicial Commissioner of Oudh in *Bashir Ahmad Khan* v. *King-Emperor* (1), *King-Emperor* v. *Farrukh Husain* (2) and *Bahadur Dube* v. *King Emperor* (3), in which in spite of the house being in the joint occupation of several persons it was held that the responsibility could not be fixed against any of them.

King, C.J. and Srivastava, J.

For the above reasons we are of opinion that no sufficient grounds have been made out to justify interference with the order of the learned Magistrate. The appeal is therefore dismissed. The bail bond of the accused, who is on bail, is discharged.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice E. M. Nanavutty and Mr. Justice Ziaul Hasan

LATAFAT HUSAIN (DEFENDANT-APPELLANT) *v.* LALA ONKAR MAL (PLAINTIFF-RESPONDENT)*

1934 *October*, 29

Evidence Act (I of 1872), sections 11, 32, 35 and 73—Document rejected by trial court—Appellate Court admitting it in evidence without hearing parties—Comparison of signatures by appellate court with admitted signatures and holding the document genuine—Procedure of appellate court, legality of —Civil Procedure Code (Act V of 1908), section 100—Second appeal—Findings of fact based upon inadmissible evidence—Second appeal against the findings, if lies—Negotiable Instruments Act (XXVI of 1881), section 118—Promissory note—Plea of want of consideration in a suit on a promissory note—Parties going to trial on the question of consideration—Presumption under section 118, Negotiable Instruments Act, whether arises—Suspicious circumstances, whether shift the burden—Defendant a young man of extra-

*Second Civil Appeal No. 248 of 1933, against the decree of Thakur Surendra Vikram Singh, Subordinate Judge of Bara Banki, dated the 1st of June, 1933, reversing the decree of Pandit Amrit Deo Bhattachrya, Munsif of Ram Sanehi Ghat at Bara Banki, dated the 19th of December, 1932.

(1) (1929) 22 O.C., 256. (2) (1920) 24 O.C., 294.
(3) (1925) 12 O.L.J., 388.