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an officer specially appointed to perform the functions of a Collector can only have the powers of the latter and not of the former. No section lays down that the term "*the Collector of a district*" shall include any officer so authorised to perform the functions of a Collector, and indeed no section authorises the Lieutenant-Governor to invest an officer with such powers. Hence to gazette an officer to perform the functions of a Collector under Bengal Act VII of 1880 will not make him *the* Collector of the district as required by section 7. It may make him *a* Collector, or *one* of the Collectors of the district, but it will not make him *the* Collector of the district, which expression evidently refers to the officer specially appointed and gazetted by the Lieutenant-Governor to act as such.

We accordingly cannot but hold that the certificate in execution of which this sale was held was not duly made and filed under the Act, and all subsequent proceedings held under it must be considered to be null and void and without jurisdiction [see clause (4) to the proviso to section 8, Bengal Act VII of 1880.]

For these reasons we think that the decree of the Subordinate Judge in this case is right, and we accordingly dismiss this appeal with costs.

The plaintiff cross-appeals as to costs, which she says the Subordinate Judge should have allowed her. Seeing, however, that she admittedly was in arrear with her road cess, we see no reason to interfere with the exercise of the Subordinate Judge's discretion in this matter. The cross-appeal therefore is also dismissed.

A. A. C. *Appeal dismissed.*

APPELLATE CRIMINAL.

Before Mr. Justice Norris and Mr. Justice Gordon.

KACHALI HARI, APPELLANT, *v.* QUEEN-EMPRESS, RESPONDENT.* 1890 *August* 28.

Evidence—Deposition of medical witness—Criminal Procedure Code (X of 1882), s. 509—Deposition wrongly admitted in evidence—Evidence Act (I of 1872), ss. 80 and 114, ill. (e).

Before the deposition of a medical witness taken by a committing Magistrate can, under s. 509 of the Code of Criminal Procedure, be given

* Criminal Appeal No. 474 of 1890, against the order passed by F. E. Pargiter, Esq., Sessions Judge of Rajshahye, dated the 2nd of June 1890.

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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 by the Magistrate in the presence of the accused. The Court is neither bound to presume under s. 80, nor ought it to presume under either s. 80 or s. 114, ill. (e) of the Evidence Act (I of 1872), that the deposition was so taken and attested.

Queen-Empress v. *Riding* (1), and *Queen-Empress* v. *Pohp Sing* (2), approved.

THE appellant was found guilty by the Sessions Judge of Rajshahye under sections 363 and 366 of the Penal Code of having kidnapped a girl from lawful guardianship, and of having abducted her in order that she might be seduced to illicit intercourse, and was sentenced by the Judge to two years' rigorous imprisonment under the former section. No separate sentence was passed under section 366. Important evidence against the prisoner with regard to the girl's age was given before the committing Magistrate by Dr. Kelly, the Civil Surgeon. He was not called as a witness at the trial before the Sessions Judge, but his deposition, taken before the committing Magistrate, was tendered and accepted in evidence, although there was nothing on the face of the deposition to show that it was attested by the Magistrate in the presence of the accused, as is required by section 509 of the Code of Criminal Procedure, and no witnesses were called to show that it had in fact been so attested.

The accused appealed to the High Court.

No one appeared on the appeal for either the Crown or the appellant.

The judgment of the Court (NORRIS and GORDON, JJ.) was as follows:—

We are of opinion that this appeal should be allowed. As regards the charge under section 363, Indian Penal Code, we think that the evidence as to the girl's age is unsatisfactory and by no means sufficient to warrant the finding that she was under 16 years of age on 18th April last, the day on which it is alleged that she was kidnapped.

As regards the charge under section 366, the only evidence of abduction is that of the girl herself, and looking at the palpable

(1) I. L. R., 9 All., 720.

(2) I. L. R., 10 All., 174.

falsehood of her story of having been ravished by the prisoner and four other men, we do not think it would be safe to rely upon it.

In this connection we have to observe that the Sessions Judge ought not to have admitted the deposition of Dr. Kelly, the Civil Surgeon, taken before the committing Magistrate, as evidence against the prisoner. To render the deposition of a Civil Surgeon or other medical witness admissible in evidence under section 509, Code of Criminal Procedure, it must be shown to have been taken in the presence of the accused, and to have been attested by the Magistrate in his presence. The deposition in question is signed by the Civil Surgeon and by the committing Magistrate, and it appears that the Civil Surgeon was cross-examined, but there is nothing on the face of the deposition to show that it was attested by the Magistrate in the prisoner's presence. No doubt this fact might have been proved by calling the committing Magistrate or any other person who was present at the inquiry before him and able to testify thereto. In the case of *Queen-Empress* v. *Riding* (1) the deposition of an Assistant Surgeon, signed by him and by the committing Magistrate, was tendered in evidence on behalf of the prosecution under section 509, Code of Criminal Procedure. Edge, C.J., refused to receive it. The learned Judge pointed out that "under section 509, Code of Criminal Procedure, it was essential that the deposition should have been taken and attested in the presence of the accused," and he added "since the prosecution are bound to prove every step of the case against the prisoner before such a deposition can be admitted, it must appear on the Magistrate's record, or must be proved by the evidence of witnesses, to have been taken and attested in the prisoner's presence." The learned Judge's attention was called to section 114 of the Evidence Act, and to illustration (e) thereto. That section says "the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case," and illustration (e) is as follows:—"The Court may presume that judicial and official acts have been regularly performed."

Upon this the learned Judge observed "that section did not direct the Court to presume the existence of facts likely to have

(1) I. L. R., 9 All., 720.

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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, Code of Criminal Procedure, had been complied with."

There is a reporter's note appended to that case which is as follows:—"Section 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 either in 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 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 further 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." This view of the law does not appear to be correct. Section 80 of the Evidence Act is as follows:—"Whenever any document is produced before any Court purporting to be a record or memorandum of the evidence or of any part of the evidence given by a witness in a judicial proceeding or before any officer authorised by law to take such evidence, or to be a statement or confession by any prisoner or accused person taken in accordance with law and purporting to be signed by any Judge or Magistrate or by any such officer as aforesaid, the Court shall presume that the document is genuine; that any statements as to the circumstances under which it was taken purporting to be made by the person signing it are true, and that such evidence, statement, or confession was duly

taken." No doubt this section will be of no assistance in a case under section 509, Criminal Procedure Code, where there are no "statements as to the circumstances under which the deposition was taken purporting to be made by the person signing it," but if the Magistrate records a statement at the foot of the deposition to the effect that the deposition was taken in the presence of the accused and was attested by him, the Magistrate, in the presence of the accused, and signs such statement, the Court would be bound to presume that such statement was true, and to admit the deposition under section 509, Criminal Procedure Code. This is clearly the view of Edge, C.J., who says in *Queen-Empress* v. *Pohp Sing* (1), where the reporter's note to *Queen-Empress* v. *Riding* (2) is discussed.—"A Magistrate should take and attest a deposition in the presence of the accused, and should also, by the use of a few apt words on the face of the deposition, make it apparent that he has done so."

Conviction quashed.

H. L. B.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

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DUNGARAM MARWARY (DECREE-HOLDER) *v.* RAJKISHORE DEO AND ANOTHER (JUDGMENT-DEBTORS). *

Sonthal Pergunnahs—Act XXXVII of 1855, *s.* 2—*Regulation III of* 1872, *ss.* 3 *and* 4—*Civil Courts Act* (*XII of* 1887)—*Suit exceeding Rs.* 1,000 *in value—Officer invested with power of a Civil Court—"Court."*

The effect of s. 2 of Act XXXVII of 1855 and s. 3 of Regulation III of 1872 is to make the general laws and regulations, including the provisions of the Code of Civil Procedure, applicable in the Sonthal Pergunnahs to suits exceeding Rs. 1,000 in value without any qualifications; provided that such suits are tried in the Courts established under the Civil Courts' Act, XII of 1887.

* Appeal from Order No. 163 of 1890, against the order of W. R. Bright, Esq., Deputy Commissioner of Sonthal Pergunnahs, dated the 1st of April 1890, reversing the order of W. M. Smith, Esq., Subdivisional Officer of Deoghur, dated the 14th of January 1890.

(1) I. L. R., 10 All., 174.

(2) I. L. R., 9 All., 720.