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SECRETARY  
OF STATE  
FOR INDIA  
IN COUNCIL  
v.  
ABDUL SALAM  
KHAN.

award to the respondent Rs. 105-6-0 as offered to him by the Collector in the beginning. It will still be open to him on the expiry of the period for which the land has been acquired to apply for the compensation mentioned in section 36, clause (2) which he has claimed at Rs. 18-0-0 per bigha and in respect to which we express no opinion in the present proceeding. The objections are disallowed with costs and the appellant will have his costs in both courts.

*Appeal allowed.*

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*March, 24.*

*Before Mr. Justice Chamier and Mr. Justice Piggott.*

LAKHPATI (DEPENDANT) v. RAMBODH SINGH (PLAINTIFF) AND  
RAM RAJ SINGH AND ANOTHER (DEPENDANTS)\*.

*Attestation of instrument—Witness how far affected with knowledge of contents.*

The mere attestation of an instrument by a person does not necessarily import concurrence by him in the transaction evidenced thereby. *Raj Lukhee Dabia v. Gokool Chundar Chowdhry* (1) referred to. The question whether attestation of document should be held to imply assent is a question of fact and must be determined with reference to the circumstances of each case and the High Court cannot entertain it in second appeal. *Deno Nath Das v. Kotiswar Bhattacharya* (2) and *Mewa Singh v. Bhagwant Singh*, (3) referred to.

THE facts of this case were as follows:—

Musammam Kalwanti, the widow of a separated Hindu, named Jita, mortgaged her husband's property to the appellant by two deeds, dated the 28th of January, 1907, and the 7th of August, 1908. At the time of these transactions there were living Sarju Dei, who is said to be a daughter of Jita, Budhai, the son of a deceased brother of Jita and Ram Raj and Ram Bodh, sons of another deceased brother of Jita. The three nephews were the sole presumptive reversionary heirs of Jita. Ram Bodh was a minor living in union with his brother Ram Raj who joined in executing both mortgages and Budhai attested both as a witness. Ram Bodh, who is still a minor, brought this suit in 1910, for a declaration that the mortgages were not binding upon him. The Subordinate Judge held that the earlier mortgage was not proved to have been made for lawful necessity at all, and that the later

\*Second Appeal No. 1532 of 1913, from a decree of B. J. Dalm, District Judge of Benares, dated the 17th of May, 1913, reversing a decree of Pratab Singh, Subordinate Judge of Jaunpur, dated the 7th of October, 1912.

(1) (1869) 13 Moo. I. A., 209. (2) (1913) 21 Indian cases, 367.

(3) (1909) 5 Indian cases, 252.

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mortgage was proved to have been for lawful necessity to the extent of Rs. 282 out of Rs. 800, but he held that Ram Bodh was bound by his elder brother's consent to the transactions, and that Budhai's consent to them was proved by the fact that he attested them; therefore the whole body of male reversioners must be taken to have consented to the transactions, and the plaintiff was not entitled to challenge them. On appeal the District Judge agreed with the first court as to the extent to which the mortgage had been shown to be supported by legal necessity, but he held that the attestation of the deeds by Budhai did not prove that he had consented to the mortgages, and that the plaintiff was not bound by the elder brother's consent, because it had been neither alleged nor proved that he had acted for the benefit of the plaintiff. Both the courts below have held that the presence of a legitimate daughter of Jita, even if proved, did not prevent the plaintiff from maintaining the suit. The learned District Judge gave the plaintiff a declaration that the earlier deed was not binding upon him and that the later was binding only to the extent of Rs. 282. The defendant appealed to the High Court.

Dr. *Satish Chandra Banerji*, for the appellant.

The Hon'ble Dr. *Tej Bahadur Sapru* and Dr. *Surendro Nath Sen*, for the respondents.

CHAMIER and PIGGOTT, JJ.—The facts of this case are that Musammât Kalwanti, the widow of a separated Hindu, Jita, mortgaged her husband's property to the appellant by two deeds, dated the 28th of January, 1907, and the 7th of August, 1908. At the time of these transactions there were living Sarju Dei, who is said to be a daughter of Jita, Budhai, the son of a deceased brother of Jita and Ram Raj and Ram Bodh, sons of another deceased brother of Jita. The three nephews were the sole presumptive reversionary heirs of Jita. Ram Bodh was a minor living in union with his brother Ram Raj who joined in executing both mortgages and Budhai attested both as a witness. Ram Bodh who is still a minor, brought this suit in 1910, for a declaration that the mortgages were not binding upon him. The Subordinate Judge held that the earlier mortgage was not proved to have been made for lawful necessity at all, and that the later

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It appears to us that the only difficulty in the case arises from the finding of the District Judge that the attestation of the deeds by Budhai does not prove that he consented to the transactions. If Budhai consented to them then we have the consent on the part of all the adult male reversioners, and it is clear that the consent is sufficient to raise the presumption that the mortgages were made for purposes binding upon the whole body of reversioners. It is contended on behalf of the plaintiff respondent that the finding of the District Judge, that Budhai is not proved to have consented to the mortgages, is a finding of fact which cannot be disturbed in second appeal, while the appellant contends that it is not a finding of fact, but that the question is what is the true conclusion to be deduced from the fact that Budhai attested the execution of the mortgages. In our opinion the finding of the learned Judge is one of fact which cannot be disturbed in second appeal. In a well known case decided as

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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