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the nearest co-sharer, is entitled to claim pre-emption; unless, indeed, it can be shown that his claim is too late.

Now, if the right of pre-emption which arose upon the sale was a new one, the claim will not be barred; but it will be, if the right which then existed was the same as that which arose at the time of the mortgage. It appears to me that it was a new right, because the *wajib-ul-arz* distinctly contemplates the right of pre-emption arising upon the different events, namely, upon the mortgage and sale. The point as to "standing by" depends on the same question. If the mortgage and the sale gave rise to distinct rights of pre-emption, the alleged standing by occurred when the right was not in existence. I am therefore of opinion that the claim is not barred. The appeal must be allowed with costs, and the judgment of the first Court restored, with this exception, that the money declared by the decree of that Court to be payable by the pre-emptor must be directed to be paid within six weeks from the date of the receipt of our decree by the lower Court.

STRAIGHT, J.—I am of the same opinion.

Appeal allowed.

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FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Mahmood.

JANKI (DEFENDANT) *v.* GIRJADAT AND ANOTHER (PLAINTIFFS).*

Pre-emption—"Sale"—Wajib-ul-arz—Act IV of 1882 (Transfer of Property Act), s. 54—Fraudulent omission to transfer by registered instrument.

The *wajib-ul-arz* of a village gave the co-sharers a right of pre-emption in cases where any one of them should wish to "transfer his share wholly or partly by sale or mortgage." One of the co-sharers entered into a transaction by which he transferred the possession of his share to a stranger for Rs. 300, and had mutation of names effected in the Revenue Department, but, in order to avoid the right of pre-emption, the parties omitted to execute or register a deed of sale in respect of the transfer.

Held by the Full Bench (MAHMOOD, J., dissenting) that the transaction gave rise to the right of pre-emption within the meaning of the *wajib-ul-arz*.

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* Second Appeal No. 200 of 1884, from a decree of Babu Mrittonjoy Mukarji, Subordinate Judge of Ghazipur, dated the 19th November, 1883, affirming a decree of Maulvi Syed Zainulabdin, Munsif of Muhammadabad, Koranta-dih, dated the 31st July, 1883.

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Per PETHERAM, C.J., that the terms of the *wajib-ul-arz* meant that if any co-sharer transferred his right wholly or partly, the right of pre-emption should arise; that, although the legal interest in the share was never transferred, the effect of the transaction in question was to transfer absolutely the whole right of possession from the vendor to the vendee, and that it was therefore such a transfer as let in the right of pre-emption.

Per STRAIGHT, J., that inasmuch as the defendants deliberately omitted to observe the necessary legal formality of a registered instrument with the object of defeating the pre-emptive right, it was very doubtful whether a Court of equity would be justified in allowing them to set up, and in giving effect to, a defence based upon their own intentional evasion of the law.

Per OLDFIELD and BRODHURST, JJ., that the failure of the parties to the transfer to comply with the requirements of s. 54 of the Transfer of Property Act (IV of 1882), as to the manner in which the transfer should be made, did not alter the nature of the transaction or affect the fact that a sale had been made, and could not affect a pre-emptor's right in respect of it.

Per MAHMOOD, J., that a valid and perfected sale was a condition precedent to the exercise of the pre-emptive right; that, in the present case, nothing had happened which could properly be termed a "sale" within the meaning of the *wajib-ul-arz;* that the application for mutation of names not having been registered, the provisions of s. 54 of the Transfer of Property Act prevented it from taking effect as a sale, or passing the ownership from the vendor to the vendee; and that therefore, under the *wajib-ul-arz,* the right of pre-emption could not arise.

THE plaintiffs in this case, alleging that they were co-sharers in a certain village, that on the 15th August, 1883, the defendant Rameshar Misr, in contravention of the terms of the *wajib-ul-arz,* sold a share of two annas and a fraction to the defendant Janki Misr, for Rs. 300, and, in order to avoid pre-emption, did not execute a sale-deed, but got mutation of names effected in the Revenue Department, sued for possession of the share in question, on payment of Rs. 300, or whatever sum the Court might fix. The *wajib-ul-arz,* on which the suit was based, provided as follows:—"If any one wishes to transfer his share, wholly or partly, by sale or mortgage, he must mortgage it to one of the shareholders of the village, or sell it to him for the fixed price. If they refuse to take it, or to pay a proper price, he is at liberty to sell or mortgage it to any one he likes; should he transfer his share to a stranger without giving information to the shareholders of the village, the transfer shall be invalid." Both the lower Courts found that the share in question had been sold by the defendant Rameshar to the defendant Janki, a "stranger," for Rs. 300, and

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that a sale-deed had not been executed in order to avoid pre-emption.

It was urged before the lower appellate Court that under s. 54 of the Transfer of Property Act a sale of immoveable property of the value of Rs. 100 and upwards could be made only by a registered instrument, and that there being in this case no registered instrument, there was no "sale," and therefore the right of pre-emption did not arise. Upon this point the Court observed as follows:—"This contention cannot, in my opinion, hold water, because, otherwise, it would be easy for a vendor and vendee to enter into a combination successfully to defeat claimants for pre-emption. The fact that the vendor and vendee fraudulently omitted to evidence the *de facto* transfer by sale by a registered instrument cannot deprive the plaintiffs of their claim for pre-emption."

In second appeal the defendant Janki again contended that there was no "sale," and therefore no right of pre-emption had accrued. The Divisional Bench (PETHERAM, C. J., and MAHMOOD, J.) hearing the appeal referred the case for decision to the Full Bench.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the appellant.

Mr. *G. T. Spankie*, for the respondents.

The following judgments were delivered by the Full Bench:—

MAHMOOD, J.—I regret that in this case I am unable to take the same view as the learned Chief Justice and the other members of the Court. The suit was instituted to enforce the right of pre-emption founded upon the specific terms of the *wajib-ul-arz* of the village in which the property in dispute is situate; and it was based on the ground that the effect of an application dated the 15th August, 1882, was to transfer the ownership of the property to a person whom, for the sake of convenience, I shall call the "vendee." This application was made in the Revenue Court for mutation of names, and its object was to substitute the name of the so-called vendee for that of the so-called vendor as owner of the share, on the allegation that the latter being a member of the same family had an original share in this property, though his

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name was not recorded. The question now before us is, whether this transaction was of such a nature as to afford a cause of action upon which a suit to enforce pre-emption may be brought?

I take it to be a fundamental principle relating to the exercise of the pre-emptive right that it cannot be enforced upon a sale which is invalid and can take no effect, but that it can be enforced when, under a valid sale, and according to the rules of law, the owner has been divested of the proprietary title and the purchaser invested with it. This rule might be amply supported by authorities upon the Muhammadan Law of pre-emption which, as I have frequently said, must, by equitable analogy, be followed in cases like the present. It appears to me that in the present case nothing has happened which can properly be termed a "sale" within the meaning of the *wajib-ul-arz*. Mr. Spankie has argued that inasmuch as the *wajib-ul-arz* was framed in 1848, it must be construed with reference to the law then in force, and not with reference to s. 54 of the Transfer of Property Act, which came into force on the 1st July, 1882. It is a recognised rule of construction that the words used in any document must be understood in their ordinary sense, unless there are words suggesting a different meaning; and although in 1848 neither the Transfer of Property Act nor the Registration Act was in existence, it appears to me that the word "sale" could not at any time have borne a different meaning from that which has now been assigned to it by the Legislature—that is to say, "a transfer of ownership in exchange for a price paid or promised, or part paid or part promised." This is not any new definition: it is merely a repetition of what has long been the law. Now it may well be that in 1848 this "transfer of ownership in exchange for a price" might have been effected orally, or by other means than that now provided; but I confidently assert that the conception of "sale" and the meaning of the word has not altered. The law says that such a transfer, in order to take effect, must be executed by a written document registered according to the law for the time being in force. S. 17 of the Registration Act (III of 1877), read with s. 49 of the same Act, leaves no doubt that if such a transaction as that now in question were effected by a written document, the value of the property exceeding Rs. 100, the document must, in order to affect

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immoveable property, be registered; because s. 49 provides that "no document required by s. 17 to be registered shall affect any immoveable property comprised therein, or be received as evidence of any transaction affecting such property, unless it has been registered in accordance with the provisions of this Act."

Now, if the application of the 15th August, 1882, amounted to a "sale," it it is obvious that, not having been registered, it could, not, as a matter of law, affect the property in suit. If the transaction were a mere oral matter, and the application a mere repetition of it, then s. 54 of the Transfer of Property Act prevents it from taking effect as a sale, or from passing the ownership from the vendor to the vendee, and therefore, under the *wajib-ul-arz*, the right of pre-emption cannot arise. Mr. Spankie argued that the proper interpretation of the *wajib-ul-arz* is, that it gives a right of pre-emption upon transfers of all kinds, including even a transfer not of the whole of the incidents constituting ownership, but of some of those incidents only. I cannot agree with this view, because the interpretation of this *wajib-ul-arz* must be limited to the words used therein, and the only transactions there mentioned are "sale" and "mortgage." The transaction now in question is neither the one nor the other.

There appears to be nothing in the Transfer of Property Act which prevents any one from entering into a contract for sale of the nature mentioned in the penultimate paragraph of s. 54 by parol or by an unregistered document. It has been said that such a contract might be made the basis of a suit for specific performance by the present vendee against the vendor; and that a decree for specific performance having been obtained, it would then operate in derogation of the pre-emptor's right. Now, in the first place, such a contract may never be enforced, and if it is enforced, then such a decree could only result in a sale-deed properly executed in reference to s. 54, and whenever that was done, and a valid sale and consequent transfer of ownership were effected, then, and not till then, this right of pre-emption would come into force. "Contract for sale" is defined in the last part of s. 54 of the Transfer of Property Act, which clearly lays down that such a contract "does not, of itself, create any interest in or charge on such pro-

perty," and in my opinion it falls under the category of "obligation arising out of contract and annexed to the ownership of immoveable property" within the meaning of the last two paragraphs (*vide* Illustration) of s. 40 of that Act—an obligation which cannot be enforced against a transferee for value without notice.

If a valid and perfected sale were not a condition precedent to the exercise of the pre-emptive right, consequences would follow which the law of pre-emption does not contemplate or provide for. In this very case, supposing the so-called vendor, notwithstanding the application of the 15th August, 1882, (which cannot amount to an estoppel under the circumstances), continues or re-enters into possession of the property, it is clear that the so-called vendee would have no title under the so-called sale, to enable him to recover possession—the transaction being, by reason of s. 54 of the Transfer of Property Act, ineffectual as transfer of ownership. The right of pre-emption being only a right of substitution, the successful pre-emptor's title is necessarily the same as that of the vendee, and if the vendee took nothing under the sale, the pre-emptor can take nothing either; and it follows that if the vendee could not oust the vendor, the pre-emptor could not do so either, because in both cases the question would necessarily arise whether the sale was valid in the sense of transferring ownership. Again, if notwithstanding a pre-emptive suit such as this, the so-called vendor, who has executed an invalid sale which does not in law divest him of the proprietary right, subsequently executes a valid and registered sale-deed in favour of a co-sharer other than the pre-emptor, or in favour of a purchaser for value without notice of the so-called contract for sale, it is difficult to conceive how the pre-emptor, who has succeeded in a suit like the present, could resist the claim of such purchaser for possession of the property. And the anomaly would become further prominent if such purchaser is a "stranger," for in that case the only way in which the successful pre-emptor like the present could obtain the property would be by bringing another suit, with respect to the *valid* sale, for pre-empting property which *ex hypothesi* belongs to himself. In my opinion, in cases like the present the turning point of the decision depends upon the answer to the question whether the proprietary title has validly passed from the vendor to the vendee, and

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the pre-emptive suit will lie or not lie according as the answer is in the affirmative or the negative. In the present case there is no doubt in my mind that the proprietary title still vests in the so-called vendor, and he may still deal with it as he likes, by sale, or mortgage, or otherwise; and it follows therefore that no cause of action has arisen for a pre-emptive suit under the *wajib-ul-arz*, the transaction of the 15th August, 1882, being neither a *sale* nor a *mortgage* within the meaning of that document. On the other hand, even if that transaction is to be treated as a contract for sale, I should say that the suit was premature.

For these reasons I would decree the appeal, and, reversing the decisions of both the lower Courts, dismiss the suit with costs to be borne in all Courts by the respondents.

PETHERAM, C. J.—I think that in this case the right of pre-emption does arise, and that the judgments of the lower Courts were right. The facts of the case are very simple. A co-sharer in a village entered into a transaction for the sale of his share in consideration of Rs. 300, and in pursuance of this transaction the Rs. 300 were paid, and the vendee obtained possession, but no transfer under the Transfer of Property Act was executed or registered, and consequently the legal interest was never transferred from the vendor to the vendee. But the vendee paid the purchase-money and got possession; he was entitled to possession and to bring an action against the vendor for specific performance of the contract for sale, and to obtain an actual transfer of the legal estate, which could then be registered. These rights he might enforce either at once, or, if attacked by the vendor, by way of defence and counter-claim. The effect of the transaction was therefore that a co-sharer transferred the right to possession, and gave possession to the vendee. The question then is—Does such transfer let in the right of pre-emption? The *wajib-ul-arz* provides as follows:—"If any one of us wishes to transfer his share wholly or partly, by sale or mortgage, he must mortgage it to one of the share-holders of the village, or sell it to him for the fixed price. If they refuse to take it or to pay a proper price, he is at liberty to sell or mortgage it to any one he likes; should he transfer his share to a stranger without giving information to the shareholders

of the village, the transfer shall be invalid." Now, it will be observed that after "partly," the words "by sale or mortgage" occur; and these words were obviously meant to extend the effect of the preceding words, and they appear to me to mean that if any co-sharer transfers his right wholly or partly, the right of pre-emption is to arise. The effect of the transaction now in question was to transfer absolutely the whole right of possession to the vendee, and therefore it appears to me to come within the meaning of the *wajib-ul-arz*, and to give rise to the right of pre-emption,

STRAIGHT, J.—I am of the same opinion, and have only a few words to add. It has been found as a fact by both the lower Courts that the defendants in this case, the vendor and the vendee, intended the transaction between them to be a transaction of sale, that consideration passed, and that the vendee was put into possession. From these facts, it seems to me, the inference is irresistible that they deliberately omitted to observe the necessary legal formality of a registered instrument with the object of defeating the pre-emptive right of the plaintiff. This being the case, I entertain very grave doubts whether this Court, as a Court of equity, would be justified in allowing them to set up, and in giving effect to, a defence based upon their own intentional evasion of the law, and, speaking for myself, I should hesitate long before countenancing it. In reference to the observations made by my brother Mahmood in the course of the argument, I fail to see how, if the vendor were to sue to recover possession of the share upon the basis that no written instrument had been executed, he could succeed, because consideration having been paid and possession obtained, the vendee would have a good answer. As I said before, however, I concur with the reasoning and conclusion of the learned Chief Justice, and would dismiss the appeal with costs.

OLDFIELD, J.—I am of the same opinion. The Courts below have found as a fact that Rameshar was the owner of the property and transferred it to Janki Misr, appellant, for valuable consideration. This transaction amounts to a sale in fact, on which the right of pre-emption comes into operation. S. 54, Transfer of Property Act, no doubt requires that a sale of this kind shall be made by registered instrument, which has not been done in this

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case, but the failure of the parties to the sale to comply with the requirement of the Act as to the manner in which the transfer shall be made by the parties does not alter the nature of the transaction, or affect the fact that a sale has been made, and cannot defeat a pre-emptor's right in respect to it. I would therefore dismiss the appeal.

BRODHURST, J.—On the findings of fact arrived at in the concurrent judgments of the lower Courts, it is established that Rameshar Misr sold and transferred the share in suit to Janki Misr for Rs. 300, and though, with the object of defeating the right of pre-emption, a deed of sale was not executed in accordance with the provisions of s. 54 of the Transfer of Property Act, there nevertheless was a transfer by sale, and under the *wajib-ul-arz* the plaintiffs have a right of pre-emption, and consequently I would dismiss the appeal with costs.

Appeal dismissed.

1884 *August* 16,

Before Mr. Justice Straight, Offg. Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst, Mr. Justice Mahmood, and Mr. Justice Duthoit.

ROHILKHAND AND KUMAUN BANK, LIMITED (PLAINTIFF) *v.* ROW (DEFENDANT).*

Minor, suit against—Civil Procedure Code, s. 443—Majority, age of—European British subject not domiciled in India—Act IX. of 1875 (*Majority Act*)—*Contract—Lex loci—Act IX of* 1872 (*Contract Act*), *s.* 11—*Cheque—Liability of indorser—Act XXVI of* 1881 (*Negotiable Instruments Act*), *ss.* 35, 43.

A cheque was indorsed in blank by a European British subject who, at that time, was under twenty years of age, and was temporarily residing, and not domiciled, in British India. It was subsequently dishonoured, and a suit was then brought by the bank which had cashed the cheque, to recover the amount from the indorser and the drawer. The former alleged that the drawer had requested him to sign his name to the cheque, saying that it was a mere matter of form, and he would not be liable for the amount, and that the bank would only cash the cheque when indorsed by him, and in consequence he consented to indorse it, but that he did so without any intention of incurring liability as indorser, that he received no consideration, and that his indorsement was in blank, and not in favour of the bank, and was converted into a special indorsement without his knowledge and consent. The Court held that, at the time of indorsement, the indorser was a minor under English law, and dismissed the suit on the ground of minority.

Held that if the Court was satisfied of the fact of the defendant's minority, it should have complied with the provisions of s. 443 of the Civil Procedure Code.

* First Appeal No. 60 of 1883, from a decree of T. B. Tracy, Esq., District Judge of Bareilly, dated the 27th February, 1883.