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adduce, even if reliable, failed to show that any right to redeem had accrued.

There is another peculiar feature in this case. The mortgage-deed was not produced. The Subordinate Judge, discovering from the evidence of the witnesses called to prove its execution that it had been written on plain paper, and professing to act under the provisions of section 34, proviso 1, of the Indian Stamp Act, 1879, levied from the plaintiff the amount of the proper duty and a penalty. Section 35 of that Act provides that when an officer admits an instrument in evidence upon payment of a penalty as provided in section 34 he shall send to the Collector an authenticated copy of the instrument. Section 39 further provides that he shall certify by endorsement on the document that the proper duty and penalty have been levied. The terms of these sections make it clear that a Court cannot admit in evidence an instrument not duly stamped upon levy of a penalty under section 34, unless the instrument is actually produced before it, and that the action of the Subordinate Judge was not warranted by law. The original instrument not having been admissible, as not being duly stamped, I hold that secondary evidence was not admissible to prove its contents.

For the reasons set forth above, this appeal fails and is dismissed with costs.

Appeal dismissed.

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March 6.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

KULSUM BIBI (DEFENDANT) *v.* FAQIR MUHAMMAD KHAN AND OTHERS (PLAINTIFFS.)*

Pre-emption—Muhammadan law—Demand made on the premises—Demand made within an undivided village a share in which was the subject of sale.

Where certain persons claimed pre-emption in respect of a share in a undivided village and proved that they made an immediate assertion of their intention to pre-empt in the presence of witnesses within the area of the zamindari to which the share sold belonged, it was *held* that, in the absence of any indication that the demand was not made *bonâ fide*, the demand of pre-emption was a good demand made "on the premises" within the meaning of the Muhammadan law.

* Second appeal No. 1270 of 1893, from a decree of J. J. McLean, Esq., District Judge of Cawnpore, dated the 6th September 1893, confirming a decree of Syed Akbar Husain, Subordinate Judge of Cawnpore, dated the 20th December 1890.

This appeal arose out of a suit for pre-emption. The plaintiffs, who were the present respondent, Faqir Muhammad Khan, and Mahbub Khan, the predecessor in title of the other respondents, based their claim upon an agreement, said to have been entered into between the original plaintiffs, the vendor Musammat Ajuba Bibi and one Bushir Khan, who between them were once owners of the entire village, a share in which was the subject of the suit; upon the *wajib-ul-arz* of the village, and upon the Muhammadan law. They alleged in their plaint that the defendant-vendor, who was stated to be the aunt of the plaintiffs, being a sharer to the extent of 4 annas in the village Supa, in which village they were also co-sharers, had sold 2 annas out of her share to the other defendant Musammat Kulsum Bibi. They further alleged that the sale consideration had been overstated with a view to defeat their right of pre-emption, and they further alleged that upon coming to know of the sale on the 31st of January 1890 they had at once made the *talab-i-muwasibat* and *talab-i-ishtishhad* as required by the Muhammadan law.

The defendant vendor did not defend the suit. The vendee filed a written statement in which she raised numerous pleas, more particularly that the plaintiffs had no right of pre-emption under the agreement relied upon by them, and that the requirements of the Muhammadan law as to pre-emption had not been complied with.

The Court of first instance (Subordinate Judge of Cawnpore) found in favour of the plaintiffs on the agreement set up by them, and gave the plaintiffs a decree without deciding any other issue in the suit except that of the price.

On appeal by the defendant-vendee the lower appellate Court (District Judge of Cawnpore) found that the agreement relied upon by the plaintiffs was inadmissible in evidence, and made an order of remand under section 562 of the Code of Civil Procedure. That order of remand was set aside on appeal by the High Court, and the appeal was ordered to be disposed of on the merits by the lower appellate Court. That Court accordingly, after directing

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evidence to be taken on the plea raised as to the making of the demands for pre-emption, proceeded to hear the appeal. The Court found that the first demand had been made at the earliest opportunity at the door of the plaintiffs' house in the village of which the share in dispute formed part, in the presence of certain witnesses; and that the demand had been repeated without any inexcusable delay to the brother of the vendee, who was her manager of affairs, the vendee being a *parda nashín* woman. As the result the Court found that the provisions of the Muhammadan law had been complied with, and, accepting the finding of the Court of first instance as to the price, dismissed the appeal.

The vendee defendant appealed to the High Court.

There the case turned on the question whether the first demand was made "on the premises," and an issue was referred under section 566 of the Code of Civil Procedure:—"Was the first demand made within the area of that part of the village in which the two anna share was?" The lower appellate Court found that the village being undivided the answer to the reference must be in the affirmative.

Maulvi *Muhammad Ishaq* and Maulvi *Muhammad Ahmad* for the appellant.

Pandit *Moti Lal* and Maulvi *Ghulam Mujtaba* for the respondents.

EDGE, C. J., and BURKITT, J.—A two-anna undivided share in a zamindari village was sold. The plaintiffs, who were shareholders in the village, claimed pre-emption under the Muhammadan law. They proved an immediate assertion of the intention to pre-empt made in the presence of witnesses within the area of the zamindari the two-anna share in which was sold. The owner of an undivided two-anna zamindari share is an owner of every portion of the zamindari, although his interest is limited to a two-anna share. We hold that this demand was made on the premises within the meaning of the Muhammadan law, and, as it was made in the presence of witnesses and was immediate, it was sufficient. It must not be inferred that the Court would hold that a pre-emptor

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who purposely went to an uninhabited and distant part of the village, a share in which was sold, and there in the presence of his couple of witnesses made a second demand under circumstances which would not make it likely that the demand would come to the ears of the vendee, would be making a *bonâ fide* and good demand according to the Muhammadan law. There is no doubt as to the *bonâ fides* of the demand in the present case. We dismiss this appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

1896.
March 7.

Before Mr. Justice Aikman.

QUEEN-EMPRESS *v.* LACHMI KANT.

Criminal Procedure Code, section 423 (b) (3)—Sentence, enhancement of—Powers of appellate Court.

Held that the alteration by an appellate Court of a sentence of a fine of Rs. 50 or in default two months' simple imprisonment to a sentence of six months' rigorous imprisonment was an enhancement of the sentence, and, as such, prohibited by section 423 of the Code of Criminal Procedure. *Queen-Empress* v. *Dansang Dada* (1) referred to.

THIS was a reference under section 438 of the Code of Criminal Procedure made by the Sessions Judge of Gorakhpur. A tahsíldár having powers of a Magistrate of the second class had sentenced the accused to a fine of Rs. 50 or in default to two months' simple imprisonment. On appeal the District Magistrate upheld the conviction, but altered the sentence to one of six months' rigorous imprisonment, being of opinion that the alteration of the sentence was one of form only and not of amount, and that the nature of the offence was such as rendered a punishment by fine only undesirable. On an application by the accused for revision of the District Magistrate's order the Sessions Judge came to the conclusion that the sentence passed by the Magistrate of the district was illegal with regard to section 423 of the Code of Criminal Procedure, and referred the matter to the High Court.

THE Public Prosecutor (Mr. *E. Chamier*) in support of the reference.

(1) I. L. R., 18 Bom., 751.