claimed rent from them, and on their refusal to pay had obtained a decree and served notice of ejectment upon them, such an inference might be drawn; but we cannot find as a fact from their merely sitting quiet and doing nothing that they intended to relinquish all rights in land which any year might emerge from the Ganges and become culturable. We find that their tenancy did not in fact determine in any of the ways provided for by the Rent Act or by agreement, and we consequently find that when the lands did emerge from the water owing to a change in the stream of the Ganges, the plaintiffs, being still tenants of those lands, were entitled to the possession of them. The defendants have no title whatsoever. The plaintiffs are proved to have a title, but whether it is one as occupancy tenants or merely as tenants having no right of occupancy it is not necessary to consider. It is to be noticed that neither the Maharaja of Dumraon, who certainly would have an interest in showing that the plaintiffs were not entitled to this considerable area of land as tenants, particularly as occupancy tenants, nor any one of their co-villagers in Rampur Kurraha was shown to have disputed or challenged the plaintiffs' title. The plaintiffs' title is merely challenged by strangers from the neighbouring village who are not shown to have even a scintilla of right to any lands in Rampur Kurraha. We dimiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Aikman.

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March 6.

KALLU (PLAINTIFF) *v.* HALKI (DEFENDANT).*

Usufructuary mortgage—Redemption—Limitation—Act No. XV of 1877 (*Indian Limitation Act*), *section* 20—*Act No. I of* 1879 (*Indian Stamp Act*), *sections* 34, 35, 39—*Admission of unstamped document in evidence on payment of penalty—Necessity for production of document.*

Section 20 of Act No. XV of 1877 does not have the effect of extending indefinitely the period within which a usufructuary mortgage must be redeemed.

Where a Court has occasion to admit a previously unstamped document in evidence upon payment of a penalty under section 34 and the following sections

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Second Appeal No. 74 of 1895, from a decree of Rai Shankar Lal, Subordinate Judge of Banda, dated the 27th November 1894, reversing a decree of Munshi Kalika Singh, Munsif of Hamirpur, dated the 3rd February 1894.

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of Act No. I of 1879, it is necessary that the original instrument should be before the Court.

THE facts of this case sufficiently appear from the judgment of Aikman, J.

Munshi *Madho Prasad* for the appellant.

Babu *Jogindro Nath Chaudhri* for the respondent.

AIKMAN, J.—The appellant in this case brought a suit for redemption of a mortgage, which he alleged had been made by his predecessor in title "about 40 years" before the date of the institution of the suit in favour of the predecessor in title of the defendant-respondent, Musammat Halki. The mortgage was a usufructuary one, and the defendant was in possession of the property claimed. The plaintiff got a decree in the Court of first instance, which was reversed in appeal by the Subordinate Judge of Banda. The learned Subordinate Judge entirely discredited the evidence adduced by the plaintiff to prove the mortgage upon which his suit was based, and held, on the authority of the ruling *Parmanand Misr* v. *Sahib Ali* (1) that it was for the plaintiff to prove by *prima facie* evidence that he had a subsisting title at the date when the suit was instituted. The Subordinate Judge came to the conclusion that the plaintiff had failed to prove that the mortgage on which he relied had been made within the period of limitation prescribed by art. 148 of the second schedule of the Limitation Act No. XV of 1877. The plaintiff comes here in second appeal. The learned vakíl who appears for the appellant argues that, inasmuch as the mortgage was a usufructuary one, his client is entitled to rely upon the last clause of section 20 of the Limitation Act, which, he contends, has the effect of extending the period of limitation. In support of his contention he relies upon an unreported judgment of this Court in S. A. No. 38 of 1893 decided on the 25th June 1894, by Tyrrell and Blair, JJ. That judgment is undoubtedly an authority for the contention that a mortgagor suing for redemption is entitled to take advantage of the last clause of the section above quoted, which runs as follows:—

(1) I. L. R., 11 All., 438.

"Where mortgaged land is in possession of the mortgagee the receipt of the produce of such land shall be deemed to be a payment for the purpose of this section."

The result of the ruling referred to would be that a suit to redeem a usufructuary mortgage would never be barred by any lapse of time. That is a view which has not been taken in any other case which has come to my notice. In numerous cases article 148, which provides a period of 60 years from the date when the right to redeem accrues, has been applied to suits for the redemption of usufructuary mortgages. As instances of such cases, I would refer to the Full Bench ruling of *Parmanand Misr* v. *Sahib Ali*, quoted above, and to the case of *Zingari Singh* v. *Bhagwan Singh* (2). With all deference to the learned Judges who decided S. A. No. 38 of 1893, I am unable to follow them in holding that the last clause of section 20 applies to a suit for redemption. It will be seen that that clause declares that the receipt of the produce of the mortgaged land shall be deemed to be a payment "for the purpose of this section." Reading the section as a whole, these words in my opinion indicate that the clause is meant to extend the time for suit by a mortgagee to recover a debt secured by a usufructuary mortgage, and are not intended to override the general provision as regards limitation for suits for redemption which is to be found in article 148 of the second schedule of the Act. The period provided by that article could be extended by an acknowledgment of liability made in writing under the provisions of section 19 of the Act, but I hold that it was not intended that it should be extended indefinitely by the concluding words of section 20. As the evidence which it was necessary for the plaintiff to adduce in order to substantiate his case has been considered entirely unreliable by the Court below, which had to find the facts, it is impossible to say, notwithstanding the fact that the defendant failed to make out the title set up by her, that the plaintiff has produced the *primâ facie* evidence which it was necessary for him to adduce. I may also remark that the evidence which the plaintiff did

(2) Weekly Notes, 1889, p. 187.

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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.