1898

THE N.-W. P. CLUB THROUGH G. B. GOYDER, HONORARY SECRETARY v. SADULLAH.

should have been so cited, and who should have had such opportunity given to them to appear and contest the action. On that ground the action should have been dismissed against the club.

We think that there is another ground upon which the action against the club should be dismissed, and that is, that as alleged in the plaint the contract was entered into by the club through its secretary. It is clearly shown as a fact that at the time the contract was entered into, Mr. Goyder was not secretary at all. Our order is:—We allow this application, set aside the decree of the Court below, and we dismiss the plaintiff's suit.

Application allowed.

APPELLATE CIVIL.

1898
July 1.

Before Mr. Justice Aikman.

ABID HUSEN (DEFENDANT) *v.* BASHIR AHMAD (PLAINTIFF).*

Pre-emption—Muhammadan law—Talab-i-ishtishhad—Reference necessary to the previous talab-i-mawasibat.

When in asserting a claim for pre-emption the making of the *talab-i-ishtishhad* is required, it is absolutely necessary that at the time of making this demand reference should be made to the fact of the *talab-i-mawasibat* having been previously made, and this necessity is not removed by the fact that the witnesses to both demands are the same. *Rujjub Ali Chopedar* v. *Chundi Churn Bhadra* (1), *Akbar Husain* v. *Abdul Jalil* (2), and *Abasi Begam* v. *Afzal Husen* (3) followed. *Nundo Pershad Thakur* v. *Gopal Thakur* (4) dissented from.

THE facts of this case sufficiently appear from the judgment of the court.

Maulvi *Ghulam Mujtaba*, for the appellant.

Mr. *Amiruddin*, for the respondent.

AIKMAN, J.—This is an appeal by the defendant vendee in a suit for pre-emption which was based on the Muhammadan law.

* Second Appeal No. 566 of 1897 from a decree of Pandit Raj Nath, Subordinate Judge of Moradabad, dated 1st June 1897, reversing a decree of Babu Nihala Chandra, Munsif of Amroha, dated the 2nd December 1896.

(1) I. L. R., 17 Calc., 543.
(2) I. L. R., 16 All., 383.
(3) I. L. R., 20 All., 457.
(4) I. L. R., 10 Calc., 1,008.

1898

ABID HUSEN v. BASHIR AHMAD.

The Court of first instance found that the plaintiff pre-emptor had failed to prove that he had performed the necessary ceremony *talab-i-mawasibat* or making immediate assertion of his rights as soon as he heard of the sale. That Court further found that the plaintiff when making the *talab-i--ishtishhad*, or demand with invocation of witnesses did not say that he had made the immediate demand. On these grounds the plaintiff's suit was dismissed. The plaintiff appealed. The learned Subordinate Judge found that the plaintiff had proved that he had made an immediate demand. This demand was not made in the presence either of the seller or of the purchaser or on the premises, and therefore the demand with invocation of witnesses was necessary. The learned Subordinate Judge found that, as the same witnesses were present at the time when the immediate demand was made and at the time when the *talab-i-ishtishhad* was made, it was unnecessary for the pre-emptor to repeat the immediate demand. He therefore reversed the decision of the Munsif and gave the plaintiff a decree. I may point out that, as there were various other pleas raised by the defendant vendee, it was improper for the lower appellate Court to decree the plaintiff's suit merely on the ground that the defendant's plea as to non-fulfilment of the necessary requirements of Muhammadan law had failed. The defendant comes here in second appeal.

In my opinion the appeal must succeed. In the case of *Nundo Pershad Thakur* v. *Gopal Thakur* (1), it was held by GARTH, C. J., and BEVERLEY, J., that when a person seeking pre-emption had performed the *talab-i-mawasibat* in the presence of witnesses and as soon as possible on the same day in the presence of the same witnesses demanded his right from the vendor and purchaser, it was unnecessary that he should again state when making his demand that he had declared his right as soon as he heard of the sale, that is, that it was unnecessary for him to make any reference to his immediate demand. The present case is on all fours with that case. But that case was dissented from and overruled by a Full Bench of the Calcutta Court in *Rujjub Ali Chopedar* v. *Chundi Churn*

(1) I. L. R., 10 Calc., 1,008

Bhadra (1), which latter case has been followed by this Court in *Akbar Husain* v. *Abdul Jalil* (2), and in a recent case *Abbasi Begam* v. *Afzal Husen* (3). That these latter rulings are correct is, in my opinion, clear from the definition of *talab-i-ishtishhad* given on p. 489 of Baillie's Digest of Moohnmmudan Law (2nd edition). By *talab-i-ishtishhad*," says that learned author," is meant a person calling upon witnesses to attest his *talab-i-mawasibat* or immediate demand." It appears to me impossible to invoke witnesses to attest the fact that an immediate demand has been made without making some reference to that immediate demand.

The learned counsel for the respondent argues that the *talab-i-ishtishhad* is merely a rule of evidence according to the Muhammadan law and is no longer of any validity. Be that as it may, I am bound to follow the decisions of this Court to which I have referred.

For the above reasons I allow this appeal, and, setting aside the decree of the lower appellate Court with costs, restore that of the Court of first instance. The appellant will have his costs of this appeal.

Appeal decreed.

REVISIONAL CRIMINAL.

1898
July 5.

Before Mr. Justice Blair and Mr. Justice Aikman.

QUEEN-EMPRESS *v.* JASODA NAND.*

Criminal Procedure Code, sections 133, 135 *and* 136—*Act No. XLV of* 1860 *(Indian Penal Code), section* 188—*Power of Magistrate to order repair of a house not adjoining a public road.*

Section 133 of the Code of Criminal Procedure does not empower a Magistrate to order the owner of a house standing apart from any public road in its own compound to repair such house. By "persons living or carrying on business in the neighbourhood," injury to whom the power to pass orders under section 133 is intended to prevent, are meant, not the persons who in the exercise of their private rights may use a building supposed to be in a dangerous

* Criminal Reference No. 311 of 1898.

(1) I. L. R., 17 Calc., 543. (2) I. L. R., 16 All., 383.
(3) I. L. R., 20 All., 457.