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admitted, even in Mr. Church's order of the 26th of February 1883 (pp. 18 and 19, appellants' book). We are unable to agree with Mr. Ryves' contention that this order operates as *res judicata*. We are not satisfied on the evidence that the plaintiffs or their predecessors have been out of possession, that the defendant has been in adverse possession, and that the claim is beyond time.

A faint attempt was made to show that Mrs. Raynor relinquished all claim to the bed of the Jakhan Rao on obtaining 400 acres of land. But there is no satisfactory evidence to connect the grant of the 400 acres with the claim to the land now in question. Mr. Raynor has stated that it had reference to another claim which his mother had against Government.

We hold that the western boundary of the plaintiff's property is the centre of the bed of the Jakhan Rao, and that the plaintiffs are entitled to a declaration to that effect.

We allow the appeal, set aside the decree of the Court below, and decree the claim with costs in both Courts.

Appeal decreed.

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August 9.

Before Mr. Justice Knox and Mr. Justice Aikman.

QURBAN HUSAIN (PLAINTIFF) *v.* CHOTE AND OTHERS (DEFENDANTS).*

Muhammadan Law—Pre-emption—Shias and Sunnis—Pre-emption claimed on ground of vicinage—Vendors and vendee Sunnis, pre-emptor a Shia.

Held that a Muhammadan of the Shia sect could not maintain a claim for pre-emption based on the ground of vicinage under the Muhammadan law when both the vendors and the vendee were Sunnis. *Gobind Dayal* v. *Inayat-ullah* (1), and *Pir Bakhsh* v. *Sughra Bibi* (2), referred to.

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

Maulvi *Karamat Husain* for the appellant.

Maulvi *Ghulam Mujtaba* for the respondent.

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* Second Appeal No. 193 of 1897, from a decree of Rai Anant Ram, Subordinate Judge of Aligarh, dated the 17th December 1896, confirming a decree of M. Muhammad Shafi, M.A., Munsif of Aligarh, dated the 30th March 1896.

(1) (1885) I. L. R., 7 All., 775. (2) Weekly Notes, 1892, p. 34.

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AIKMAN, J.—This appeal arises out of a suit brought to enforce a right of pre-emption based on Muhammadan law and custom.

The plaintiff's suit was dismissed by the Court of first instance, which held that the plaintiff had no right to pre-empt the property sold. This decision was, on appeal, affirmed by the Subordinate Judge.

The plaintiff comes here in second appeal and the sole question for decision is whether, under the circumstances of the case, the plaintiff-appellant has a right of pre-emption in respect of the property sold.

The plaintiff and the vendors are neighbours residing in the town of Koil in which the house property sold, and claimed in this suit, is situated. The plaintiff claims to be allowed to pre-empt the property sold on the ground of vicinage. The plaintiff is a Shia governed by the Imamiya Law, whereas the vendors are Sunnis governed by the Hanifeea law. The vendee is also a Sunni. Now by the Imamiya law, a neighbour, as such, has no right of pre-emption. It is admitted by the learned counsel who appears in support of the appeal that the plaintiff in this case might sell his house to anyone he likes, and that his Sunni neighbours could not successfully assert any right of pre-emption against him. But it is argued that, as according to the doctrines of the Sunni school, neighbours have a right of pre-emption, the plaintiff being a neighbour is entitled to take advantage of this right, even though he is not a Sunni. It is admitted by the learned counsel on both sides that in disposing of this case the Court ought to be guided by the rule of justice, equity and good conscience. But whilst one side argues that it would be in accordance with that rule to let the plaintiff have the benefit of the law governing the defendant-vendor, the other side contends that it would not be consonant with that rule to do so.

Very learned and able arguments were put forward by the counsel on either side in support of their respective positions. I do not propose to follow them in these arguments. For, admitting the appellant's contention that the case should be governed by

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the law of the school to which the vendor belongs, the learned counsel for the appellant has failed to satisfy me that, according to the doctrines of that school, a neighbour against whom a Sunni has no right of pre-emption has nevertheless a right of pre-emption against the Sunni. In my judgment the principle of reciprocity lies at the root of the law of pre-emption.

It is true that according to the Hanifeea law it is not necessary that the pre-emptor should be of the same religion as the vendor. On p. 477 of Baillie's Digest, 2nd edition, that learned author says:—"Islam on the part of the pre-emptor is not a condition." He goes on to say, "so that *zimmees* (*i. e.*, infidels subject to and under the protection of a Muhammadan Government) are entitled to exercise the right of pre-emtion *as between themselves* or against Mooslims." Those words *as between themselves* are to my mind an indication that though a person need not be of the same religion as the vendor to entitle him to take advantage of the Hanifeea law of pre-emption, he must yet belong to a class of persons against whom a right of pre-emption can be enforced.

At p. 793 of his exhaustive judgment in the Full Bench case *Gobind Dayal* v. *Inayat Ullah* (1) Mahmood, J., observes:—"The rights and obligations created by that law (*i. e.*, the Muhammadan law of pre-emption), as indeed by every other system with which I am acquainted, must necessarily be reciprocal." It has not, I repeat, been shown to my satisfaction that it was ever the intention of the Hanifeea law to confer a right of pre-emption on a neighbour regardless of the fact that no reciprocal right could be enforced against him.

The case relied on by the lower Courts, namely, *Pir Bakhsh* v. *Sughra Bibi* (2), differs from the present case, for there the plaintiff and the vendor were both Shias, whilst the vendee was a Sunni. But the following observation of the learned Judge who decided that case appears to me to be in point:—"I do not think that any rule of justice, equity and good conscience exists that

(1) (1885) I. L. R., 7 All., 775. (2) Weekly Notes, 1892, p. 34.

would enable us to allow the plaintiff, who from the fact of her being a Shia necessarily abhors the doctrines of the Sunni school, to take advantage of the law of that school in regard to pre-emption, and to maintain the pre-emption suit, any more than if the plaintiff stood in the position of the defendant-vendee she could be made liable to the doctrines of the Sunni school if the present vendee stood in the position of the plaintiff pre-emptor." For the above reasons I am of opinion that this appeal cannot succeed, and I would dismiss it with costs.

KNOX, J.—I also am of opinion that this appeal must be dismissed. The plaintiff, now appellant, is a Muhammadan gentleman of the Shia faith. He says in his plaint that he has a right of pre-emption under the Muhammadan law and custom in respect of the house sold, the subject-matter of the suit.

The appellant has not proved the custom alleged, and the sole question is whether he has any right of pre-emption under the Muhammadan law.

Now if by the Muhammadan law the plaintiff means the Imamiya doctrines, he has no standing, and he sees this, and therefore urges that the decision should be in accord with the doctrines of Abu Hanifa, and if not with these, still under the general rule of justice, equity and good conscience, which he considers would award him his claim.

His learned counsel addressed us very able arguments on this view of the question, but I think the question must be decided upon the general principles of Muhammadan law.

The appellant is claiming what has been properly described as a weak right. He is trying to place a restriction upon liberty of transfer of property. It is for him to show that he is vested with some right or power to make such restrictions. The Shia law gives him—a Shia—no such right under the present circumstances, and it is for him to show us that he can take advantage of the Sunni law, which he would be the first to repudiate did it place any similar restriction upon himself. As he has shown no law or precedent to the above effect, I would hold that he has not proved

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the existence of any such right of pre-emption in himself, and would dismiss the appeal with costs.

ORDER.—Appeal dismissed with costs.

Appeal dismissed.

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November 7.

REVISIONAL CRIMINAL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

QUEEN-EMPRESS *v.* ADAM KHAN AND ANOTHER.*

Procedure—Complaint—Criminal Procedure Code, Section 203—Dismissal of complaint—Subsequent complaint arising out of the same matter.

When a competent tribunal has dismissed a complaint another tribunal of exactly the same powers cannot re-open the same matter on a complaint made to it. *Nilratan Sen* v. *Jogesh Chundra Bhuttacharjee* (1) and *Komal Chandra Pal* v. *Gourchand Audhikari* (2) followed *Queen-Empress* v. *Puran* (3) and *Queen-Empress* v. *Umedan* (4) referred to.

THIS was a reference, under section 438 of the Code of Criminal Procedure, made by the Superintendent of Dehra Dun through the Sessions Judge of Saharanpur. One Hira Lal brought a complaint against Adam Khan and Pandey Khan under section 406 of the Indian Penal Code in the Court of an Honorary Magistrate. The Magistrate took the complainant's statement and dismissed the complaint under section 203 of the Code of Criminal Procedure. The complainant then made a similar complaint arising out of the same circumstances against the same men in the Court of a Deputy Magistrate. The Deputy Magistrate entertained the complaint and issued warrants for the arrest of the accused, who were put in the lock-up.

The case being brought to the notice of the Magistrate of the District, he made the present reference to the High Court with a view to having the order of the Deputy Magistrate set aside.

Mr. *C. Dillon*, in support of the reference.

Pandit *Moti Lal* (for whom Babu *Durga Charan Banerji*), for the complainant, Hira Lal.

* Criminal Reference No. 463 of 1899.

(1) (1896) I. L. R., 23 Calc., 983.
(2) (1897) I. L. R., 24 Calc., 286.
(3) (1886) I. L. R., 9 All., 85.
(4) Weekly Notes, 1895, p. 86.