

As no useful purpose is likely to be served by further enlarging the Bench, I have thought it fit to modify my views so that there may be a clear majority on one view. The fact that there has been so much difference of opinion shows that the Stamp Act on the point in question is capable of various interpretations. I think I may accept that interpretation which is for the benefit of the subject, the Act being purely a fiscal one.

In modification, therefore, of my opinion expressed formerly I hold that section 13 of the General Clauses Act can be made applicable to article 62 of the Stamp Act, as held by two of my brothers, and that, therefore, the stamp duty payable in this particular case will be Rs.5 and no more.

BY THE COURT :—The opinion of the majority of the members of the Court is that section 5 of the Stamp Act does not apply to the case, and that under article 62, read with section 13 of the General Clauses Act, the stamp duty chargeable on the deed in question is Rs.5.

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## APPELLATE CIVIL

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*Before Sir Shah Muhammad Sulaiman, Chief Justice,  
and Justice Sir Lal Gopal Mukerji*

BACHAULI (PLAINTIFF) v. UDAI SINGH AND ANOTHER  
(DEFENDANTS)\*

1933  

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February, 24

*Pre-emption—Customary law—Preferential rights—Kumaun customs—"Kinsman" whether includes kinswoman—Married girl is not a kinswoman of her father's family—"Relative of vendor within the third degree"—Such relationship with vendor's husband not sufficient.*

A Hindu widow in Kumaun sold the property inherited from her husband, and a suit for pre-emption was brought by a married daughter of the brother of the vendor's husband. According to the customary law of pre-emption in the Kumaun Division, as recorded in Stowell's Land Tenure of

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\*Second Appeal No. 1400 of 1931, from a decree of A. Hamilton, District Judge of Kumaun, dated the 25th of August, 1931, reversing a decree of Jwala Prasad, Subordinate Judge of Garhwal, dated the 3rd of July, 1930.

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Kumaun Division, a "kinsman" of the vendor, and a "relative of the vendor within the third degree", have preferential claims. The plaintiff claimed to be entitled to pre-empt on either ground. *Held*, that (1) apart from the question whether the word "kinsman" did or did not include a kinswoman, it was clear that the plaintiff by her marriage had gone out of the family and ceased to be a kinswoman of the vendor; and (2) that the plaintiff and the vendor not having descended from a common ancestor, the plaintiff could not come under the category of a relative of the vendor within the third degree. The plaintiff was, no doubt, a relative within the third degree of the vendor's husband, but that did not satisfy the condition.

Mr. *Basudeva Mukerji*, for the appellant.

Miss *L. W. Clarke*, for the respondents.

SULAIMAN, C. J., and MUKERJI, J. :—This is a plaintiff's appeal arising out of a suit for pre-emption in Kumaun. The Pre-emption Act does not apply, but the suit was brought on the basis of the customary law.

Jawaru and Badru were two brothers, after whom their widows, Mst. Dauli and Mst. Katgi, got possession of the estate, half and half. It is assumed that they were in separate possession of these half shares. Mst. Katgi sold her half share on the 4th of November, 1929, to Udai Singh and others, and the present suit was instituted in the first instance by Mst. Dauli for pre-emption of the same. An objection was taken in the written statement that Mst. Dauli had lost all interest because of a gift made by her in favour of her daughter Mst. Bachauli. An application was promptly filed that the name of Mst. Bachauli should be substituted in place of Mst. Dauli and that Mst. Dauli should be allowed to act as the next friend of her daughter. This application was allowed. The lower appellate court has remarked that this procedure was somewhat irregular, but inasmuch as the name of Mst. Bachauli was substituted before the expiry of the period of limitation the irregularity cannot be fatal to the suit.

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The suit was decreed by the first court holding that Mst. Bachauli was a "kinsman" of Mst. Katgi and therefore had a preferential claim. The court also held that she was a relative of the vendor within the third degree. On appeal the learned Judge has come to a contrary conclusion. He has held that the plaintiff could not be regarded as a relative of the vendor within the third degree because she was a female and not a male, and although he was of opinion that she was within the third degree. It seems to us that inasmuch as it is admitted in the plaint that Mst. Bachauli is married, although her husband is living in the house of Mst. Dauli as *ghar jawain*, it is not possible to hold that she is a "kinsman" of Mst. Katgi. If Mst. Katgi has become a member of the family by her marriage, on the same principle Mst. Bachauli has gone out of the family. It is, therefore, wholly unnecessary to decide in this case whether the word "kinsman" in the record of the custom made by Mr. Stowell in his Land Tenure of Kumaun Division at page 46 includes a kinswoman.

As regards the question whether the plaintiff can claim a preferential right on the ground of her being a relative of the vendor within the third degree, we are of opinion that a person would be a relative, whether male or female. But to have the preference the person must be a relative of the vendor within the third degree and not merely a relative of the deceased husband of the vendor. Mr. Stowell on page 47 has pointed out that the method of counting the degree of relationship is to count back to the common ancestor, treating him as No. 1. Mst. Bachauli is, no doubt, within the third degree of the father of Jawaru and Badru, but Mst. Katgi is not a descendant of that ancestor. We are, therefore, unable to hold that she can be regarded as a relative of the vendor within the third degree.

The appeal accordingly fails and is dismissed with costs.