be deemed to be a sale reduced into the form of a decree and subject to the law of *lis pendens* and therefore ineffectual against the original pre-emptor. At page 19 of the report it is said that the principle underlying the rule of *lis pendens* is that the litigating party is exempted from taking notice of a title acquired during the litigation. In the present instance the title of the vendees was impaired by the terms entered into between them and Taj Muhammad, and in my opinion, the plaintiff, having regard to the rule of *lis pendens*, cannot be affected thereby. It is also, in my opinion, incorrect to say that the sale has been converted into a mortgage. The sale still subsists *qua* the vendor, but his son, Taj Muhammad, after his death, can recover the land, if he pays Rs. 900 to the vendees. I therefore accept the appeal and, setting aside the order of the lower Appellate Court, remand the case for decision, in acordance with law, to the Court of first instance. Stamp of this Court and of the lower Appellate Court will be refunded and other costs will be costs in the cause.

M. R. *Appeal accepted—Case remanded.*

APPELLATE CIVIL.

Before Mr. Justice Abdul Raoof and Mr. Justice Campbell.

MOHINDAR SINGH (PLAINFIFF)—*Appellant*, 1922

versus *Feb.* 21.

ARUR SINGH AND OTHERS (DEFENDANTS)—*Respondents.*

Civil Appeal No. 3031 of 1918.

Punjab Pre-emption Act, I of 1913, section 8 (2)—Government Notification declaring that no right of pre-emption shall exist in a certain area—effect of, on pending suit.

On 10th October 1917 plaintiff brought 2 suits for pre-emption in respect of 2 plots of land in the estate of Amritsar sold by the same vendor to 2 separate vendees on the 11th October 1916. On 6th May 1918, during the pendency of the suits, the Punjab Government declared by Notification under section 8 (2) of the Punjab Pre-emption Act that from the date of the Notification "no right of pre-emption shall exist" within a certain area, in which the plots in suit are admittedly com-

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prised. The trial Court thereon dismissed the suits holding that the Notification had taken away before decree plaintiff's right of pre-emption which he appeared to hold at the dates both of the sale and of the institution of the suits. Plaintiff's appeal to the District Judge was rejected.

Held that, although there may be circumstances which justify a Court in refusing to enforce a right of pre-emption unless it is maintained intact throughout the progress of the suit, the usual method of dealing with suits is to decide the questions at issue according to the state of affairs existing when the plaintiff's cause of action arose.

Held further, that for that reason, and also because the Notification cannot be regarded as having been framed with the intention of causing the dismissal of all pending suits to enforce pre-existing rights of pre-emption, it was not necessary for the lower Courts to dismiss the suits under appeal in consequence of the Notification, and they should not have done so.

Bishen Singh v. *Ganda Singh* (1), disapproved.

Kaju Mal v. *Salig Ram* (2), followed.

Niaz Ali v. *Muhammad Ramzan* (3), *Sanwal Das* v. *Gur Parshad* (4), and *Dhanna Singh* v. *Gurbakhsh Singh* (5), referred to.

Ram Gopal v. *Piari Lal* (6), and *Atma Ram* v. *Devi Dyal* (7), distinguished.

Dhanna Singh v. *Gurbakhsh Singh* (5), per Shah Din, J. approved.

Second appeal from the decree of A. H. Brasher, Esquire, District Judge, Amritsar, dated the 8th August 1918, affirming that of Lala *Gokal Chand, Mehta, Munsif, 1st Class, Amritsar, dated the 21st June 1918, dismissing the claim.*

TEK CHAND, for Apellant.

GOKAL CHAND, Narang, for Respondents.

The judgment of the Court was delivered by—

CAMPBELL J.—The plaintiff sued separately to pre-empt two contiguous plots of land, each measuring 9 *marlas*, in the estate of Amritsar. The vendor

(1) 10 P. R. 1913.
(2) 91 P. R. 1919.
(3) 130 P. R. 1916.
(4) 99 P. R. 1909. (F. B.)
(5) 91 P. R. 1909 (F. B.), pages 344, 362, 439, 442, 453, 457.
(6) (1899) I. L. R. 21 All. 441.
(7) 49 P. R. 1901.

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was the same in each case, but the vendees were different. The sales took place on the 11th October 1916 and the two suits were filed on the 10th October 1917. On the 6th May 1918 the Punjab Government declared by Notification No. 10413 under section 8 (2) of the Punjab Pre-emption Act, 1913, "that from the date of this notification no right of pre-emption shall exist in respect of agricultural land and village immovable property" within an area in which the plots in suit admittedly are comprised. The suits were pending in the trial Court at the date of this notification and for that reason the Munsif dismissed them both, holding that the notification took away from the pre-emptor before decree the right of pre-emption which he appeared to hold at the dates both of the sale and of the institution of the suits. Appeals preferred to the District Judge were dismissed, the District Judge referring to *Bishen Singh* v. *Ganda Singh* (1). The result has been two second appeals to this Court Nos. 3031 and 3035 of 1918, both of which will be disposed of by this judgment.

The judgment reported as *Bishen Singh* v. *Ganda Singh* (1) was delivered on facts precisely similar to those now under consideration. It held that the right of pre-emption in suit ceased to exist immediately on the publication of the notification, although it was in existence when the suit was instituted, and that the Court below had no alternative to dismissing the suit having no power to pass a decree establishing a right which had ceased to exist. It is not disputed that the present appeals must fail if *Bishen Singh* v. *Ganda Singh* (1) be followed, but Bakhshi Tek Chand for the appellants contends that the case was not correctly decided.

Reference to it is to be found in two later published judgments, *Niaz Ali* v. *Muhammad Ramzan* (2) and *Kaju Mal* v. *Salig Ram* (3). In both of these cases the pre-emptor had obtained a decree, his right to pre-empt had been declared not to exist by a notification published subsequent to decree and during the pendency of the vendee's appeal, and the notification was pleaded in support of the appeal unsuccessfully. In *Niaz Ali* v.

(1) 10 P. R. 1913. (2) 130 P. R. 1916.
(3) 91 P. R. 1919.

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Muhammad Ramzan (1) the judges expressed no disapproval of what was ruled in *Bishen Singh* v. *Ganda Singh* (2) but distinguished the position of a decree-holder defending his decree from that of a mere plaintiff seeking to enforce a claim to pre-empt. They held that the decree gave the decree-holder the status of full owner immediately he paid in the decree money, that unless fault could be found with the decree it should be upheld, and that if it was right on the day it was passed, the subsequent Government notification could not make it wrong. They remarked that had the plaintiff's suit been dismissed, and had he been the appellant, a Government notification issued while the appeal was pending and taking away the right to pre-empt would probably have been fatal to his chance of success.

In *Kaju Mal* v. *Salig Ram* (3) no mention was made of *Niaz Ali* v. *Muhammad Ramzan* (1), and *Bishen Singh* v. *Ganda Singh* (2) was definitely dissented from in the following terms :—

"With all deference we are unable to follow that ruling which not only attributes to a notification greater force than to a repealing Act, but proceeds upon the principle that in the absence of a provision to the contrary a notification has retro-activity."

Bakhshi Tek Chand relies strongly upon this passage in support of his argument that in the present cases the Government notification cannot deprive the plaintiff-appellant of a right which he possessed at the date of the sales and at the date of the institutions of his suits and which has not been deteriorated by any voluntary act either of the plaintiff or of the vendor. He points to section 4 of the Punjab General Clauses Act of 1898 which provides that, unless a different intention appears, repeal of an Act shall not affect any right acquired under the enactment repealed, and to sections 2 (3) and 12 of the Punjab Pre-emption Act, 1913, which, while altering the procedure of pending suits and appeals from the date of the Act, left untouched rights acquired under the former Act. He claims that it is absurd that the present vendees should be placed by an order of the Executive Government under powers conferred by the Act in a

(1) 130 P. R. 1916. (2) 10 P. R. 1913.
(3) 91 P. R. 1919.

better position than they would hold if the legislature were to repeal the whole Act after suit and before decree.

Dr. Gokal Chand for the respondents replies that the language of section 8 (2) of the Act and of the notification is plain and unambiguous; that the legislature has given the Executive Government power to declare that in any local area the right of pre-emption shall not exist, that the plaintiff's right to a decree has been perfectly legally and quite explicitly destroyed by the notification of 6th May 1918 from that date, and that Government must be taken to mean what it states. He has also referred us to the *dicta* of various learned Judges in the Full Bench cases *Sanwal Dass* v. *Gur Parshad* (1) and *Dhanna Singh* v. *Gurbakhsh Singh* (2) [*e.g.*, Chatterji J., page 344, Clark C. J., page 362 and page 439, and Rattigan J., page 442, Punjab Record, 1909] to the effect that the statutary qualifications of a pre-emptor must be retained until decree. These, however, were *obiter* in the particular cases where they were made and remarks indicating opinions to the contrary were recorded by Kensington J. (page 447) and Shah Din J. (pages 453 and 457), two of the majority judges in *Sanwal Das* v. *Gur Parshad* (1).

We find it difficult to believe that Government intended by the notification under discussion to declare anything more than that in respect of sales transacted after the date of notification there should be no right of pre-emption. Although Dr. Gokal Chand's demand is perfectly reasonable that the words used in the notification should be allowed to speak for themselves, we feel ourselves unable to follow *Bishan Singh* v. *Ganda Singh* (3) and to uphold the orders of the lower Courts. The plaintiff claimed a right conferred by statute to acquire the land in suit by sale in preference to the vendees which right arose when the land was sold to the vendees (sections 4, 14 and 15, Punjab Act I of 1913), and he also was permitted by statute (section 21), to bring a suit to enforce that right. He brought a suit. The trial Court held that he possessed the right at the time of the sale and at the moment when

(1) 90 P. R. 1909 (F. B.). (2) 91 P. R. 1909 (F. B.) pages 344, 362, 439, 443, 447, 453, and 457.

(3) 10 P. R. 1913.

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he filed his suit. In consequence of the vendees' denial of his right the plaintiff was not given a decree immediately, and on a date nearly seven months subsequent to the institution of the suit the Local Government under powers conferred by the Act declared that his right did not exist from that date. The statute did not require him to preserve his right free from interference beyond his control up to the date of decree in his suit, and we do not think that the Court trying the suit was obliged to insist upon such preservation of the right.

It was held in *Ram Gopal* v. *Piari Lal* (1) that where a plaintiff has lost, during the pendency of a suit for pre-emption, his right to pre-empt, the suit should be dismissed, and that ruling was followed in *Atma Ram* v. *Devi Dyal* (2). In the United Provinces, however, the right of pre-emption is not defined and secured by statute and in *Atma Ram* v. *Devi Dyal* (2) the pre-emptor divested himself by gift, before obtaining a decree, of the proprietary right in the house from which he derived his title to sue—a situation differing conspicuously from that which we are considering.

The right in suit in *Ram Gopal* v. *Piari Lal* (1) was one restricted to co-sharers in the *mahal* and was based upon a provision in the *wajib-ul-arz*. During the pendency of the suit the original *mahal* was sub-divided into four other *mahals*, and the plaintiff ceased to be a co-sharer in the *mahal* comprising the land in suit. The learned Judges found that there was no authority on the question whether, in a suit for pre-emption based on an agreement giving pre-emptive rights to co-sharers, the plaintiff must maintain his status as co-sharer up till the date of the decree and they proceeded to decide the question upon principle. They held that there was no general principle of law or procedure which compelled them to look exclusively to the state of things which existed at the date of institution of the suit, and reversed the decree for pre-emption on the ground that the custom was one in favour of the co-sharers of the undivided *mahal* and no others, and that the plaintiff had before decree become as much a stranger in the sense of the

(1) (1899) I. L. R. 21 All. 441. (2) 49 P. R. 1909.

wajib-ul-arz as the defendant-vendee. Sir Arthur Strachey, C. J. remarked in the course of his judgment :—

"In the absence of authority on the subject and in dealing with claims for pre-emption arising under the *wajib-ul-arz*, it seems to me that the only safe course is to see what mode of deciding the question would be most in furtherance of the contract or custom of pre-emption, and the principles upon which such a contract or custom is based."

Ram Gopal v. *Piari Lal* (1) was referred to in *Dhanna Singh* v. *Gurbakhsh Singh* (2), by Shah Din J., who dissented from its conclusions emphatically and considered that the decision was in disregard of the principles which underlie a customary right of pre-emption. He further gave it as his opinion (and we agree) that general principles deducible from the statutory provisions relating to pre-emption in the Punjab are in favour of the pre-emptor's cause of action, after it has accrued not being affected by any contingencies arising after the date of sale. Certainly a right conferred by statute is not quite the same thing as a right derived from contract or based upon custom.

No doubt there may be cases where, having regard to all the circumstances and to the nature and origin of the particular right of pre-emption claimed, a Court may be justified in refusing to enforce a right unless it is maintained intact throughout the progress of the suit ; but the usual method of dealing with a suit is what the learned Judges of the Allahabad Court have found it necessary to explain as not obligatory, namely, to decide the questions at issue according to the state of affairs existing when the plaintiff's cause of action arose.

In the present cases we concede that the meaning of the Government Notification must be taken to be what is stated in plain words, but, as indicated already, we do not believe that it was framed with the intention that it should have greater effect than a repealing Act or for the purpose of causing the dismissal of all pending suits to enforce pre-existing rights of pre-emption and of rendering futile the ex-

(1) (1899) I. L. R. 21 All. 441. (2) 21 P. R. 1909 (F. B.)

penditure of time and money incurred by plaintiffs who started with a sound cause of action. We hold that it was not necessary for the Courts below to dismiss the suits under appeal in consequence of the notification of the 6th of May 1918, and that they should not have done so In this conclusion we must be taken to differ, with all respect, from the learned Judges who, in *Bishen Singh* v. *Ganda Singh* (1), held in similar circumstances that the trial Court had no alternative to dismissing the suit. We think that the Bench which decided *Kaju Mal* v. *Salig Ram* (2), was correct in thinking that the practical effect of such a decision was to make the notification retro-active in a manner not contemplated by its authors.

We accept both appeals, set aside the order of the lower Appellate Court and remand the appeals under Order XLI, rule 2 for decision of the other points at issue. Stamp on appeal will be refunded and costs will be costs in the cause.

Appeal accepted—Cases remanded.

APPELLATE CIVIL.

Before Mr. Justice Abdul Rauf and Mr. Justice Campbell.

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Feb. 22.

NUR HASAN AND OTHERS (PLAINTIFFS) — *Appellants,*

versus

Mst. GHULAM ZOHRA ETC., (DEFENDANTS)— *Respondents.*

Civil Appeal No. 1344 of 1918.

Custom (Succession)—Koreshis of Taragarh, *tahsil and district Gurdaspur*—onus probandi *that Koreshis are governed by custom—application of personal law where custom is not proved—collaterals in the fourth degree and sister—Muhammadan Law.*

Held, that the *onus probandi* that Koreshis of Taragarh are governed by the general agricultural custom of the Punjab was rightly laid upon the plaintiff collaterals and that they had failed to discharge this *onus*.

Jowahir Singh v *Yaqub Shah* (3), followed.

(1) 10 P. R. 1913. (2) 92 P. R. 1919.

(3) 5 P. R. 1906.