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conviction, if there is one, must be before a Magistrate, for a Magistrate, and not the Judge of the Court of Session, is the person empowered to pass sentence. Similar questions arose in *Indrobeer Thaba* (1) and *Regina* v. *Donoghue* (2). It is probable that the Magistrate who took cognizance of the case has not power to award a sufficient punishment in case these men are proved to be guilty of the offence. As to whether or not these men, or either of them, are guilty, we express no opinion. We set aside the order of commitment, the result of which is that the case goes back to the Court of the Magistrate who made the order of commitment, and we transfer the case from the Court of that Magistrate to the Court of the District Magistrate of Allahabad. As to the question whether these men should be tried separately or together, that the Magistrate must decide. If any application for separate trials is made to him, he will no doubt consider it; but we make no suggestion that they should be tried separately.

APPELLATE CIVIL.

1897
May, 11.

Before Mr. Justice Banerji and Mr. Justice Aikman.

AMIR HASAN (PLAINTIFF) *v.* RAHIM BAKHSH AND OTHERS (DEFENDANTS).*

Pre-emption—Muhammadan Law—Rights of third persons having a claim to pre-emption where the vendee is also a person who would have a similar claim were the sale to a stranger.

Under the Muhammadan law, even when the buyer is himself a pre-emptor, that is a person who would have the right of pre-emption against an outsider, other persons having a similar right of pre-emption are entitled to claim pre-emption against the buyer; and, in such a case, the rights of the claimants to pre-emption should be determined in the same way in which they would have been determined had the buyer acquired the property by enforcing his right of pre-emption against a stranger, in the absence of the other pre-emptors, and the absentee pre-emptors had appeared subsequently and claimed pre-emption.

*Second Appeal No. 203 of 1896 from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 23rd December 1895, confirming a decree of Maulvi Muhammad Shafi, Munsif of Koel, dated the 8th April 1895.

(1) 1 W. R., Cr. R. 5. (2) 5 Mad. H. C. Rep. 277.

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Baboo Moheshee Lal v. *Mr. G. Christian* (1), *Teeka Dharee Singh* v. *Mohur Singh* (2), *Lalla Nowhut Lall* v. *Lalla Jewan Lall* (3), dissented from.

In cases of pre-emption to which the Muhammadan law applies the rules of that law are to be administered in their entirety where they are not inconsistent with the principles of justice, equity and good conscience. *Chundo* v. *Hakeem Alim-ood-deen* (4) and *Gobind Dayal* v. *Inayat-ullah* (5) referred to.

A person entitled to a right of pre-emption is not bound to claim pre-emption in respect of all the sales which may be executed in regard to the property, although every suit for pre-emption must include the whole of the property subject to pre-emption conveyed by one transfer. *Kashi Nath* v. *Mukhta Prasad* (6) referred to.

THIS was a suit for possession of a house by right of pre-emption according to the Muhammadan law. The claim was based upon the allegation that the house sold was situated in the same lane as the plaintiff's house, the lane being in the joint user of the plaintiff and the vendors. The plaintiff alleged compliance in the usual manner with the necessary formalities required by Muhammadan law. The vendees defendants resisted the claim principally on the ground that they also had a house situated in the same common lane; that they thereby were possessed of equal rights of pre-emption with the plaintiff, and that, as the sale had been completed in their favour, the plaintiff's suit could not succeed as against them.

The Court of first instance (Munsif of Koil) accepted this plea of the defendants vendees and dismissed the suit.

The plaintiff appealed, and the lower appellate Court (District Judge of Aligarh) dismissed the appeal, also holding that inasmuch as the vendees themselves had an equal right of pre-emption, by reason of participation in the common lane, with the plaintiff, the plaintiff's claim could not be supported as against them.

The plaintiff thereupon appealed to the High Court.

Mr. *Karamat Husain*, for the appellant.

Mr. *Abdul Majid*, for the respondent.

(1) 6, W. R., 250.
(2) 7, W. R., 260.
(3) I. L. R., 4 Calc., 831.
(4) N.-W. P. H. C. Rep., 1874, p. 28.
(5) I. L. R., 7 All., 775.
(6) I. L. R., 8 All., 370.

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BANERJI and AIKMAN, JJ.—This was a suit for pre-emption under the Muhammadan law. The property claimed is a house situated in a blind lane, and the plaintiff claims pre-emption as a partner in the appendages of the house. It has been found by the Courts below that the vendees own houses in the same lane and would themselves have the right equally with the plaintiff to pre-empt the property against a stranger. Those Courts have held that the plaintiff has no preferential right of pre-emption and is not entitled to a decree, and they have accordingly dismissed the claim.

It is contended on behalf of the plaintiff, who has preferred this appeal, that the Muhammadan law does not require that the claimant for pre-emption should have a preferential right, and that under that law, if the vendee and the pre-emptor have equal rights of pre-emption as against an outsider, the property should be divided between them in the same way in which it would have been divided between them had the vendee been a stranger and both of them had claimed pre-emption against him. The contention is that the rule laid down in Book XXXVIII, Chapter I, of the Hedaya (Vol. III, p. 566) that "when there is a plurality of persons entitled to the privilege of *shaffa* the right of all is equal" is as much applicable when the purchaser is a person having the right of pre-emption as when he is a stranger. The question thus raised is by no means an easy one, and has not, as far as we are aware, been decided by this Court. There are, however, three rulings of the Calcutta High Court which support the view of the learned Judge of the Court below.

In *Baboo Moheshee Lal* v. *Mr. G. Christian* (1) Bayley and Shumbhoo Nath Pundit, JJ., held that the right of pre-emption "could, under Mahomedan law only, be against strangers or third parties *not* coparceners." In *Teeka Dharee Singh* v. *Mohur Singh* (2) the same learned Judges observed that "the very fact of the purchaser not being a stranger, but one who is already either a shareholder or a neighbour, proves that the Mahomedan

(1) 6 W. R. 250. (2) 7 W. R. 260.

law of pre-emption never intended to apply to such a case." It is difficult to follow the reasoning of the learned Judges in the case last mentioned, but in neither of the two cases have they referred to any authority of Muhammadan law as supporting their view.

The case of *Lalla Nowbut Lall* v. *Lalla Jewan Lall* (1) was decided by a Full Bench, which held that "by the Mahomedan law one coparcener has no right of pre-emption as against another coparcener." The learned Chief Justice in delivering the judgment of the Court said:—"There appears to be no reason, either upon principle or authority, why the right of *shaffa* should exist as between co-parceners, and the rule as laid down in Hamilton's Hedaya, Vol. III, Book 38, Ch. I, appears to have been misunderstood in this respect. That rule merely prescribes that any one partner (or coparcener) of a property has a right of *shaffa* as against a stranger who purchases a share from his copartner, and does not mean that the right exists as between copartners who may purchase shares from one another. The object of the rule, as explained in that chapter, and in Ch. 3, is to prevent the inconvenience which may result to families and communities from the introduction of a disagreeable stranger as a coparcener or near neighbour. But it is obvious that no such annoyance can result from a sale by one coparcener to another. The only result of such a sale would be to give the purchaser a larger share in the joint property than he had before, and perhaps larger than the other coparceners have." No other authorities were cited in the judgment.

In Mr. Justice Ameer Ali's work on Mahommedan Law it is stated, on p. 590 of Vol. I, that "when one co-sharer conveys his share to another co-sharer, no other co-sharer, if any, can have a right of pre-emption, the rights of all being equal, and the reason on which the right is founded, therefore, being absent. In other words, no right of pre-emption arises in favour of a coparcener when the purchaser himself is a co-sharer of the vendor and the

(1) I. L. R., 4, Calc., 831.

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claimant." The learned author evidently based his opinion on the rulings mentioned above as he has not referred to any authority of Muhammadan law which warrants it.

As, according to the Hedaya, the object is "to prevent the vexation arising from a disagreeable neighbour" (Vol. III, p. 591; Book XXXVIII, Chap. III), and as in the case of a purchase by a person who stands on the same footing as the claimant for pre-emption that object is non-existent, it would seem, were there no authority to the contrary, that the Muhammadan law sanctioned the enforcement of the right of pre-emption against a stranger only. But the texts from various authors who are regarded as high authorities on Muhammadan law cited by Mr. *Karamat Husain*, the learned counsel for the appellant, to whom we are much indebted for his erudite and exhaustive argument, leave no room for doubt that the right of pre-emption may, under that law, be enforced against a purchaser who is not a stranger, but is a person who could equally with the plaintiff have claimed pre-emption against a stranger, and that in the case of purchase by such a person the rights of other persons entitled to pre-empt the property should be determined in the manner in which they would have been determined had the person who purchased the property acquired it by pre-emption against a stranger purchaser in the absence of other pre-emptors, and the absentee pre-emptors had afterwards appeared and claimed their shares. It is settled law that where the vendee is a stranger and more persons than one have the right of pre-emption, and one of those persons is absent "decree is to be given to those who are present, according to their number. But if, after decree of the whole to one who is present, a second should appear, half is to be decreed to him, and if a third should appear, decree is to be given to him for a third of what is in the hands of each of the other two." (*Baillie's Digest of Moohummudan* law, 2nd Ed., p. 501. See also Hedaya, Vol. III, p. 567 and Tagore Law Lectures for 1873, p. 519). According to the authorities cited to us by the learned counsel, to which we shall presently refer, the above rule applies and determines the right of

pre-emption, even when the purchaser is a pre-emptor, that is, a person who would have the pre-emptive right as against a stranger. It is in this sense that the word appears to have been used in the following texts of Muhammadan Law which have been cited to us, and which seem to us to be conclusive on the point.

In the *Takmila Bahr-ur-Raik* (*a*) occurs a passage which has a direct bearing upon the question before us. It is thus translated:—"It is given in the *Tatar Khaniyah* that a neighbour purchased a house and there was another neighbour on the other side who claimed pre-emption; the house would be equally divided between the purchaser and the neighbour." The *Bahr-ur-Raik* is, according to Mr. Morley (Introduction to the Digest, p. CCLXX), the most famous commentary on the *Kanz-ud-Dakaik*, "a book of great reputation," and Mr. Justice Ameer Ali says of it that "it is highly thought of in Sunni countries" (Mahommedan Law, Vol. I, Introduction, p. 19). The *Tatar Khaniyah* is referred to on p. CCLXXXVII of the Introduc-

(*a*) Part II, Book on Pre-emption, Egyptian Edition, p. 143.

(*a*) تكمله البحرالرائق شرح كنزالدقائق جزء ثامن كتاب الشفعه طبع مصر ١٣٢

(هى تمليك البقعة جبراً على المشتري بما قام عليه) هذا فى الشرع و زاد بعضهم بشركة اوجوار فقوله تمليك جنس شمل تمليك العين و المنافع و قوله البقعة فصل اخرج به تمليك المنافع و قوله جبراً اخرج به البيع فانه يكون بالرضا و قوله بما قام عليه يعني حقيقة أوْ حكما كما سياتي فى الخمر و غيره و المراد تمليك البقعة أوْ بعضها ليشمل ما اذا اشتراها احد شفعائها فغى التاتارخانيه اشترى الجار دارا و لها جار آخر من جانب آخر وطلب الشفعة تقسم الداربين المشتري والجار نصفين *

ايضاً ١٦١

ولواشتراها الشفيع من المشتري بطلت شفعته لانه بالاقدام على الشراء اعرض عن الشفعه ولمن هو بعده فى الشفعاء أوْ مثله ان ياخذها منه بالشفعة بالعقد الاول وان شاء بالثاني بخلاف ما اذا اشتراها ابتداءً من غيران يثبت له فيها حق الاخذ لان شراها هناك لم يتضمن اعراضا *

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tion to Morley's Digest, and on pp. 52 and 53 of Shama Charan Sircar's Tagore Law Lectures for 1873.

The *Radd-ul-Mukhtar*, which Mr. Justice Ameer Ali says, "is certainly esteemed now-a-days as the best authority on Hanifi Law," (Mahommedan Law, Vol. I, Introduction, p. 21), and which, according to Mr. Shama Charan Sircar, (p. 46) is "a very high authority among the Hanifis," quoting from Alqunyah, says:—"A neighbour purchases a house while there is another neighbour to it. (If) the neighbour then demands pre-emption and the purchaser too, the house is (to be divided) between them half and half, for both of them are pre-emptors." (*b*). The author of the *Radd-ul-Mukhtar* says further:—"His words 'according to the number of the pre-emptors.' Because of their equality in the right for the whole owing to the existence of the cause of it, there ought to be equality in the juristic result. And this would include the case in which the purchaser should happen to be one of them and should demand (pre-emption) with them. He then would be calculated to be one of them and the property sold would be divided among them." (*c*).

In the well known work, the *Fatawa Alamgiri*, we have the following passages:—"If a person purchases a house of which he is a pre-emptor and then appears another pre-emptor

(*b*) Vol. V, Book on pre-emption, p. 165. Egyptian Edition.

(*c*) Vol. V, p. 152.

(*b*) ردالمحتار جلد خامس كتاب الشفعة باب مايثبت هى فيه صفحه ١٦٥ مصر

و فى القنية اشترى الجار داراً و لها جار آخر فطلب الشفعة و كذا المشتري فهي بينهما نصفين لانهما شفيعان *

(*c*) ردالمحتار جلد خامس كتاب الشفعة صفحه ١٥٢ طبع مصر

(قوله بقدر رؤس الشفعاء) لاستوائهم فى استحقاق الكل لوجود علته فيجب الاستواء فى الحكم و شمل مالو كان المشتري احدهم وطلب معهم فيحسب واحدا منهم و يقسم المبيع عليهم كما فى الوهبانية و شروحها *

having an equal right with him, the *Kázi* (Judge) will pass a decree for one half." (*d*).

Again:—"If the first vendee is a pre-emptor of the house and the pre-emptor present purchases it from him, and then the absent pre-emptor appears, the last named pre-emptor can, if he likes, take half the house under the first sale."

The *Inayah* or *Aini*, a commentary on the Hedaya, which, Mr. Morley says, "is much esteemed for its studious analysis and interpretation of the text" (Introduction, p. CCLXIX), contains the following passage:—"If the first purchaser is also a pre-emptor and the pre-emptor who is present also purchases it jointly with him and subsequently the absent pre-emptor

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(*d*) Vol. IV, Book on Pre-emption, Chap. VI, Lucknow Edition, p. 15.

(*d*) فتاوای عالمگیری کتاب الشفعه جلد رابع باب السادس طبع نولکشور ۱۵

(ولو ان رجلا اشترى دارا وهو شفيعها ثم جائه شفيع مثله قضى القاضي بنصفها) و ان جائه شفيع دونه فلا شفعة له هكذا فى شرح الطحاوى *

ایضاً ۱۵-۱۶

ولو كان الشفيع الحاضر اشترى الدار من المشترى ثم حضر الغائب فان شاء اخذ كل الدار بالبيع الاول و ان شاء اخذ كلها بالبيع الثانى ولو كان المشترى الاول شفيعا للدار فاشتراها الشفيع الحاضر منه ثم قدم الغائب فان شاء اخذ نصف الدار بالبيع الاول لان المشترى الاول لم يثبت له حق الشراء قبل الشراء حتى يكون بشرائه معرضا عنه فاذا باعه من الشفيع الحاضر لم يثبت للغائب الا مقدار ماكان بحصته بالمزاحمة مع الاول و هو النصف لان السبب عند البيع الاول اوجب الشفعة للكل في كل الدار وقد بطل حق الشفيع الحاضر بالشراء لكون الشراء دليل الاعراض فبقى حق المشترى الاول والغائب في كل الدار فيقسم بينهما فياخذ الغائب نصف الدار بالبيع الاول و ان شاء اخذ الكل بالبيع الثانى لان السبب عند العقد الثانى اوجب للشفيع حق الشفعة ثم بطل حق الشفيع الحاضر عند العقد الاول ولم يتعلق باقدامه على الشراء الثانى لاعراضه فكان للغائب ان ياخذ كل الدار بالعقد الثانى *

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appears, he (the absent pre-emptor) can, if he likes, take half the house under the first sale." (*e*).

The last authority, but by no means of the least weight, to which we will refer is the *Durr-ul Mukhtar*. It is, according to Mr. Justice Ameer Ali, "a work of great authority and merit." (Mahommedan Law, Introduction, p. 20), and the learned author of the Tagore Law Lectures for 1873 refers to it as "a work of great celebrity" (p. 46). It says—"When two persons purchase a house and both are pre-emptors and then appears a third pre-emptor after division has been made under a decree or otherwise, he, that is, the pre-emptor, can have the division cancelled, because what was a half before, has now become one-third (*Sharah wahbaniya*)." (*f*).

(*e*) Vol. IV, Book on Pre-emption, Lucknow Edition, p. 23.

(*f*) Book on Pre-emption, Calcutta Edition, p. 706.

(e) عینی شرح هدایه کتاب الشفعه جلد رابع طبع نولکشور ۲۳

فی المبسوط والذخیرة شفیعان احدهما حاضر و الآخر غائب و قضی للحاضر بکل الدار فللغائب ان یاخذ نصفها ولو جعل بعض الشفعاء نصیبه للآخر لم یصح الجعل وسقط حقه و قسمت علی عدد من بقی و ان قال الذی قضی له بالشفعة للاخر انا اسلم لک الکل فاما ان تاخذ الکل او تدع فلیس له ذلک وللثانی ان یاخذ النصف ولو کان الحاضر لم یاخذها بالشفعة ولکن اشتراها من المشتری فحضر الغائب ان شاء اخذها کلها بالبیع الاول او بالبیع الثانی لان الحاضر اسقط حقه بالاقدام علی الشری و خرج من الدین ولو کان المشتری الاول شفیعا ایضا فاشتراها شفیع حاضر ایضا معه فحضر الغائب ان شاء اخذ نصف الدار بالبیع الاول و ان شاء اخذ الکل بالبیع الثانی والله سبحانه و تعالی اعلم *

(f) الدر المختار کتاب الشفعه طبع کلکته ۷۰۴

ویبطلها شراء الشفیع من المشتری فلمن دونه او مثله اخذها منه بالشفعة بالعقد الاول او الثانی بخلاف مالو اشتراها ابتداء حیث لا شفعة لمن دونه *

الدر المختار کتاب الشفعه طبع کلکته ۷۰۶

(کما لو اشتری اثنان دارا و هما شفیعان ثم جاء شفیع ثالث بعد ما اقتسما بقضاء او غیره فله ای للشفیع ان ینقض القسمة ضرورة صیرورة النصف ثلثا-شرح وهبانیة) *

These texts, the authority of which has not been questioned by Mr. *Abdul Majid* on behalf of the respondents, establish, as we have said two propositions; first, that even when the buyer is himself a pre-emptor, that is, a person who would have the right of pre-emption against an outsider, other persons having a similar right of pre-emption are entitled to claim pre-emption against the buyer; and, secondly, that in such a case the rights of the claimants to pre-emption should be determined in the same way in which they would have been determined, had the buyer acquired the property by enforcing his right of pre-emption against a stranger, in the absence of the other pre-emptors and the absentee pre-emptors had appeared subsequently and claimed pre-emption. In this view, as all persons having equal right of pre-emption are only entitled under the Muhammadan law to divide the property equally *per capita*, and as the purchasers in this case are two in number, the plaintiff appellant is entitled to only a third share of the property sold.

Mr. *Abdul Majid*, whilst conceding that this is so under strict Muhammadan law, contends that we should not apply the rules of Muhammadan law in their entirety to cases of pre-emption. He relies on the rulings of the Full Bench in *Chundo* v. *Hakeem Alim-ood-deen* (1) and *Gobind Dayal* v. *Inayat-ul-lah* (2) in which the majority of this Court held that the Court is not bound to administer the Muhammadan law in claims of pre-emption, but that, according to the rule of justice, equity and good conscience,

(1) N.-W. P., H. C. Rep. 1874, p. 28. (2) I. L. R., 7 All., 775.

ردالمحتار جلد خامس كتاب الشفعه باب مايبطلها طبع مصر ١٦٧

قوله (و يبطلها شراء الشفيع من المشتري لانه بالاقدام على الشراء من المشتري اعرض عن الطلب و به تبطل الشفعة المنح (قوله فلمن دونه كما اذا كان شريكا و لجميع جار - (قوله بالعقد الاول او الثاني) انظر ماكتبناه عن التاتر خانية عند قول المصنف ويفسخ بحضوره (قوله بخلاف مالو اشتراها ابتداء) اى قبل ان يثبت له فيها حق الاخذ لانه لم يتضمن اعراضا لاقباله على التملك وهو معنى الاخذ بالشفعة و انما اشتراها لعدم التمكن من اخذها بطريق آخر زيلعى *

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that law should be applied in cases of pre-emption. We, as a Division Bench, are bound by the opinion of the majority of the Full Bench, and, according to that opinion, to administer under the rule of justice, equity and good conscience the rules of Muhammadan law in cases of pre-emption. We do not think we should be justified in applying those rules in a mutilated form, and we are of opinion that in cases of pre-emption we should apply the Muhammadan law, where it is not inconsistent with the principles of justice, equity and good conscience. We are not satisfied that the rules deducible from the texts cited above are repugnant to those principles.

Mr. *Abdul Majid's* next contention is that the plaintiff does not seek to pre-empt the whole of the property sold and that his suit must fail for this reason. It is alleged that the house in question was sold by Musammats Ulfat and Imrat on the 28th of September, 1893, and that on the 29th of September, 1893, five persons conveyed to the same vendees what they stated to be their interests in the house. The plaintiff has claimed pre-emption in respect of the first sale only. It is argued that as he has not claimed to pre-empt the property comprised in both the sales, he has thereby forfeited his right of pre-emption. We are aware of no law which requires that a person entitled to the right of pre-emption is bound to claim pre-emption in respect of all the sales which may be executed in regard to the property. What the Muhammadan law enjoins is, as observed by Mahmood, J., in *Kashi Nath* v. *Mukta Prasad*, (1), that "every suit for pre-emption must include the whole of the property subject to pre-emption conveyed by one transfer." In this case the plaintiff has in his plaint claimed the whole of the property comprised in the sale deed of the 28th of September, 1893, and he has not split up that bargain. His claim, therefore, does not violate any rule of Muhammadan law. As, however, the vendees have equal rights of pre-emption with him and they are two in number, the plaintiff would be entitled to only a third share of the property

(1) I. L. R., 6 All., 370.

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on payment of one-third of the sale price, provided that he has complied with all the requirements of Muhammadan law. In this case it was denied that he had made the preliminary demands, and it was asserted that the sale had taken place with his consent. There was also a dispute as to the actual amount of the sale price. These questions have not been decided by the lower appellate Court. As that Court dismissed the suit upon a preliminary point, and its decision upon that point is, in our opinion, erroneous, we set aside the decree below and remand the case to the lower appellate Court under section 562 of the Code of Civil Procedure with directions to readmit it under its original number in the register and to dispose of it according to law. Costs here and hitherto will abide the event.

Appeal decreed and case remanded.

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May 11.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Blair.

MOTI LAL (DECREE-HOLDER) v. MAKUND SINGH AND OTHERS (JUDGMENT-DEBTORS).*

Execution of decree—Limitation—Act No. XV of 1877, *(Indian Limitation Act) Sch. ii, Art.* 179(4)—"*Step in aid of execution*"—*Application by decree-holder to be put in possession of property which he has purchased at a sale in execution of his decree.*

Held that an application made by a decree-holder to be put into possession of property which he had purchased at an auction sale held in execution of his decree was a "step in aid of execution" of that decree, and would afford the decree-holder a fresh starting-point for limitation. *Sujan Singh* v. *Hira Singh* (1) referred to.

The facts of this case sufficiently appear from the judgment of the Court.

Mr. *W. K. Porter* and Munshi *Gobind Prasad*, for the appellant.

Munshi *Ram Prasad* and Babu *Satya Chandar Mukerji*, for the respondents.

EDGE, C.J. and BLAIR, J.—The question before us is as to whether execution of a decree for money in this case was barred

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* First Appeal No. 144 of 1895 from an order of Babu Bepin Bihari Mukerji, Officiating Subordinate Judge of Aligarh, dated the 6th May, 1895.

(1) I. L. R., 12 All., 399.