instance was right in dismissing the plaintiffs' suit, and the decree of the lower appellate Court must be set aside. We accordingly allow the appeal, reverse the decree of the lower appellate Court, and restore that of the Court of first instance with costs in all Courts.

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ALI HUSAIN KHAN v. TASADDUQ HUSAIN.

Appeal decreed.

Before Mr. Justice Banerji.

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KARIM (DEFENDANT) *v.* PRIYO LAL BOSE (PLAINTIFF) AND MUSAMMAT GOPI KUNWAR (DEFENDANT).*

Muhammadan law—Pre-emption—Shafi-i-khalit—Easement—Owner of dominant tenement.

Under the Muhammadan law of pre-emption the owner of the dominant tenement has in respect of a sale of the servient tenement a right of pre-emption as a *shafi-i-khalit* which is preferable to the right of one who is merely a neighbour as regards the property sold. *Shaikh Karim Buksh* v. *Kamr-ud-deen* (1) and *Chand Khan* v. *Naimat Khan* (2) referred to.

THIS was a suit, based upon the Muhammadan law, for pre-emption of the sale of a house. The plaintiff was the owner of a house to the north of the house sold, and the defendant vendee owned a house to the south of the same and adjacent to it. It was found that the apertures for the passage of light into the plaintiff's house opened towards the disputed house, and that rain water from the eaves of the plaintiff's house fell on that house, that is, that the plaintiff had certain rights of easement over the house sold. The plaintiff claimed that he was a partner of the vendor in the appendages of the said house and therefore took precedence of the vendee, who was merely a neighbour. The Court of first instance (Munsif of Benares) decreed the plaintiff's claim, and this decree was on appeal affirmed by the District Judge. The defendant vendee appealed to the High Court.

Munshi *Gokul Prasad*, for the appellant.

Mr. *Karamat Husain*, Babu *Devendro Nath Ohdedar* and Dr. *Satish Chandra Banerji*, for the respondents.

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* Second Appeal No. 1002 of 1903, from a decree of J. Sanders, Esq., District Judge of Benares, dated the 17th day of July 1903, affirming a decree of Babu Manmohan Sanyal, Munsif of Benares, dated the 28th day of May, 1903.

(1) N.-W. P., H. C. Rep., 1874, p. 377. (2) (1869) 3 B. L. R., A.C., 296.

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KARIM v. PRIYO LAL BOSE.

BANERJI, J.—This appeal arises in a suit brought by the first respondent to enforce his right of pre-emption in respect of a house situated in the city of Benares sold by the second defendant to the first defendant, who is the appellant here. The suit was based on a custom which admittedly exists in that part of the city of Benares in which the property in suit lies. It has been found by both the Courts below that the preliminaries required by Muhammadan law, which is the law applicable to a case like this, were performed by the plaintiff. The only question is whether he has a right to pre-empt the property.

The plaintiff's house lies to the north of the house in dispute. That of the defendant vendee lies to the south of it and is adjacent to it. It has been found, and the finding must be accepted as conclusive, that apertures for the passage of light into the plaintiff's house open towards the disputed house, and that rain water from the eaves of plaintiff's house falls on that house; so that the plaintiff enjoys rights of easement over the house sold. The plaintiff claims that he is a partner of the vendor in the appendages of the said house and that he has priority over the vendee, who is only a neighbour. The Courts below have found in favour of the plaintiff and granted him a decree.

According to Muhammadan law the right of pre-emption appertains (1) to a partner in the property sold, (2) to a partner in the immunities and appendages of the property (such as the right to water and to roads), and (3) to neighbours; each class taking precedence over the class which follows. Consequently a partner in the immunities and appendages has priority over a neighbour, the reason being that he participates with the vendor, which a neighbour does not. (Hedaya, Vol. III., page 564.) It is contended on behalf of the appellant that as the plaintiff has only a right of easement over the property sold he is not a participator in the appendages of that property and is not a pre-emptor of the second class. It is urged that as the word *shafa* (pre-emption) means "conjunction," there must be a conjunction arising either from vicinage or from partnership of some kind; that there must be a community of

interest between the vendor and the pre-emptor and not a conflict of interest such as necessarily exists between the owner of the dominant tenement and the owner of the servient tenement, and that consequently the owner of the dominant tenement or the owner of a servient tenement is not a pre-emptor of the second class, *i.e.*, a *shafi-i-khalit*. Reliance is placed on the Hedaya and on the ruling of this Court in *Shaikh Karim Buksh* v. *Kamr-ud-deen* (1). There is, no doubt, much force in this contention, but the authorities appear to support the conclusion of the Court below. In Mr. Ameer Ali's Muhammadan Law, Vol. I., p. 601, 3rd Edn., a *shafi-i-khalit* is said to be a pre-emptor by virtue of a right of easement over the property sold; and in Wilson's Anglo-Muhammadan Law, p. 399, the owner of a dominant tenement as well as the owner of a tenement which is the servient tenement of the property sold are declared to be pre-emptors of the second class. In *Chand Khan* v. *Niamat Khan* (2), which was referred to on behalf of the respondent, it was held that where the plaintiff's land and that sold were subject to the same servitude, the plaintiff had a right of pre-emption as *khalit*. Whether that view is in accordance with Muhammadan law or not it is needless to consider, as in the present case the plaintiff's house and the house sold are not subject to the same servitude, and consequently the question determined in that case does not arise. I may observe, however, that Mr. *Karamat Husain*, the learned counsel for the respondent, whose knowledge of Muhammadan law is extensive, informs me that he has not been able to find any authority in the recognized text books which supports that view. In Baillie's Digest of Muhammadan Law, which is based on the well-known work the Fatwah Alamgiri, there are passages which show that the owner of a dominant tenement has a right of pre-emption in respect of the servient tenement, and that the owner of a servient tenement has a similar right in respect of the dominant tenement. The learned author puts the following case (p. 484):—"The lower part of a house belongs to two persons, one of whom owns the upper part jointly with a third party, and sells his share in both

(1) N.-W. P., H. C. Rep., 1874, p. 377. (2) (1869) 3 B. L. R., A.C., 296.

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the lower and the upper parts of the house, and observes that the partner in the lower has the right of pre-emption with regard to the share in it, and the partner in the upper has the right of pre-emption in regard to the share in it; and the partner in the lower has no right of pre-emption in the upper, nor the partner in the upper any right of pre-emption in the lower; for the partner in the lower is only a neighbour to the upper or a *sharer in its rights when the way to the upper is through the lower* * * * and a partner in the substance is entitled to the preference." The passage I have emphasized shows that when the owner of the property sold has a right of way over the property of another, the latter is regarded as a partner in the rights of the property sold; and is thus a pre-emptor of the second class as *shafi-i-khalit*. Again at p. 485 it is stated that where the upper floor of a mansion is sold, "if the way to the upper floor be through the mansion of a third party the owner of the mansion in which the way lies has a preferable right to the pre-emption of the upper floor." These passages declare the right of pre-emption of the owner of a servient tenement. The right of the owner of a dominant tenement is affirmed in the following passage at p. 486:—"If a mansion is sold in which one person has a way and another a channel of water the former has the right of pre-emption, rather than the latter." Mr. *Karamat Husain* has cited a passage from the Fatwah Alamgiri, Book on Pre-emption, Chap. II, p. 167, which is also to the same effect and declares that "if a house is sold and a man has a way therein," the owner of the way has a right of pre-emption. Upon these authorities it must be held that if a person has a right of way or of the flow of water over the property sold he must be regarded as a partner in the appendages of the said property and to have the right of pre-emption in regard to it. The case of *Shaikh Karim Buksh* v. *Kamr-ud-deen* (1) referred to by the learned vakil for the appellant does not lay down anything inconsistent with the above view. It was held in that case that where there are appurtenances to two properties the owner of one of them can claim pre-emption in respect of the other. But this does

(1) N.-W. P., H. C. Rep., 1874, p. 377.

not exclude the rights of others, who, as pointed out above, may also be regarded as *shafi-i-khalit*.

As the plaintiff in the present case has the right of flow of water over the disputed property he has the right of pre-emption as a *khalit*, and has priority over the vendee, who is only a neighbour. This appeal must therefore fail, and is accordingly dismissed with costs.

Appeal dismissed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

MAHARANI OF DUMRAON (DECREE-HOLDER) *v.* BUDDHA KURMI AND OTHERS (JUDGMENT-DEBTORS).*

Act No. XII of 1881 *(North Western Provinces Rent Act), section* 35—*Decree for rent—Execution of decree—Application to eject tenant—Limitation—Act No. XV of* 1877 *(Indian Limitation Act), schedule II, article* 179—*Act (Local) No. II of* 1901 *(Agra Tenancy Act), section* 175 *et seqq—Appeal.*

A land-holder obtained under Act No. XII of 1881, section 35, a decree for arrears of rent against certain tenants. The decree-holder did not attempt to execute this decree against the tenants until more than three years had elapsed from the date thereof; but meanwhile she did apply for and obtained the ejectment of the tenants. *Held* that execution of the decree was barred, and that the decree-holder's application for ejectment could not operate to save limitation.

Sed quære whether any appeal lay from the order of the first Court (Assistant Collector) disallowing execution. *Kharag Singh* v. *Pola Ram* (1) doubted.

THE Maharani of Dumraon obtained a decree for arrears of rent under the North-Western Provinces Rent Act, 1881, against certain tenants on the 15th of February 1900. The decree-holder, on the 21st of January 1901, applied for ejectment of the tenants under section 35 of the Act above mentioned and in April of the same year they were ejected. On the 18th of January 1904 the decree-holder applied for execution of her decree for rent by attachment and sale of certain cattle belonging to the judgment-debtors. The Court of first instance

* Second Appeal No. 64 of 1905, from a decree of L. Marshall, Esq., District Judge of Ghazipur, dated the 12th day of October 1904, affirming an order of Kunwar Kanta Prasad, Assistant Collector of Ghazipur, dated the 12th day of August, 1904.

(1) (1904) I. L. R., 27 All., 31.