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try, and if the jurisdiction were to be taken away from the Magistrate and given to the Civil Court, the parties would be deprived of a right which the law has intended to give them of having a jury appointed to decide whether an order in such a case is reasonable or not. In this particular case, the jury have actually found that no injury to the public has resulted.

It is unnecessary to decide whether this action has been brought from malicious motives; but the first Court found that it was brought merely to annoy the defendant who had erected a new house on the spot.

The decision of the lower Appellate Court is reversed, and the decision of the first Court affirmed with costs in the lower Appellate Court and the costs of this appeal.

Before Mr. Justice L. S. Jackson and Mr. Justice Markby.

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CHAND KHAN (PLAINTIFF) *v.* NAIMAT KHAN (DEFENDANT) *

Mahomedan Law—Right to Pre-emption.

Under the Mahomedan law, the owner of the land through which the land in respect of which a right of pre-emption is claimed receives irrigation, has a preferential right to purchase rather than a mere neighbour.

Baboo *Lakhi Charan Bose* for appellant.

Baboo *Girija Sankar Mazumdar* for respondent.

THE facts sufficiently appear in the judgment of

JACKSON, J.—The plaintiff in this case claimed to purchase certain lands, which the defendants had mutually sold and bought under *huq-shafa*. He claimed it in two ways, both by the right of *khulit*, and also by the right of vicinage. The defendant denied the right called *khulit*; and as to vicinage, he alleged, that he himself was the next neighbour, and therefore had, at least, an equal right of pre-emption; and he also denied the performance of the *tulub-i-muwasabat* and the *tulub-ishad*.

* Special Appeal, No. 103 of 1869, from a decree of the Subordinate Judge of Hooghly, dated the 21st October 1868, reversing a decree of the Moonsiff of that district, dated the 23rd June 1868.

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The Moonsiff found on all the points for the plaintiff. The Subordinate Judge held that the right which the plaintiff claimed under the denomination of *khulit*, was not such as the Mahomedan law recognised; but he omitted to consider the plaintiff's alleged co-equal right of vicinage; and he thought it unnecessary to determine whether the preliminary forms had been observed or not.

The plaintiff comes here in special appeal, and asserts that the right of *khulit* was made out. It appears to me, that in the circumstances of this case, the plaintiff was entitled to claim as *shafa khulit*. It appeared, because the defendant's written statement admitted it, that water from a certain *dighi* was accustomed to flow across the plaintiff's land and the land in dispute. That appears to me to be such participation in the appendages of the land as is referred to in Macnaghten on Mahomedan Law, page 4, section 6. It seems a more than usually reasonable claim, because it would be a matter of great consequence to the plaintiff that he should be able to acquire land in respect of which his own land was burdened with servitude, such as that of water passing over it.

I am also of opinion, that even if this were not the case, the plaintiff's claim to participate in the purchase as being a neighbour equally with the defendant, ought to have been considered. That, however, is immaterial, because a *shafia* kabuliat ranks above a mere neighbour. We are unable however to dispose of this case finally, because the Subordinate Judge, as he thought no right was made out, did not determine, whether or not the plaintiff had observed the necessary preliminaries. The case therefore must go back to him in order that he may find on the evidence whether he observed those forms or not.

MARKBY, J.—I am of the same opinion.