370. mber 2. A. No. of 1870.

complying with the terms of the requisition, he do suffer simple imprisonment for that period.

The Section of the Criminal Procedure Code under which this sentence was passed does not authorize or contemplate the imposition of a term of imprisonment in default of compliance with the order to enter into a recognizance to keep the peace, nor is there any provision in the Chapter to which the Section belongs for providing for imprisonment to enforce compliance with an order under Section 280 to enter into such a recognizance. The application of Section 288 is clearly limited to proceedings taken under Section 282. That portion of the Session Judge's sentence, therefore, which provides a period of imprisonment in default of the prisoner's entering into a formal engagement to keep the peace must be set aside.

APPELLATE JURISDICTION. (a)

Regular Appeal No. 68 *of* 1870.

IBRAHIM SAIB.....*Appellant.*

MUNI MIR UDIN SAIB.....*Respondent.*

The Mahomedan doctrine of pre-emption is not law in this Presidency.

70. nber 7. No. 68 1870.

THIS was a Regular Appeal against the decree of C. G. Plumer, the Acting Civil Judge of Chittoor, in Original Suit No. 24 of 1868.

This was a suit by plaintiff to enforce his right of pre-emption to 14§ cawnies of punjah land with a hut, well, trees and other things attached thereto, and Rupees 50 damages.

The plaint set forth that the above property belonged to one Narayana Chetty, who sold it to 1st defendant for Rupees 1,000 and executed a deed of sale on November 4th, 1867; that the plaintiff, who owns the land adjourning the said property had, under the Mahomedan law, the right of

(a) Present: Holloway, Acting C. J. and Innes, J.

1870. December 7. E. A. No. 68 of 1870.

pre-emption ; that immediately on hearing of the above sale he declared his intention of becoming the purchaser, and made the necessary affirmation by witnesses in the presence of 1st defendant ; that the 2nd defendant was made a party to the suit, as he was in possession of the property.

The 1st defendant put in a written statement, in which he contended that the plaintiff's claim founded on the alleged right of pre-emption was invalid, inasmuch as the seller of the property was a Hindu, and therefore the Mahomedan law was not applicable to the suit ; that the plaintiff had waived his right of pre-emption when the property was purchased by the seller in 1862 ; that the plaintiff did not give notice to the 1st defendant of his intention to purchase the property as set forth in the plaint ; and that he made no objection to the sale of the property to 1st defendant.

The 2nd defendant's name was subsequently, by consent of both parties, struck off the record.

The following issues were settled :—

I. Whether, as affirmed by plaintiff and denied by defendant, the Mahomedan law is applicable to this case ?

II. Whether, as affirmed by plaintiff and denied by defendant, the plaintiff has taken the preliminary steps to establish his right by pre-emption.

III. Whether plaintiff is entitled to the damages claimed by him, and to what amount ?

The following was the judgment of the Civil Judge :—

The first and principal point to be determined is that involved in the first issue.

I will briefly allude to the facts of the case, and then give my opinion on the question of law raised in the 1st issue.

The garden, which is the subject of the present suit, was sold by one Narayana Chetty to the 1st defendant, and a deed of sale executed by the former in favor of the latter dated the 4th November 1867. The garden was then in possession of one Mahomed Alli Saib, who had rented the garden from Narayana Chetty.

This man refused to give up the possession of the garden, on the grounds that Narayana Chetty had agreed to

870. sell the garden to him at whatever price any one else might
mber 7. offer for it, and that he was ready to pay the price for which
4. No.68 the garden had been sold to 1st defendant.
1870.

The 1st defendant then brought a suit in this Court against Mahomed Alli Saib and Narayana Chetty to confirm his purchase and to recover possession of the property.

This suit was finally decided in favor of 1st defendant on the 1st March 1870.

While the above suit was pending, the plaintiff filed the present suit to enforce his right of pre-emption, he being the admitted owner of the adjoining property.

The first question to be determined then is, can the Mahomedan law of pre-emption be applied in the present suit ?

I am of opinion, though I admit this opinion has not been arrived at without considerable hesitation, that the Mahomedan law cannot be applied to the present suit.

I can find no judicial precedent to govern the present case,—there are many cases decided in Bengal and quoted in the Appendix to *Macnaughten's Principles of Mahomedan Law* title *Pre-emption* in which this principle of law has been applied to Hindus, but in all those cases it was distinctly stated that it was so applied in consequence of the existence of long prevailing local usage and custom sanctioning its application. Now, in this case the existence of any such local usage and custom is not alleged, but it is contended that the original vendor, the Hindu, will in no way be effected by the decision of this suit, and that, the vendee being a Mussulman, the Mahomedan law is clearly applicable.

I think, however, that the vendor will be affected by the decision of this suit, for the effect of a decree in favor of the plaintiff would be to force on him a purchaser with whom he had never contracted—it would establish the plaintiff as the original purchaser from the vendor, and not merely as a purchaser from the vendee, for it is through the former that his title would be acquired, (*Baillie's Digest of Mahomedan Law, page* 490.)

It is argued that the plaintiff has the right to sue either the vendee or the vendor, but that proposition should

1870
December 7.
R. A. No 68
of 1870.

be qualified by the addition of the words "whomsoever of them is in possession," for "when the vendee has not taken possession, the suit is not valid against him until the vendor appear," (*Baillie's Digest, page* 486). Although the pre-emptor has the right to sue either the vendor or vendee, still, I think, this can only refer to cases where the right can be *enforced against* either. Now, in this case, it is admitted that it could not be enforced against the vendor, he being a Hindu.

Again, the vendee, 1st defendant, was not in possession of the property at the time of the institution of this suit—he was at that very time seeking by the aid of the Court to obtain possession of the said property.

I think, therefore, that it must be held that the constructive possession (the actual possession which has been subsequently held to have been wrongful was with a third party) as between the vendor and vendee was with the vendor; it certainly was not with the vendee. The vendor, therefore, should have been made a party to this suit instead of the vendee, but the vendor, being a Hindu, cannot be affected by this principle of Mahomedan law, and it is admitted that, as against him, the plaintiff's right of pre-emption cannot be enforced.

For these reasons then I find on the first issue that the Mahomedan law is not applicable to the present suit,—there is no necessity to go into the question of fact raised in the 2nd and 3rd issues.

The plaintiff's claim is dismissed with costs.

The plaintiff appealed to the High Court against the decree of the Civil Judge of Chittoor for the following reasons :—

1st.—The decree of the Civil Judge is contrary to law.

2nd.—The Mahomedan law of pre-emption is clearly applicable to the present suit.

3rd.—The defendant was the proper person to be sued, and the plaintiff is entitled in law and according to usage to have his right established as against th[redacted]

870
mber 7.
. No. 68
1870.

Rama Row, for the appellant, the plaintiff.

Johnstone and *Ranguiga Naida*, for the respondent, 1st defendant.

The Court delivered the following judgment :—

HOLLOWAY, *Ag. C. J.*—The question is whether a Mahomedan can exercise the right derived from neighbourhood *(ex jure vicinitatis)* to insist upon the sale by a Hindu being made to him instead of to another Mahomedan.

The Civil Judge decided that the proposition of law did not apply, because the vendor was a Hindu and the vendee was not in possession. Undoubtedly, the Civil Judge is right in saying that the passage at page 486 of *Baillie's Digest* is fatal to the suit in its present frame. The proposition seems to embody a rule of pleading. Where possession has not been delivered, the vendor is a necessary party. It would be wrong, however, on this the first attempt, so far as we know, to enforce such a right to allow the case to pass off upon this mere point of pleading, and I therefore proceed to consider whether this Mahomedan rule is law in this Presidency. It is clearly not so by positive enactment or by customary law assimilating this rule of positive law and making it an existent rule of our law. It is needless to add that it is not so as the so-called *lex loci rei sitae* and therefore governing matters connected with the alienability and other incidents of real property.

The question therefore resolves itself into whether it is consistent with equity and good conscience to import an exceptional rule opposed to the principle of law administered here—perfect freedom of contract ?

The word pre-emption is a little deluding. That was an institution known to Roman law and sanctioned an obligatory relation between the vendor and a person determined, binding the vendor to sell to that person if he offered as good conditions as the intended vendee. It arose from contract and also from provisions of positive written law (Windscheid, s. 388.) It was protected solely by a personal action and gave no right of action against the vendee to whom the property had been passed.

1870
December 7
R. A. No 68
of 1870

The so-called pre-emption of Mahomedan law resembles the Retract-recht (*jus retractus*) of German law. It is an obligation attached by written or customary law to a particular status which binds the purchaser from one obliged to hand over the object matter to the other party to the obligation on receiving the price paid with his expenses. The action in German as in Mahomedan law is exercisable at the moment at which the property is handed over to the purchaser (Gerber, s. 175. et seq. Deutsch-Priv-Recht.)

The right *ex jure vicinitatis* was one of six sorts and like all the rest was based upon a notion that natural justice required that such preference should be accorded to certain persons having specific relations of person or property to the vendor. It was once, as an enthusiastic Germanist admits, so used as to put the most unreasonable restraints upon the right of alienation. With more enlightened notions of the public weal, nearly every trace of it has disappeared, and it can no longer be considered a principle of the common law of Germany. While it existed the antidote to its baneful influences was, as in Mahomedan law, the favouring of subtle devices for its defeat and the attaching of short periods of prescription to its exercise. It cannot be equity and good conscience to introduce propositions which the history of similar laws shows by experience to be most mischievous. If introduced at all, it must apply to all neighbours. The Mahomedan law binds Mahomedans no more than others except in the matters to which it is declared applicable. It is then law because of its reception as one of our law sources in the matter to which it applies. Where, however, not so received, it can only be prevailing law because consistent with equity and good conscience. I am of opinion that it is manifestly opposed to both, that no such obligation in this Presidency binds a Mahomedan or any one else, and that this appeal must be dismissed with costs.

INNES, J.—I concur in the judgment of Mr. Justice Holloway.

Note.—Heimbach in Weiske's Rechts Lexicon, Vorkaufs-recht und Retract, Vol. XIII. 259.