1905.
January 16.

SABAPATHI *v.* SIVAPRAKASAM.

C. R., Jaffna, 2,795.

Tesavalamai—*Right of pre-emption—Qualifications necessary to entitle a neighbour to such right—Dutch original, and English and Tamil translations, of the Tesavalamai.*

The English text of the *Tesavalamai* published in vol. I. of the Revised Ordinances must be taken as the sole recognized official repository and declaration of the laws and customs of the Tamils of Jaffna.

It is not within the discretion of the court to alter the translation even after having recourse to the Dutch original and the opinion of experts.

According to section VII., part I., of that text, in order to entitle an adjacent landowner to the right of pre-emption, it is necessary that he should also be a mortgagee of the land in respect of which the right is claimed.

THE first defendant had sold to the second defendant a plot of land which lay adjacent to another plot of land belonging to a Hindu temple whereof the plaintiffs were managers. The plaintiffs prayed for a declaration that they were entitled to the right of pre-emption, a cancellation of the sale by the first defendant to the second defendant, and an order on the first defendant that he should execute a conveyance in their favour.

The District Judge having given judgment in favour of the plaintiffs, the defendants appealed.

The case came on for argument before two judges and was ordered to be listed before a Full Bench. It was argued before Moncreiff, J., Middleton, J., and Grenier, A.J., on December 12, 1904.

Van Langenberg, for defendants, appellants.—The right of pre-emption is claimed by the plaintiffs under section VII., part I., of the *Tesavalamai*. In *Tillainathan v. Ramasamy Chetty* (*4 N. L. R. 328*) Bonser, C.J., questioned the right of an adjacent landowner to claim pre-emption unless he was also a mortgagee of the land in respect of which pre-emption was sought. So far back as 1834 the Supreme Court thought (*Marshall's Judgments, p. 377*) that the right of pre-emption only existed where the party claiming it held a mortgage or some other claim upon the land.

Walter Pereira, K.C. (with him *Wadsworth*), for plaintiffs, respondents.—The question involved has not yet been finally decided, the authorities cited by the other side being no more than mere expressions of opinion. The English translation of the *Tesavalamai* speaks of "neighbours whose grounds are adjacent to the lands (meaning the lands in respect of which the

right of pre-emption is claimed), and who might have the same in mortgage, should they have been mortgaged." There is no reason to suppose that the words "should they have been mortgaged" are redundant. They are susceptible of a meaning. Even supposing the law required the double qualification in a neighbour as contended for by the other side, to entitle him to the right of pre-emption, the qualification of being a mortgagee is necessary only when there is at all a mortgage in existence. In the present case there was admittedly no mortgage in existence in favour of anybody. It may, in reply to this contention, be said that a dishonest landowner might by executing a bogus mortgage deprive a neighbour of his right of pre-emption; but it is submitted that it is for the Court to inquire into the matter and decide the question whether the mortgage is *bonâ fide*, or merely intended to defeat a neighbour's rights.

Then, the paragraph of the translation of the *Tesavàlamai* relied upon is unhappily worded. What was intended was to give the right of pre-emption to neighbours whose lands were adjacent, and to those who had a mortgage of the land in question. The original of the *Tesavalamai*—that is to say the *Tesavalamai* drawn up by Claas Isaaksz on the order of Governor Van Simons—was in Dutch. He (counsel) had information that it was to be found among the archives in the custody of the Government Archivist, and that it bore out his (counsel's) contention. The Tamil translation was altogether in his favour. The English translation being obscure and somewhat ambiguous, it was competent to their lordships to refer to the Dutch original.

Cur. adv. vult.

16th January, 1905. MONCREIFF, J.—

This suit is in respect of a piece of land named Natharputhukadu, of one lacham in extent. The land is bounded on the north and south by roads, on the west by land belonging to a temple of which the plaintiffs say they are the founders and managers. On the east is a plot of ground which, according to the plaintiffs, belongs to their temple, but the second defendant says it belongs to him.

The second plaintiff sold the land to the first defendant on the 30th November, 1896. He sold it for Rs. 50 as land in his possession purchased by him on the 17th November, 1896. The eastern boundary is given as land left for charity in the name of Siva. I find nothing the translation of the deed to show that the land was sold, as stated by the Commisioner, for charity purposes only. On the contrary, the deed provides that the purchaser (the first defendant) "may possess it from this day as his own purchased property."

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The plaintiffs say that the first defendant, having thus become possessed of the land, " got up " a transfer deed in favour of the second defendant. The defendants say that the first defendant sold it on the 18th January, 1902, to the second defendant for Rs. 250, on the express condition that the vendee should devote the land to charitable purposes, and that he should resell it to the vendor for Rs. 250 if at any time he should wish to dispose of it. It is stated in the deed that the eastern boundary of the land is charity land called Sivadharmanilam under the management of the second defendant.

The plaintiffs ask (1) for a declaration that they are entitled to the right of pre-emption of the land on behalf of their temple; (2) for the cancellation of the sale of the 18th January, 1902, by the first to the second defendant; (3) that the first defendant be ordered to execute a conveyance of the land to the temple of the plaintiffs for the Rs. 250 deposited in Court by the plaintiffs.

The defendants say that the plaintiffs have no right of pre-emption according to the terms of the authorized English translation of the *Tesavalamai*, section VII., paragraph 1 of which runs thus:—" Formerly, when any person had sold a piece of land, garden, or slave, &c., to a stranger without having given previous notice thereof to his heirs or partners, and to such of his neighbours whose grounds are adjacent to his land, and who might have the same in mortgage, should they have been mortgaged, such heirs, partners, and neighbours were at liberty to claim or demand the preference of becoming the proprietors of such lands."

Mr. Pereira contends that the class of persons " who might have the same in mortgage " is distinct from the class of " neighbours whose grounds are adjacent to his land," and says that he is prepared to prove that he is right by reference to the original version of the *Tesavalamai* promulgated by the Dutch Government in 1707, which is now among the archives.

In order to extract the meaning required by Mr. Pereira from the English translation I think it would be necessary to insert the word " those " in it before the phrase " who might have the same in mortgage."

After the *Tesavalamai* was printed in Dutch and promulgated in 1707 it was translated into Tamil by Jan Pirus in pursuance of directions given by the Dissava Class Isaaksz, and referred to twelve sensible Mudaliyars, who "confirmed " the translation.

Regulation No. 18 of 1806, made some years after the capitulation, provided that " The *Thesavalamai*, or customs of the Malabar inhabitants of the Province of Jaffna, as collected by Governor Simons in 1706, shall be considered to be in full force."

Sir Alexander Johnston had the *Tesavalamai* translated from Dutch into English and printed in 1806. Later, possibly in 1814, he had copies printed in English and Tamil and sent to the Courts and Magistrates. A copy of the English translation is published with an English translation of *Van Leeuwen's Commentaries*, printed by A. Strahan, Law Printer to His Majesty, Printers' street, London. The volume is in the Law Library, but does not contain the date of publication. It was of course published before the reign of Her late Majesty Queen Victoria, and is, I presume, the translation published in 1820. When published, the "rude English of the Ceylonese (Dutch) translator" was corrected, but even then the text was not that which we now have. For the word "mortgage" we find "pawn". The phrase runs, "Neighbours whose grounds are adjacent to his land, and who might have the same in pawn."

The Ceylon Courts have naturally used the English translation for nearly a century, although the original text is in Dutch. That which we now use is printed in a volume issued "by authority" by the Government Printer, and I imagine we are to take it to be a correct translation until those who authorized it think fit to alter it. I do not think it was left to our discretion to alter the translation even after having recourse to the Dutch original and the opinion of experts.

The right of pre-emption then belongs to "neighbours whose grounds are adjacent to his (the vendor's) land, and who might have the same in mortgage." The plaintiffs have no mortgage of the land, and I think their action should be dismissed with costs. If I am right, it is not necessary to deal with the other questions raised in the case.

MIDDLETON, J.—

This was an action by the plaintiffs as founders and managers of a "Hindu temple" claiming the right of pre-emption over land adjacent to land on which the temple stands, as against the defendants, the second defendant being the purchaser of the land in question from the first defendant, who originally purchased it from the second plaintiff.

The land in question was marked B on the plan D 1 put in evidence. It was admitted that the plaintiffs were managers of the temple, and, as managers, were entitled to the possession of the land on the west of the land described in the third paragraph of the plaint, which was the land in dispute.

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The main question between the parties was whether the plaintiffs had a right of pre-emption under section VII., paragraph 1, of the *Tesavalamai*, on the ground that they were adjacent owners not being mortgagees of the land.

The Commissioner of Requests upheld the plaintiff's right of pre-emption, but it is not very clear from his judgment that it was on his construction of the *Tesavalamai* that he did so.

The *Tesavalamai* reads as follows in the official copy bound with the Revised Ordinance, in vol. I., p. 31: "Formerly, when any person had sold a piece of land, garden, or slave, &c., to a stranger without having given previous notice thereof to his heirs, or partners, and to such of his neighbours whose grounds are adjacent to his land, and who might have the same in mortgage, should they have been mortgaged, such heirs, partners, and neighbours were at liberty to claim or demand the preference of becoming the proprietors of such lands..... "

I see no reason to alter the opinion I expressed in the case reported in *7 N. L. R. 151* as regards the effect of Ordinance No. 4 of 1895. We were invited by Mr. Pereira to read the English official version of the *Tesavalamai* by the light of the Tamil translation, and to say that the wording implied the existence of two kinds of neighbours: (1) adjacent; (2) those having mortgages.

I confess that I am unable to put this meaning into the plain wording of the English text, which I must consider also to be the sole recognized official repository and declaration of the laws and customs of the Malabars of Jaffna governing this case. It was apparently issued in English by authority somewhere about the year 1814 owing to the action of Sir Alexander Johnston, the Chief Justice, and has since been authoritatively published with the Ordinances of the Island in this language, and has been looked upon and treated as the prototype of this customary law.

Adjacent neighbours with a mortgage on the land have also a real interest in it proximately similar to that enjoyed by heirs or partners who are the other members of the class enjoying the right of pre-emption. There seems to be no reason why the non-adjacent neighbours with a mortgage should have any such right, any more than a mortgagee residing in another Province.

In my opinion, therefore, the right of pre-emption only lies in the adjacent owner who happens to be a mortgagee of the land, and I therefore think that the plaintiffs are not entitled to the right they claim under the *Tesavalamai*, and that on this ground, which I believe to be the only one raised before the Full Court, the appeal must succeed.

GRENIER, A.J.— 1905.

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I have had the advantage of reading the judgment of my brother Moncreiff, and I entirely agree with him in the reasons he has given in support of it. The passage from the *Tesavalamai* which was the subject of much discussion before us is very simply worded, and there can be no doubt therefore as to its meaning. We cannot import into it any words, such as those suggested by Mr. Pereira, in order to give the passage the meaning sought to be given to it by him. I regard the words " should they have been mortgaged " as only redundant. It seems to me that according to the passage in question the right of pre-emption was confined to three classes of persons, namely: (1) heirs, (2) partners, and (3) such neighbours as owned lands adjacent to the land which was intended to be sold, and who might have the same in mortgage. Notice of the sale was to be given only to such persons. There is no provision for any other class of persons if we are to give the words their plain grammatical meaning.

The authorized translation of the *Tesavalamai*, which has been in use in the Northern Province, has had the sanction of nearly a century; and, as my brother Moncreiff has rightly said, we must take it to be a correct translation until it is altered by law.

The judgment of the Court below must be set aside and the plaintiffs' action dismissed with costs.