1903.
May 7.

SUPPAIYA *v.* TAMBAIYA.

D. C. Jaffna, 2,443.

Thesavalamai—Law of pre-emption in Jaffna—Ordinance No. 4 of 1895.

The effect of Ordinance No. 4 of 1895 is not to abolish the law of pre-emption in Jaffna under the *Thesavalamai*.

THE issues agreed upon in this case were:—

(1) Whether the law of pre-emption, according to the *Thesavalamai* of Jaffna, is in force in Jaffna ?

(2) Are the parties governed by the *Thesavalamai* in regard to the transaction in dispute between the parties ?

(3) If the second plaintiff is entitled to pre-emption, what price ought she to pay for the land ?

The second plaintiff claimed to be the owner of a share in each of certain lands described in the plaint, and as such owner she claimed to have the right to pre-empt the second defendant's shares of the said lands, though the first defendant had bought them from the second defendant by deed dated 27th March, 1901, which was nearly three months before the date of the action.

The defendants denied the second plaintiff's right to such pre-emption.

The District Judge, having heard evidence and the arguments of counsel, gave judgment as follows:—

"In ancient times previous notice of the intended sale of a land had to be given by the seller to his 'heirs, partners, and neighbours": one month's notice to those who resided in the village; three months to those out of the village, but in the same Province; six months to those in another Province; and a year's notice to those who resided abroad. If the period expired without the person interested taking steps to pre-empt, the sale was considered valid.

"This way of giving notice was superseded by the 'good orders' of the old Commandeur Blom ('of blessed memory'), which was to the effect that instead of notice being given to the individuals interested a general notice should be sufficient, and that no land whatever should be sold until the proposed sale had been published on three successive Sundays at the church to which that seller belonged, during which period those persons who wished to exercise the right of pre-emption were to come forward.

"This custom of giving notice was superseded by what is known as the Udaiyar's schedule system, which again was abolished by the Ordinance No. 4 of 1895.

"How then is the seller of the present time to give his heirs, partners, and neighbours notice of the intended sale? Is he to revert to the system in vogue before the Commandeur Blom promulgated his 'good orders?' That system was doubtless abolished because it was found to be highly inconvenient; it would be found still more inconvenient at the present day, when so many Tamils of Jaffna are to be found in different parts of the world. An individual who wished to sell a piece of land might have a hundred heirs, partners, and neighbours, some of whom might be in England, others in Singapore or Malacca. How is he to give notice to all of them, even if aware where all of them were living? Is a sale of a land to be set aside, years after it was concluded, at the instance of an heir or partner who suddenly appears on the scene after a lengthened sojourn in China or Peru? The law then is silent as to how notice of the intended sale is to be given, the attendant formalities having become obsolete. I hold that the right of pre-emption has become obsolete also, and I therefore dismiss the plaintiff's action with costs."

The plaintiff appealed.

Dornhorst, K.C. (with *Wadsworth*), for appellant.

The Ordinance No. 4 of 1895 does not repeal the right of pre-emption, but only certain provisions for the publication of sales and other alienations of immovable property, situated in

1903.
May 7.

those parts of the Northern Province to which the *Thesavalamai* applies. In the case of *Tillainathan v. Ramasamy Chetty* decided in October, 1900, Bonser, C.J., did not think that the right of pre-emption was abolished by that Ordinance; and a contiguous owner was allowed to claim pre-emption (*4 N. L. R. 328*).

Rámanáthan, S.-G.—The case cited is of no value here, because the question whether the right of pre-emption was abolished or not was not decided, but only that there was no proof that the second and third plaintiffs who were the adjacent owners wanted the land for themselves. The opinion of Bonser, C.J., as regards the effect of Ordinance No. 4 of 1895 is only an *obiter dictum*. In Holland pre-emption was claimed as local custom, but the Common Law was against it as contrary to free commerce. In Governor Simons' time the right of pe-emption was exercisable only in case previous notice of the sale had not been given to the parties concerned. The forms of notice then observed were abandoned during the time of Commandeur Blom, and in place of them it was considered sufficient if notice on the part of the seller was given at the parish church to which he belonged on three successive Sundays. In later days this form of notice was also abandoned, and publication by beat of tom-tom in the village and certificate of such publication under the hand of the Udaiyar of the village as enjoined. This certificate, named the "Udaiyar's schedule," was necessary to be produced before the notary to enable him to prepare the deed of conveyance. The Ordinance No. 1 of 1842 refers to this publication and schedule, but the Ordinance No. 4 of 1895 abolished them. Therefore the duty of giving notice by the seller is now no longer a matter of law or custom. As the right of pre-emption, according to *Thesavalamai*, is exercisable only in case the customary notice of the sale had not been given by the seller, and as neither custom nor statutory law requires the seller to give any notice, the right of pre-emption has been rendered obsolete since 1895.

Assuming the right of pre-emption to exist, there ought to have been issues raised as to how and by whom the duty of giving notice was to be fulfilled. It is important to know whether the owner, the second defendant, is now bound to notify to the person who claims the right of pre-emption, viz., the second plaintiff; or whether, in view of notices of sale having become obsolete or been repealed by the Legislature, it was not the duty of the second plaintiff, when she became part owner of the property, to have intimated to the second defendant her willingness to buy his share in the event of his selling it; and whether, in the absence of such notice on her part, her action can be maintained, now that the

first defendant has bought it. The defendant should have an opportunity of raising these issues and having a decision thereon.

Dornhorst heard in reply.

7th May, 1903. LAYARD, C.J.—

The only question that can be decided at present is, as to whether the Judge is right in holding that the right of pre-emption does not now exist under the *Thesavalamai*. The Judge appears to have thought that the Ordinance No. 4 of 1895, which repealed Ordinance No. 1 of 1842 and thereby did away with the publication of sales and other alienations of immovable property situated in those parts of the Northern Province to which the *Thesavalamai* applied, also repealed all the rights of pre-emption which had existed up to the date of the coming into operation of Ordinance No. 4 of 1895. I do not think that the Ordinance was intended by the Legislature to have any such effect, and I entirely concur with the remarks of Chief Justice Bonser to be found in the case of *Tillainathan v. Ramasamy Chetty*, reported in *4 N. L. R. 328*. It seems incredible that the Ordinance No. 4 of 1895 was to have the effect of abolishing all rights of pre-emption in existence at the time of the passing of it, " for in such case one would expect the Legislature to have stated its intention in plain terms. It would have enacted that " from and after the passing of that Ordinance no right of pre-emption would be recognized by law " in those parts of the Northern Province to which the *Thesavalamai* applied.

The Solicitor-General has strenuously contended that, though the right of pre-emption may still exist, no duty remains to the vendor to give notice before he transfers the land. I understand that he desires to be at liberty to raise that issue in the Court below, provided we do not feel in a position to decide it here. As at present advised, I am not prepared to give any decision on that point, though I am inclined to think that, as the right of pre-emption still exists, the duty is cast on the vendor before parting with the property to give notice to the person who has the right of pre-emption.

However, I will not decide this point at present, but I will remit the case to the District Court for further hearing, with liberty to the defendants to raise the question suggested by the Solicitor-General, if they should be advised, and any other issues which it may appear to them desirable to raise in their defence.

The judgment of the District Judge is set aside and the case remitted to the District Court for trial.

WENDT, J.—I am of the same opinion and for the same reasons.