

Preemption in Tesawalamai: a Problem in Choice of Residual Law

OCCASIONALLY points which interest historians and academic lawyers come to the very front of practical legal controversy. The subject of preemption has been very much in the air during the last decade in Indian and Ceylon cases, and now we have a Privy Council decision which indicates the advantage of having well-prepared academic theories ready to cope with the rare and unexpected problem. *Mangaleswari v. Velupillai Selvadurai*¹ cannot be said to be an epoch-making decision, but it bears the marks of Mr. L. M. D. de Silva's customary caution, and leaves a way open to establish, if necessary, what is the residual law in preemption cases under the Tesawalamai. It must be noted at the outset that even under the Tesawalamai Preemption Ordinance (No. 59 of 1947) many problems may arise which have to be settled under the Tesawalamai itself, for the Ordinance is amending and not exhaustively codifying; and in this case the parties were agreed that reference to the Ordinance would be neither necessary nor helpful.

In *Mangaleswari's case* a father and daughter had inherited as half-sharers lands subject to preemption in 1935. The father sold his share in 1937. In 1950 the daughter, whilst still a minor, brought an action as co-sharer to preempt the share. Two things stood in her way. Firstly it was suggested that her father's (and natural guardian's) knowledge that he was going to sell was constructive notice to the minor daughter and that she had therefore had notice of the intended sale and thus no cause of action arose in her favour. Secondly the respondent relied on a decision of the Supreme Court of Ceylon, *Velupillai v. Pulendra*,² to the effect that the pre-emptor, in order to succeed, must show that *had* he received reasonable notice he *could*, as well as would, have purchased the property. This decision, and others which take a similar view, had already been criticised powerfully on practical grounds.³ Their Lordships disposed of the first point

1. [1961] 2 W.L.R. 813 (P.C.).

2. (1951) 53 N.L.R. 472.

3. H. W. Tambiah, "The Contents of Thesawalamai," *Tamil Culture*, vol. 8, No. 2, 1959, at p. 35 of the offprint. (In the present article the spelling Tesa- is used, not merely because it is used by the Privy Council but because the other spelling is a Madrassi idiosyncrasy, as in 'Santha' for the girl's name Sāntā).

very simply: notice to, or knowledge of, a natural guardian who stood in so interested a position as the father in this case could not be imputed to the minor appellatant at all. The second point was more difficult.

Since the Tesawalamai itself did not lay down that the preemptor must show that at the time when his cause of action arose he must be *able*, as well as willing, to buy, this rule established in Ceylon since 1951 must rest upon a residual legal source. In the (controversial) case of *Sabapathypillai v. Sinnatamby*⁴ it was laid down that where the Tesawalamai is silent, the Roman-Dutch law is applicable. But this case did not preclude the question's being opened, whether in preemption cases other sources of law besides the Roman-Dutch ought not to be consulted. And in fact it was well known in Ceylon that there existed a theory that preemption was derived from Islamic law (a baseless theory, as we shall see), and in fact Islamic principles had been consulted more than once. The proposition that Roman-Dutch law (which knows preemption, as do most of the pre-Napoleonic germanic customary laws) is the ultimate source was negatived by their Lordships. They say,⁵

"It appears to their Lordships that neither the Roman-Dutch law nor the Muslim can be regarded as part of the law of Tesawalamai, but that it is permissible to look at the law obtaining in those systems, to ascertain the reasoning which underlies the principle of preemption as it is to be found in them in dealing with various problems; and, where not in conflict with the principles of Tesawalamai as established in Ceylon and otherwise appropriate, to borrow such rules and concepts as seem best suited to the situation in Ceylon."

Their Lordships carefully scrutinised both the Roman-Dutch and the Islamic systems to see whether any such rule could be found as was propounded on behalf of the respondent and was authenticated by *Velupillai's case*.⁶ It was evident that no such rule was to be found in either source, and the appellatant won her appeal.

In this article the question which is sought to be answered is "what is the residual law in Tesawalamai preemption problems"? Since the process

4. (1948) 50 N.L.R. 367. On the subject see H. W. Tambiah, *Laws and Customs of the Tamils of Jaffna* (Colombo, 1950), pp. 43f.

5. At [1961] 2 W.L.R. 813, 818.

6. (1951) 53 N.L.R. 472.

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of tracing out this matter is very complicated, an attempt will be made to go very deliberately step by step.

Naturally, if we go back beyond the earliest information on the customary law of the Tamils in Jaffna,⁷ we are bound to come to a period when the Tamils of Ceylon were more or less in touch with their cousins in South India, and still conscious of their cultural and religious community with Indian Tamils. True enough, traces of this were still to be found when Sir Alexander Johnston, 150 years ago, made very extensive and fruitful enquiries into the sources and nature of customary laws in Ceylon and in the adjoining Peninsula.⁸ It is clear that he was then assured that the residual law for Hindus governed by the Tesawalamai, and possibly for non-Hindus so governed, was the Hindu law as administered by Indian (not Anglo-Indian) authorities in the adjoining districts of the Coromandel Coast. He specifically mentions two well-known textbooks of Hindu law which were said to be consulted in Jaffna: the *Vijñānēśvarīyam*, i.e. the *Mitāksharā* of Vijñānēśvara, and the *Parāśara-mādhavīyam*, i.e. the commentary by Vidyāraṇya-svāmī on the code of Parāśara. This is enough.⁹

It tells us that Brahmans able to read Sanskrit^{9a} would tell the caste-heads in Jaffna what the Sanskrit law books said in cases where customs were unclear, or open to controversy. Naturally the purpose of the compilation of the Tesawalamai 'Code' by the Dutch was, as far as possible, to limit, or

7. See H. W. Tambiah, "The Law of Thesawalamai," *Tamil Culture*, vol. 7, No. 4, 1958, at pp. 1-8 of the offprint. At p. 9 the learned author suggests that preemption might have been brought by Malayalis from Malabar. This suggestion fits in with the author's theory of Malabar contributions to Tesawalamai, on which the debate is bound to continue.

8. H. W. Tambiah, "The Alexander Johnstone Papers," *Ceylon Historical Journal*, vol. 3, No. 1, pp. 18f.

9. The information on the subject is reproduced substantially at p. 32 of Tambiah's *Laws and Customs* . . . (cited above).

9a. Brahmans who were more familiar with Tamil than with Sanskrit may have availed themselves of Tamil translations of Sanskrit works. A Tamil version of the *Varadarājīyam* has not come to hand, but F. W. Ellis, sometime Collector of Madras, was interested in and must have possessed a copy of a Tamil translation of the *Vijñānēśvarīyam*, which had in the Tamil country "always been held as of superior authority to any other lawbook whatever, not excepting even the text of Menu (Manu)" (Ellis, in *Law Magazine*, London, IX, 1833, 217-224 at pp. 220, 222). This Tamil work was both translation and gloss (we should probably call it a paraphrase), but was in verse! Ellis actually believed that it would diminish the importance of Brahmans as expositors of law: *ibid.*, 223. Sir Alexander, who visited India in 1807 and 1817, received a copy of Ellis' article from Ellis himself, and as Ellis was concerned to publicise the Tamil translation mentioned above it is far from unlikely that Johnston made its existence known on his return to Ceylon. The currency of other Tamil translations of the *Vijñānēśvarīyam* in Ceylon has not been shown, but there may well have been versions of the *Parāśara-mādhavīyam* in use there and on the continent. Other work of Ellis on the same general subject appears in the *Asiatic Journal*, Madras Literary Society, VII, 1819, 644-6, and VIII, 1819, 17-23, but does not enlighten us further on this point.

render unnecessary, recourse to such books except in matters of religion, where the Dutch had no interest or inclination either to establish or to tamper with the rules previously enforced. The position in Jaffna was therefore exactly similar to that prevailing in Madras Presidency when the Anglo-Hindu law began to develop: the Sanskrit books offered a residual source of law, notwithstanding the fact that in very many cases their actual rules were abrogated (or, more correctly, derogated from) by customary deviations. That the Tamils of South India did consult the Sanskrit books in difficult matters that came to judicial tribunals is rendered certain by the behaviour of the inhabitants of the French possessions, whose 'committee of jurisprudence' regularly (but by no means exclusively) looked into the books in such situations.¹⁰

Now that we know that Roman-Dutch law ought not to have been fixed upon as the residual law in Tesawalamai cases,¹¹ and that Hindu law was the residual law, how much further forward are we? Is there any Hindu law of preemption? Here we arrive at a difficulty. In India it has long been the fashion to proceed upon the hypothesis that customary law (as recorded in the *wajib ul-arz* of the Punjab, or in statutes codifying or regulating customary laws of preemption elsewhere) must be construed *per se*, and helped out, where necessary, by recourse to Islamic law on *shafa* (preemption). At one time, as Dr. H. W. Tambiah (as he then was) very properly pointed out,¹² a Full Bench of the North-West Provinces (now Uttar Pradesh) with an insight far ahead of its time had determined that preemption as a feature of customary law, existing independent of personal laws as such, derived not from the Muslims, but from ancient customary law.¹³ But this sensible, and correct, understanding of the history of the subject was rejected, somewhat carelessly, by the Privy Council. In *Digambar Singh v. Ahmad*¹⁴ we are given the benefit of their Lordships' theory that preemption in customary law is derived from the Islamic law, upon the basis that the Hindus learnt preemption from their Muslim governors.^{14a} The position now established is that even where preemption, as amongst Hindus, derives its authority from the customs and usages of

10. See Léon Sorg, *Avis du Comité Consultatif de Jurisprudence Indienne* (Pondicherry 1897).

11. See above, n. 4.

12. "Contents. . .," at p. 32; F. B. Tyabji, *Muhammadan Law*, 3rd. edn. (Bombay 1940), p. 666, n. 8.

13. See also Tyabji, pp. 669-70. Also K. Balasingham, *Laws of Ceylon*, I(1929), 163-7.

14. (1914) L.R. 42 I.A.10, AIR 1924 P.C. 11, 14.

14a. See n. 23a below.

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the people, it is presumed to be founded on, and co-extensive with, the Muhammadan law on that subject, unless the contrary is shown. Tyabji, the authority on Islamic law in India who is usually consulted first these days, says^{14b} that preemption was apparently unknown in India before the time of the Mughal rulers. Nevertheless judicial doubts have been thrown on the theory of the Islamic origin of preemption in India in very recent times. The Supreme Court of India in *Radhakishan Laxminarayan v. Shri-dhar*¹⁵ has said that so far as Berar is concerned (a typical region where preemption exists as part of the *lex loci* by custom) the theory of the Muhammadan legal origin of preemption does not seem to be well founded. They base their doubts upon the differences which appear between *shafa* and the requirements and other provisions of the local custom, and they advance a theory of their own, based upon migrations of peoples.

Thus we arrive at the position that although in practice reference to Islamic law is useful to supply the deficiencies in customary systems of preemption, and this is regularly done in India, in fact the system itself is not of Islamic origin. This disposes of the theory advanced in *Karthigesu v. Parupathy*,¹⁶ a Ceylon case which relies on an Allahabad decision,¹⁷ that preemption in Jaffna was due to early occupation of North Ceylon by Mahomedans (of which there is no trace worthy of mention) or by Malabars (i.e. Tamils) who had themselves come under Mahomedan influence in India. These alternative explanations do not stand a moment's examination.

But does Hindu law supply information about preemption? In a recent article in the Jubilee Number of the Adyar Library Bulletin^{17a} the present writer, confining his attention to India, and without reference to the problems that had arisen in Ceylon, showed that there is plenty of information on preemption to be found in Hindu law texts. Before we examine it we must clarify the question as to what is Hindu law itself in such a context as this.

The phrase "Hindu law" does not mean Hindu customary law, customary law that is part of the *lex loci* (as in the Punjab) or customary law to which Hindu legal texts refer. It means the law contained in and laid down

14b. At p. 666, sec. 523(3).

15. AIR 1960 S.C. 1368.

16. (1945) 46 N.L.R. 162, 163. Dr. Tambiah has repeatedly shown the implausibility of this approach.

17. *Gobind Dayal v. Inayatullah* (1885) I.L.R. 7 All. 775 FB.

17a. XXV, 1961, 13-27.

by the *dharmasāstra*. That law as administered, or distorted, or developed, by the British-Indian judiciary is called "Anglo-Hindu law". The current system, based on the Codes and the Constitution of India, is called "Modern Hindu law". We shall see presently that Modern Hindu law has had its own adventures with preemption which make a curious sequel to the very confused picture left by the Anglo-Hindu system. Hindu law itself provides for preemption in *smṛiti*-texts attributed to the front-rank authors Brihaspati, Kātyāyana, and the less important authors Viṣṇu, Vyāsa and Bhāradvāja. The two great east-coast legal writers of the middle ages, Varadarāja in his *Vyavahāra-nirṇaya* (otherwise *Varadarājīyam*), and the author of the *Sarasvatī-vilāsa*,¹⁸ carefully cite these authors in order to provide a picture of preemption in practice. Their citations do not exactly correspond,¹⁹ but it is beyond question that they intended their readers to apply these texts to situations developing in actual practice. There is also a considerable section of the *Mahānirvāṇa-tantra* which deals with preemption.²⁰ It does not follow the *smṛitis*, and has a practical air about it, giving rise to a suspicion that the customary law, which it incorporates, took some of its colour from *shafa*. Because the *Mahānirvāṇa-tantra* was probably not a South Indian work, we can neglect it for the purpose of this article.

One may ask, why were these facts not known before? The truth is that no opportunity arose for the *smṛiti*-texts to be considered and applied in Anglo-Hindu law, because (i) they did not appear in translated texts; (ii) they did not refer to Hindu personal law and so would not come within the scope laid down in the Presidency Towns for application of personal laws; (iii) even for Muslims, where the matter was referred to in the *mufassil* under justice, equity and good conscience, the Madras High Court refused to entertain the topic, and ruled the subject of *shafa* to be incompatible with the law which that Court should administer.²¹ This most unpromising background more than adequately accounts for our ignorance. No High

18. On these digests see P. V. Kane, *History of Dharmasāstra*, vol. 1 (index).

19. The passages appear at *Vyavahāra-nirṇaya of Varadarāja*, ed. Rangaswami Aiyangar, and Krishna Aiyangar, (Adyar, 1942), pp. 355 and following; *Sarasvatīvilāsa of Sri Prata-parudramahadeva*. . . , *Vyavaharakanda*, ed. R. Shama Sastry (Mysore, 1927), pp. 322 and following.

20. This passage is cited by H. W. Macnaghten, *Principles and Precedents of Moohum-mudan Law*. . . (Calcutta, 1825) at pp. xvii-xix. See *Mahānirvāṇatantram*, ed. Hariharānanda Bhārati, (Madras, 1929), XII, 107-112, pp. 390-3.

21. *Ibrahim Saib v. Muni Mir Udin Saib* (1870) 6 Mad. H.C.R. 26. This was a case where Holloway, J., employed his extensive knowledge of Civil Law to the disadvantage of Indian litigants. See also *Bhim Rao v. Patilbua* (below, n. 32).

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Court other than that of Madras would even think of consulting either the *Sarasvatī-vilāsa* or the *Varadarājīyam*.

One may further ask, is there reason to believe that those two digests were capable of being consulted in Ceylon? The answer is twofold: (i) they are *prima facie* applicable as residual textbooks for Ceylon Tamils upon an exactly equal basis with the Tamils of, say, Madura District, the fact that the *Sarasvatī-vilāsa* is later than the great migrations to Jaffna, etc., not being relevant as the author relies on ancient *smritis* long antedating those migrations; (ii) the evidence that Hindus actually practised preemption, independently of the Hindu law itself, is overwhelming, and it is proof that the rules found in the texts actually represent a living system of practice that is essential to a claim that textbook law should be consulted in such contexts. We should perhaps look at this evidence briefly. Our best examples come from Goa, where the practice of Hindus, untouched by Muslim overlordship, was in full vigour²² until the Portuguese tampered with it—for they, like many Indian judges, thought the institution an unwarrantable restriction on the freedom *uti vel abuti eo, quod est tuum*. Moreover, there is curious material which Professor U. C. Sarkar recognised as rules of preemption in the *Arthaśāstra* of Kauṭilya.²³ Now that work is of somewhat equivocal authority on matters of jurisprudence. Its antiquity is open to doubt, but most authorities regard it as genuinely contemporary with Aśoka. However, we cannot claim it as a source on Hindu law. Yet, as evidence of actual usage amongst Hindus at that remote epoch, it is of unquestioned value, and this particular context does not call for the caution we must use in some other places. It is true that the courts occasionally cite Kauṭilya, but that does not make him an authority on Hindu law, only *pro tanto* on Anglo-Hindu law which, as we have seen, is another matter altogether. However, no one has given any kind of authority to the passages which seem to deal with preemption, and we must take them for what they are worth as evidence of the public's determination to allow no sales of land to take place unless "near" persons (to paraphrase the position) first neglect a right to preempt. We shall return to this source later. Evidence that Kauṭilya was still read and worked over in Madras Presidency in the middle ages is forthcoming, because some commentaries on the *Arthaśāstra* are of Tamil or Andhra provenance. Moreover there is ample evidence that in

22. See J. H. de Cunha Rivara, *Brados à Favor das Comunidades das Aldeas do Estado da India* (Nova Goa, 1870), p. 46.

23. See n. 28 below. U. C. Sarkar, *Epochs in Hindu Legal History* (Hoshiarpur, 1958), p. 87, 206.

Kerala formerly, as in the Malabar Districts nowadays, *ottidars* (referred to in Hindu law texts as 'creditors') had a right of preemption: see the authorities cited in *Narayana Menoki v. Karthiayani*.^{23a}

To proceed: given that the Hindu law ought to be consulted as the residual law on preemption under the Tesawalamai, what can it teach us? Fundamental propositions do indeed emerge, which are exactly what we need. We see at a glance that the concept of *shafa* is different in many respects. The Hindu notion is, briefly, that when an owner *proposes* to sell his land he should offer it first to relations, in order of nearness, to neighbours who are co-sharers in certain rights of way or water, then to neighbours who are not such co-sharers, then to fellow-villagers, and amongst fellow-villagers to creditors before others. Where persons claiming to preempt are amongst the favoured classes, but some can claim under two heads (e.g. as a remoter relation but a neighbour) intermediate groups of claimants in the order of priority emerge. The notion is that this offer must be made, and that no transfer of land is valid until relations, neighbours and fellow-villagers have been summoned to attend a ceremony at which seisin is taken by the proposed transferee. If the sale is carried out without the ceremony, or without the proper invitations or summons being sent out, those who are *matāh*, literally "to be respected", and whose rights to preempt have been overlooked, have a number of days, or weeks, or months, depending upon their distance and circumstances, in which they may upset the sale, and substitute themselves, if they insist, for the provisional transferee. If the *matāh* give their consent, or indicate consent by silence, or allow time to run out against them, the provisional transferee becomes an actual transferee, and not before. The concept of resiling from sales, and upsetting transactions on various grounds, is ancient in India as well as in Ceylon, and dies hard, as anyone can see who reads a volume of the Indian Law Reports.

In this particular problem of the alleged right of the preemptor to sue only when he is able as well as ready and willing to pay the price, the Hindu law is not explicit. One must derive the law from a consideration of its principles. Because a period of time is allowed within which a protest (or claim) must be made by the preemptor, it is evident that anyone who proposed to preempt, be he an adult or a minor acting through his guardian, can give notice of his objection to the transfer, raise money if necessary from a lender, and come forward in the period allowed. It is implicit in the Hindu texts that a relation, etc., who stops a sale on the ground of his

^{23a}. [1961] Ker. L.T. 809.

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right to dispute the alienation to a stranger, must satisfy the owner himself. This is a point which has led to the decay of the subject in digests other than those mentioned. Because he can satisfy him in other ways than by offering actually to purchase there and then, an absolute right to purchase from the owner upon tendering the price would not entirely accurately be insisted upon. In practice the relations might cause the owner to postpone his sale, especially where he only wanted to pay his debts, and particularly where he was not likely to live long and the estate might come to the objectors by succession. However, as the South Indian digests referred to above apparently intend, there is no substantial difference between the right to stop a sale on tender of adequate consideration and the right to stop a sale and insist upon purchasing the property in question.

The upshot of this discussion is that under the Hindu system a preemptor must, in order to stop the sale to the proposed stranger or less qualified purchaser, tender a consideration sufficient to cause the owner to desist, and that in nine cases out of ten this is equivalent to the preemptor's exercising his right to preferential purchase over the proposed transferee. Consequently it is by no means necessary that at the moment of the proposed transfer the consent of the preemptor must be dispensed with because he does not have the cash available. If he does not come forward with the cash within the period of time allowed for exercising the right of preferential purchase, his rights are at an end.

The Hindu texts have not been translated anywhere. Parties will require agreed translations from the Sanskrit, but the present writer offers the passages below as his own attempts to give the sense of the originals.

Vyāsa: "Relations, neighbours, creditors are in order 'possessed of causes of purchase'. Amongst them the nearer are *matāḥ* ('to be respected') in the sale, and foremost are the *sapindas* ('agnates within seven inclusive degrees'). Where neighbours on four sides compete, he on the East is preferred, then he on the West, the North, and in the absence of all others, the South. Those who share water come next, then those who are (merely) contiguous. Then come *bāndhavāḥ* (? remoter relations, or partners, connexions) and after them their contiguous neighbours. And this is not broken by streams, springs, paths and the like."²⁴

24. After this passage, at p. 356 of the *Varadarājīyam* (cited above), occur three lines which are omitted in three manuscripts, and which are not essential for our purpose.

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Bhāradvāja: “Relations, neighbours, creditors in order are ‘takers of land’. Thereafter members of the same *kula* (‘agnatic lineage’), and in the absence of all, members of another family (i.e. ‘cognates’, says Varadarāja).”

Brihaspati: “Full brothers, *sapinda*s, sharers of water (i.e. *samānodakas*²⁵), members of the same *gotra* (‘agnatic lineage’), neighbours, creditors, fellow-villagers: these seven are *matāḥ* in a sale of land.”

Vyāsa: “The period of resiling in the case of land is ten days both for purchaser and seller. It is twelve days in the case of *sapinda*s. After that, the sale is absolute (*avichālyam*). Neighbours have the same period (of grace), and we learn that creditors have the same period. And *sapinda*s, who have this same period, are understood to be *matāḥ* in purchase.”

Pañcādhyāyī:²⁶ “Relations, neighbours, creditors are learnt to have the same period (of grace) when it (the intended sale) is known. For all of them have a ten-day period, etc., and so have the purchaser and seller themselves. That field will go to the relative, etc., where the price accepted by the seller is inadequate.”²⁷

Elsewhere: “Those that have been mentioned as ‘suitable’ in a purchase are prominently situated (? or shown honour) in a sale. They are not entitled to complain (or ‘impugn the transaction’) if they let the matter pass, on the next day.” (Varadarāja comments, these relations, neighbours, etc., who are entitled to be present, must release their rights or assert them immediately after the proposal has come to their knowledge, and not on the next day: the period of ten days for resiling is reserved to the parties to the transaction).

Brihaspati: “A purchase of immovables is valid only with the consent of the relations, etc., otherwise there is no purchase at all, and the parties may even be liable to a penalty.” (Varadarāja comments that this applies

25. On *samānodakas* see any work on the Hindu law of intestate succession. They are agnates removed from the common ancestor from eight to fourteen degrees inclusive.

26. This work, cited twice in the *Varadarājīyam*, is not at all well-known. The present writer has not found any reference to it in the works of P. V. Kane (than whom no living person knows more about Hindu law). Rangaswami Aiyangar himself had no light to throw on the matter. But Varadarāja *cites* the work, and that is what matters.

27. The last sentence, the meaning of which cannot be established with certainty in view of our lack of knowledge of the method of price-fixing in ancient times, is omitted from two manuscripts (Varad., p. 357).

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ly where relations, etc., are in the vicinity.) "Where relations, neighbours, and creditors are absent from the village at the time of the purchase, they have no right of protest when three fortnights have elapsed since the purchase." (Varadarāja adds that this applies where they are *not* in the vicinity, and likewise what follows. . .).

Kātyāyana: "In one's own village ten nights; in another village three fortnights; but in another kingdom six months; and if the languages differ even a year."^{27a}

Passing over other *śmṛiti*-texts to very similar effects, we note *Bharaḍvāja*: "A sale of land to creditors in another village is not valid, except in cases where the fellow-villagers have no means, or (they themselves) are indebted."

In conclusion we may sum up the discussion as follows:— whatever may be the position with some chapters of Tesawalamai law, in preemption recourse must be had to Hindu law as the residual law. If from the spirit and outlook of the institution as known to the *dharmaśāstra* no answer is forthcoming, it is permissible to have recourse to the Anglo-Hindu law on preemption, which owes something to Islamic law at second hand. If one consults the customary law it is better to look at Kautīlyā first²⁸ (for all his antiquity) rather than to the customary law of, for example, the Punjab:²⁹ but in all cases direct consultation of either the Roman-Dutch or Islamic law is deprecated.

The Privy Council note that preemption is not regarded with favour.³⁰ This is undoubtedly correct, not only for Islamic law but also for customary law. In India it is accepted that any course which would defeat a right to

27a. The similarity of this to the provisions of Tesawalamai is evident.

28. The text is printed in the Trivandrum edn. (pt. 2, 1924) at pp. 51-2. The section is there numbered 61. In Shama Sastry's edn. the passage is at the commencement of Bk. III, ch. ix. In his translation (which contains many errors) published from Mysore in 1929 it appears on pp. 190-1. The passage may be paraphrased as follows:— Relations, neighbours and creditors may take (or preempt) at sales, outsiders coming in only after them. At a public meeting the land, etc., is advertised for sale at a stated price; after the third proclamation, if no one objects, the proposed purchaser may purchase the property. If by competition the price is enhanced the increase above the announced price goes to the Treasury. A person lodging a protest against the sale must pay a fee. Where a protest is made to one not the owner (or is not made to the owner as it should have been) a fine of 24p. is payable. The owner in receipt of a protest may sell if the protesting party does not put in an appearance within seven nights. If property subject to preemption, and under a protest, is transferred through default of the owner, the latter must pay a fine of 200p. In other cases of transfer pending a protest the fine is 24p.

29. On which see Rattigan's Digest; also Agrawala's work on the Law of Preemption.

30. [1961] 2 W.L.R. 813, 820, citing Tyabji, p. 725.

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preempt is legal and will not be hindered by the court.³¹ In India many High Courts, apparently wrongly, have attempted to kill preemption altogether by appeals to Art. 15 and Art. 19 of the Constitution.³² Nevertheless the better view is that the institution lives on, and has a useful life in front of it,³³ as the Supreme Court's frequent investigations of preemption show.³⁴ Under the *Tesawalamai* many of these objections do not apply at all. Mere proposal to transfer is enough to give rise to protest (unlike the Islamic system) and failure to give notice is itself a cause of action. The better view seems to be that now adopted in India,³⁵ that a right of preemption is a right in property (though not capable of transference) and that *lex vigilantis subvenit*. As long as the preemptor takes the proper steps in the period allowed by law, the court will uphold his right notwithstanding theories about "unjustifiable fetters upon the free disposition of property." And Parliament has recently created a new right of preemption in favour of those who inherit shares in businesses and immovable property, a right which, as it happens, is bound to develop somewhat differently from the Islamic law, since the right arises when the sharer *proposes* to transfer, not by gift.³⁶

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31. *Radhakishan* (cited above), AIR 1960 S.C. 1368, 1372a.

32. See *Panch Gajar Gaur Brahmins v. Amar Singh*, AIR 1954 Rajasthan 100 FB; and other cases cited and discussed in *Bhim Roto Eknath v. Patilbhai Ramkisan*, (1959) 62 B.L.R. 574. Also *Mulla Haji v. Pandit Lachminarayana* AIR 1961 Mad. Pr. 311.

33. See case last cited.

34. *Shri Anubehari Singh v. Gajalhar* (1955) 1 S.C.R. 70; *Bishan Singh v. Khanna Singh*, AIR 1958 S.C. 838; *Radhakishan* (cited above) AIR 1960 S.C. 1368. Now see also *Ram Saran v. Mst. Domini* AIR 1961 S.C. 1747.

35. *Shri Anubehari Singh* (cited above).

36. Hindu Succession Act, 1956, s. 22.

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