execution of a decree of a Civil Court, and was, as such barred by Clause 12 of the 2nd schedule of the Limitation Act.

[179] The plaintiff has appealed. In this appeal it is only necessary to decide the question of Limitation. Adamma's husband, under whom the plaintiff claims, was no party the decree or the execution proceedings which resulted in the Court sale at which the defendant's husband became purchaser; and the plaintiff's title, if any, could not therefore be affected by them. We do not concur with the District Judge in thinking that the real object and purpose of the suit could be taken to be to avoid or set aside the sale within the meaning of Clause 12 of the 2nd schedule of the Limitation Act; because that is *not the only means* by which the defendant's title could be defeated and the plaintiff could recover possession. It is not enough that the party in possession is a purchaser at a Court sale, but it must also appear that the plaintiff is bound to set aside that sale before he could recover. If Timmaiya was entitled to the lands in question as against the defendant in Suit No. 8 of 1864, the plaintiff in the present suit is entitled to recover them on proof of such title and of its transfer first to Narasinga Rao and then to himself, and has no reason to set aside the sale set up by the defendant. Following the decision of this Court in R. A. 31 of 1880, we reverse the decress of the Courts below and remand the suit for disposal on the merits. The costs of this appeal will be costs in the cause.

NOTES.

[Art. 12 does not apply to suits in which the plaintiff was not a party to, nor bound by, the sale sought to be set aside:—(1882) 5 Mad. 54;

This case was explained away in (1883) 7 Mad., 258, as based on the principle that the Court did not profess to sell the plaintiff's property and not on the fact of his not being a party to the suit. But 7 Mad., 258, was doubted in (1895) 18 Mad., 478 and was overruled in (1896) 20 Mad., 118 F. B; (1897) 19 All., 308.

See also (1886) 9 Mad., 460.]

[4 Mad. 179.]

APPELLATE CIVIL—FULL BENCH.

The 5th April and 22nd September 1881.

PRESENT:

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE, MR. JUSTICE INNES, AND MR. JUSTICE MUTTUSAMI IYYAR.

Ramasami Sastrigal.....(Defendant), Appellant

and

Samiyappanayakan and others.....(Plaintiffs), Respondents.*

Mortgage by way of conditional sale executed since 1858—Construction, rule of.

Per CURIAM (INNES, J., *dessenting*).—In the Madras Presidency, where contracts of mortgage by way of conditional sale have been entered into subsequent to the year 1858, redemption after the expiry of the term limited by the contract must be allowed as suggested in *Thumbusawmy Moodelly* v. *Hossain Rowthen* (L. R., 2 I. A., 341; s... I. L. R., 1 Mad., 1).

* Second Appeal Nos. 361, 362, 363 of 1879 against the decrees of F. Brandt, District Judge of Trichinopoly, reversing the decrees of A. Chendrayyar, District Munsif of Kulitalai, dated 26th March 1879.

[180] *Per* INNES, J.—Contract of mortgage and conditional sale must be construed in accordance with the intention of the parties which can only be gathered from the terms of the instrument.

It cannot be presumed that parties to mortgages by way of conditional sale executed since 1858 contracted with reference to the rule enforced by English Courts of Equity, adopted by the Sadr Court in 1858, and followed for 13 years in this Presidency.

THE facts so far as they are necessary for the purpose of this report are set out in the Judgment of TURNER, C.J.

The question referred to a Full Bench was whether contracts of mortgage by way of conditional sale executed subsequent to the year 1858 are to be construed strictly, in accordance with the rule laid down in Pattabhiramier's case (13 M. I. A., 560), or in accordance with the doctrines of the English Courts of Equity (allowing redemption after the term specified), adopted by the Sadr Court in 1858 and followed for 13 years by the Courts of this Presidency.

Bhashyam Ayyangar for Appellant.

The distinction suggested by their Lordships of the Privy Council between conditional sales by way of mortgage executed before 1858 and since 1858 may be a sound one as the basis for legislation, but not for judicial decision. If the course of decisions since 1858 was erroneous, there can be no presumption of law that the contracting parties were aware of such course of decisions. No doubt every man will be presumed to know the law and to have contracted with reference to it, and it is immaterial whether he in fact knew it or not. If the High Court has no power of making laws, a course of decisions by that tribunal which have been declared by the Privy Council to be erroneous and opposed to law can have no more legal effect upon contracts entered into by the parties in this Presidency than an erroneous course of decisions passed by a District Court upon contracts entered into in that district before such course of decisions was pronounced erroneous by the High Court and reversed on appeal in a particular case. If such principle could be judicially recognized and can legally form an element in construing documents, the consequences will be very anomalous and inconvenient. A further distinction will have to be introduced in respect of contracts entered into subsequent to the decision of the Privy Council in Pattabhiramier's case, in which **[181]** the decision of this Court, which was in conformity with the course of decisions since 1858, was reversed in 1874. Further, if it is pleaded that the conditional vendor was not cognisant of the course of decisions subsequent to 1858, it is difficult to see on what principle evidence in support of such plea can be excluded. The very insertion of the so-called penal clause in a deed executed subsequent to 1858 shows conclusively that the parties had no knowledge of the course of decisions of this Court based on the decisions of the Court of Chancery and opposed to the course of decisions here prior to 1858.

Hon. *T. Rama Rau* for Respondents.

Pattabhiramier's case was decided by the Privy Council in December 1870 (*vide* Moore's I. A., p. 560). The Privy Council have expressed in that case that they did not design to disturb any rule of property established by judicial decisions. Again, the Judicial Committee have observed that there has been no course of decisions in Madras admitting equity of redemption after term, and based their judgment upon that and intimated that their decision would have been the other way if the fact were otherwise.

As a matter of fact, the course of decisions of the late Sadr Court since 1858 and of the High Court since 1862 has been that whenever the security

for money was an object of the transaction, no sale could become absolute (*vide* Appeals Nos. 49 of 1858, 190 of 1858, 105 of 1859,90 of 1859; S. A. Nos. 155 of 1859, 27 of 1860, and 272 of 1860; S. A. No. 682 of 1861). The late Sadr Court and the High Court have ever since 1858 followed the rule of the Courts of Equity in England that once a mortgage is always a mortgage.

Even after the receipt of the decision of the Privy Council in Pattabhiramier's case in Madras, the High Court followed their own rule (*vide* VII, M. H. C. R., p. 6, decided on 11th December 1871 and p. 395, same volume decided on 7th December 1874.)

The rule of law observed by the High Court of Madras has been to ascertain the intention of the parties to the instrument and try to give effect to it. The High Court of Bombay actually declined to follow the decision in 13 Moore's I. A. (*vide* Bombay High Court Reports, page 69). Then we have the decision in Thumbusawmy's case in Indian Law Reports, Vol. I, Madras Series. In this case the Privy Council do not state that the law laid down by them in Pattabhiramier's case should invariably be followed. **[182]** They express a strong doubt and then state finally that in the case of a mortgagee who had acquired an absolute title before 1858 there would be strong reasons for adopting the rule in Pattabhiramier's case, and in case of securities executed since 1858, there would be strong reasons for recognizing the English doctrine of equity and giving effect to the Madras authorities with reference to which the parties might be supposed to have contracted. In Bombay there was a decision passed subsequent to this. *Vide* I. L. R., Bombay Series, Vol. II, p. 231, in which the Bombay High Court have clearly said that the decision in Pattabhiramier's case was not intended to be followed.

Under these circumstances it is only reasonable to follow the rule of law adopted by the late Sadr Court and by the High Court since 1858, *viz.*, the intention of the parties to the instrument must be ascertained and effect should be given to the same.

Lastly, even if full effect were to be given to the decision of the Privy Council in Thumbusawmy Moodelly's case, the sound principles laid down by the Privy Council in that case would have to be followed, and in the present case the contract is dated 22nd September 1865, subsequent to 1858, and therefore it must be presumed that the parties contracted with reference to the state of law then in force.

The Court (TURNER, C.J., INNES and MUTTUSAWMI AYYAR, JJ.) reserved Judgment till September 22nd, when the following **Judgments** were delivered :—

Turner, C.J.—On the 22nd September 1865 Muttusami Nayakan borrowed from the appellant a sum of Rs. 400, and, to secure its repayment, made over to the appellant a plot of land. The instrument of mortgage stipulated that the appellant should retain possession and receive the profits of the plot in lieu of interest and should be repaid the principal sum on the 14th June 1868. It also contained a condition in terms following :—

"If the principal sum be not paid on or before the said date, then the said land, in satisfaction and lieu of the said amount, shall be enjoyed by you (the mortgagee) as if it had been sold outright to you, and as if this instrument had been an instrument evidencing an outright sale."

[183] Default was made in payment of the principal on the day named.

On the 27th October 1877, the respondents, nephews and heirs of Muttusami Nayakan who had died in the meanwhile, sued the appellant to

recover possession of the mortgaged land on payment of the principal sum due. The Munsif, in view of the rulings of the Privy Council in Pattabhiramier *v.* Vencatarow Naicken (13 M. I. A., 560) and Thumbusawmy Moodelly *v.* Hossain Rowthen (L. R., 2 I. A., 241; s. c. I. L. R., 1 Mad., 1) considered himself bound to uphold and strictly enforce the terms of the condition declared in the instrument of mortgage and dismissed the suit.

On appeal, in advertence to observations made by their Lordships of the Privy Council in their judgments in the cases cited, the Judge considered himself at liberty to adopt what he deemed the more equitable course, and to presume that the parties had contracted with reference to the exposition of the law adopted by the Courts in this country at the time the contract was made. He therefore reversed the decree of the Munsif and decreed the claim.

The appellant urges in second appeal that the sale had become absolute before the institution of the suit; that the condition for sale could legally be enforced; and that the decree of the Lower Appellate Court is opposed to the rulings of the Privy Council.

The various forms of mortgage known to the Hindu Law are mentioned in *Colebrooke's* Digest, Edition of 1801, vol. 1, pp. 81, 82.

Among these is the mortgage with a condition that, in the event of default being made in the payment of principal on or before a date named, the property mortgaged shall pass to the mortgagee as an absolute purchaser.

This form of Hindu mortgage under the names of Katkabala, Muddatakriyam and Gahan Lahan obtains commonly throughout British India, though its incidents may vary. It is generally, though not universally, accompanied by the delivery of possession to the mortgagee with premission to enjoy the usufruct either in lieu of or in part payment of, the interest, and, while ordinarily it involves no personal obligation on the part of the mortgagor for repayment of the debt (Macpherson on Mortgages, 11), it may, **[184]** by special agreement or local custom, confer on the mortgagee the option of recovering the money from the mortgagor personally or of availing himself of the sale. Although there is no precise form of words necessary to constitute such a mortgage, it ordinarily differs from the *bye al wufa* or *bye bil wufa* of the Muhammadans in this, that, in the Hindu form, there is a preliminary mortgage with a condition for future sale, while in the Muhammadan form there is at once an absolute sale with a counter-agreement for resale which may be contained in the original sale deed or in a separate contemporaneous instrument. The origin and nature of this form or mortgage among the Munhammadans is explained in Baillie's Muhammadan Law of Sale, page 301. It was introduced or adopted in order to defeat the precept of Muhammadan law prohibiting usury. The lender, by stipulating for the usufruct or for the payment of a price on the resale higher than he paid, secured the same advantage as would have accrued to him from placing his money at interest, while the transaction in form did not violate the aw.

In the contract known as Peruartham, which obtains in some taluks of Malabar, we have another form of mortgage by conditional sale, with this singularity that the sum to be paid on resale or redemption is not a sum ascertained beforehand by agreement, but the then market value of the property (I. L. R., 1 Mad., 57). Under Hindu Law, if the mortgagor failed to discharge the mortgage debt on the expiry of the term or within a few days thereafter (Col. Dig. Book 1, Chapter III, Sec. II, vv. 115, 116), the stipulation took effect and the mortgagee became the absolute owner of the property mortgaged *Ibid.*, vv. 112, 115, 116).

In the Presidency of Bengal the Regulations I of 1798 and XVII of 1806 prohibited the enforcement of the condition of sale until proceedings had been taken in the manner thereby prescribed for foreclosure. In this and the Western Presidency there was no similar legislation and until the year 1855, in this Presidency, the Courts gave effect to the contract according to its tenor. In 1852 it had been argued that the forfeiture under such a contract should not be enforced, but the Sadr Adalut arrived at no decision on the point as the mortgagees had pleaded that the contract **[185]** became ineffectual and the mortgagor failed to disprove the plea—S. A. Rep. 1852, p. 69. The first reported case in which the Sadr Adalat refused to enforce the forfeiture occurs in the year 1855—S. A. Rep. 1855, p. 197. Three years later, in 1858, the Sadr Court definitively adopted the practice of Courts of Equity in England to allow redemption after the expiry of the time limited by the contract. They at the same time indicated that a distinction should be observed between a conditional sale with power to redeem and a mortgage, defining the former as an arrangement whereby the parties have at its inception fixed the value of the property, with a view to its sale for such consideration, and the latter as an arrangement wherein in the sum borrowed may be far within the value of the property, and care may be taken that the value of the property should be sufficient to cover the sum borrowed by way of security.

In the latter case they held that the clause of forfeiture was introduced only *in terrorem* and by way of penalty, and that the mortgagee would receive all that he was equitably entitled to if, on the failure of the mortgagor to pay off the loan by the time stipulated, the mortgagee were allowed to fall back on the security, not to absorb the whole of it, but to take his money out of it.

The distinction taken in this decision between what are purely contracts for sale and, in a certain event, for repurchase and contracts which, taking the form of a sale with a condition for repurchase, are intended to be mere securities for loans during the term the condition subsists, is unaffected by any decision of this Court.

The distinction is obvious. A man contemplating discontinuance of residence in a particular place may desire to sell his house but to retain the option of repurchasing it if he should return. It would be reasonable to fix a term within which such an option should be declared. In this case no considerations of equity intervene to deter the Courts from giving effect to the contract.

On the other hand, where the machinery of a sale with a condition for repurchase has been adopted as a security for a loan, it may be presumed the lender has taken care that the interest or the profits in lieu of interest will recoup him for the temporary deprivation of his capital, and, if he eventually gets his capital and the interest agreed, he has all he can reasonably ask. In the former **[186]** case it is pretty certain the owner obtained the full value of his property at the time of the sale; in the latter, it is equally probable that he did not.

The ruling last mentioned was followed in S. A. 190 of 1858, S. A. Rep. 1859, p. 59; S. A. 69 of 1859, *Ibid.*, p. 130, and in 78 of 1859, *Ibid.* 150. In the case last mentioned the Chief Judge, the Honorable W. A. Morehead, dissented and, declaring the ruling was opposed to the decisions of the Court prior to 1858, protested that the Judges were not entitled to introduce new principles into the laws of the country until such principles had been made law by legislative enactment.

The ruling was nevertheless followed in—

S. A. 105 of 1859, S. A. Rep. 1860, p, 251,
S. A. 90 of 1859, S. A. Rep. 1860, p. 26.
S. A. 27 of 1860, S. A. Rep. 1860, p. 26,
S. A. 155 of 1859, S. A. Rep. 1860, p. 40,
S. A. 272 of 1860, S. A. Rep. 1861, p. 20, and
S. A. 682 of 1861, S. A. Rep 1862, p. 81.

Although the Sadr Court had not permitted the foreclosure of such mortgages, the High Court, after its establishment, dissented in this particular from the rulings of the Sadr Court (Vencatachellam Pillai *v.* Tirumala Chary) (2 M. H. C. R., 289). In other respects it followed the rulings of the Sadr Court.

In The Zamindar of Bobbili *v.* The Zamindar of Madgole (7 M. H. C. R., 6) it held that the intention of the parties must be ascertained, and that for that purpose resort might be had to other documents and oral evidence; and, finding the document then in suit to be a sale with a condition for repurchase, it enforced the stipulation for an absolute sale and refused redemption.

On the other hand, where the Court considered it was the intention of the parties to create a mortgage, in decreeing foreclosure, it gave the mortgagor reasonable time to come in and redeem [Venkata Reddi *v.* Parvatiammal, (1 M. H. C. R. 460)], and in a suit brought by the mortgagor allowed redemption 11 years after the date stipulated for payment [Nallanna Gaundan *v.* Palani Gaundan (2 M. H. C. R., 420),] and in another case nearly 60 years after that date [Samathal *v.* Kamatchiamma Boyi Sahib, (7 M. H. C R., 395).]

[187] In the meantime the question as to the effect be given to the stipulation for sale in a deed of mortgage with conditional sale came before the Privy Council in Pattabhiramier *v.* Venkata Row Naicken

It was there held that contracts of conditional sale, whether effected as a security for a land or not, were to be construed according to their tenor, and that the Courts of the Presidency were bound to give effect to them. That this ruling, if we may be permitted to say so, was in strict accordance with Hindu law and with the earlier decisions of the Courts established under British rule cannot be doubted. It is perhaps not difficult to imagine the reasons which influenced Judges in the Southern and Western Presidencies to depart from the law of the country and rulings of their predecessors.

In times when the machinery for the administration of the law is imperfect, when such tribunals as there may be considered themselves at liberty to award what they believe to be justice in the particular case and are not constrained to observe in their decisions uniformity of principle, we can hardly expect to find formulated rules of equity. The letter of the law may be preserved without much risk of hardship if, in practice, it is not universally regarded. The recognition of the more refined rules of equity is the work of Judges whose action, no longer capricious, secures a reasonable certainty of redress, and who are aware that it is of importance to all men that justice should be administered on definite principles. We can hardly expect to find in the law administered by Hindu Punchayets that the equitable rule, which affords relief against forfeiture, would be recognized *eo nomine*. When, under British rule, the more efficient administration of justice was secured by the establishment of regular Courts, the Regulations, in directing these Courts to administer the personal law of the natives of India, in cases of succession and certain other cases in which a divergence from it might have injured sentiments or altered customs it was politic or just

to respect, appeared to allow considerable latitude to the Courts in matters purely secular, laying down the rule that they should proceed according to justice, equity, and good conscience. When Judges feared that, in a certain class of cases, by enforcing to the letter a contract or a condition attaching by general law to a contract, they might overshoot the mark at which it was their duty to aim, and, by affording a remedy in excess of the wrong [188] originate a new wrong or abet oppression, it is not to be wondered they should have sought to avoid these consequences and have imported a doctrine novel only in its application which enabled them to arrive at results that commended themselves to public sentiment. The principle of awarding relief against forfeiture had been accepted in Indian Legislature, *e.g.*, the Bengal Regulation XVII of 1806 and in the Rent Act X of 1859, and the Judges of the Courts of this Presidency considered themselves at liberty to introduce it into the Southern Provinces.

Their Lordships of the Privy Council, in Pattabhiramier's case, have laid down a rule by which we are bound to govern ourselves, that where by the custom of the country the parties have a right to the execution of a contract according to its tenor, and, especially, where that right has been judicially recognized as an incident of the contract, we are not at liberty to take upon ourselves to refuse execution of the contract by importing a principle, which, however sound, it is the province of the Legislature and not of the Courts to introduce. "We must judge of property according to the rules which the law has fixed and can make no new ones, nor invent new remedies, however compassionate the case may appear or however popular it may be to attempt it." (Lord Keeper Somers in the Banker's case.)

But in the case in which the Judicial Committee indicated the error in the course pursued by the Madras Courts, their Lordships went on to observe that, in allowing the appeal, they did not design to disturb any rule of property established by Judicial decisions so as to form part of the law of the forum wherever such may prevail, or to affect any title founded thereon.

This judgment arrived in India in 1871. At that time, for 13 years, the Courts had followed the ruling originally pronounced by the Sadr Court in 1858, and, inasumch as the case of Pattabhiramier *v.* Venkata Row Naiken had been decreed *ex parte*, and it did not appear from the report that the long series of decisions had been brought to the notice of their Lordships, the Courts in this country considered that they might, without derogating from their duty to accept as binding on them rulings of the highest Court of Appeal, observe the rule which had been so persistently followed. In the more recent decision of Privy Council in Thumbusawmy Moodelly *v.* Hossain Rowthen, their Lordships re-[189] affirm their ruling in Pattabhiramier's case and, adverting to the rulings of the Courts in this Presidency and in the Presidency of Bombay, observe: "The state of the authorities being such as has been described, it may obviously become a question with this Committee in future whether they will follow the decision in 13 M. I. A., which appears to them based on sound principles, or the new course of decisions which has sprung up at Madras and Bombay which appears to them to have been in its origin radically unsound"; and they intimate that in the case of a mortgagee who had acquired an absolute title before 1858, "there would be strong reasons for adopting the former course." In the case of a security executed since 1858, there would be strong reasons for recognizing and giving effect to the Madras authorities with reference to which the parties might be supposed to have contracted; and, while abstaining from

expressing any opinion on this question until the necessity for so doing arises at the same time their Lordships intimate that the state of the law calls for the interposition of the Legislature and they indicate the provisions of an enactment suitable to the circumstances. "An Act," they say, "affirming the right of the mortgagor to redeem until foreclosure by a judicial proceeding and giving to the mortgagee the means of obtaining such a foreclosure with a reservation in favour of mortgagees whose titles under the law as understood before 1858 had become absolute before a date to be fixed by the Act, would probably settle the law without injustice to any party."

It can hardly be doubted that legislation will proceed on these lines, and we know it to be in the contemplation of the Legislature to deal with the subject. Under such circumstances, we have, in the cases now before us in which contracts have been made since 1858, to determine the question on which, though left undetermined by the Judicial Committee, it appears their Lordships have indicated a reasonable principle of decision. In one of these it was found by the Court of First Instance—and the point is not decided by the Lower Appellate Court—that after the date on which the sale would have become absolute, the mortgagors negotiated with the mortgagee and procured him to transfer the security to a stranger, treating it as a subsisting mortgage. In this case it seems, at the least, probable that the parties contracted in reference to what was at the time pronounced by the Courts to be law. **[190]** In the other cases, there are no such indications; but it would be unsafe to infer from their absence that the parties may not have so contracted.

It appears to us that were we, in the case of contracts entered into since 1858, to revert to the sounder law which obtained before that date, we should, as is intimated by the Privy Council, possibly give an effect to such contracts which the parties contracting in reference to the declarations of the Local Courts had not intended. It also appears to us that it would introduce still worse confusion were we for a season to apply the law as it stood before 1858, should the Legislature hereafter determine to accept the advice of their Lordships and pass an enactment in the terms suggested. For these reasons we conceive that we shall not be wanting in due respect for the distinguished tribunal by whose decisions we are bound, if we follow the course they have pronounced there were strong reasons for adopting and apply the rules introduced, however erroneously, by judicial decisions in these provinces. We shall then affirm the decision of the Lower Appellate Court, extending the time for payment to the expiry of three months from the receipt of this decree in the Court of First Instance and dismiss the appeal, but we order each party to bear his own costs.

Innes, J.—In Bapirazu *v.* Kamarazu (I. L. R., 3 Mad., 26) we had to consider what is the effect of the decisions of the Judicial Committee of the Privy Council in the cases of Pattabhiramier v. Venkata Row Naicken (13 M. I. A., 560) and Thumbusawmy Moodelly *v.* Hossain Rowthen (L. R., 2 I. A., 241; s.c, I. L. R. 1 Mad.,) as applied to suits arising out of instruments of mortgage and conditional sale executed before 1858. We decided that the intention of the parties to the instrument was to be ascertained and effect to be given it, and that that intention was to be ascertained by construction of the terms in which the contract itself was expressed, and was not to be presumed in accordance with a foreign rule of law to have been in conflict with the express language of the document. We also thought, from the views expressed by the Judicial Committee, that it was no longer open to us, in endeavouring to arrive at the intention of the parties, to have recourse to oral

[191] evidence or to instruments other than the document itself by which the parties expressed the terms in which they contracted.

We have now to consider the effect of those decisions as applied to suits upon instruments of the kind referred to executed subsequent to 1858. With regard to such suits the Committee say that there would be strong ground for recognising and giving effect to the Madras authorities with reference to which the parties might be supposed to have contracted.

Whatever the error of the late Sadr Court and the High Court had been in the rules they had applied to the construction of these documents, it cannot be assumed that the Judicial Committee intended that the High Court should now depart from the fundamental principle of construing these instruments in accordance with the intention of the parties to them.

What the Judicial Committee intended to say was, I conceive, that there might be reason for presuming in many cases that the parties to the instrument had contracted with reference to the decisions since 1858 ; that stipulations might be found inserted which, when strictly construed, would have the effect of converting the instrument in certain events into a deed of absolute sale ; but that in many of such cases it might be presumed from the decisions of the Sadr and High Court since 1858 that the parties had so acted with full recognition of these decisions and a knowledge that the stipulations would not be enforced ; and that in such cases the doctrine of the late Sadr Court since 1858 should be applied.

But I think the course of decisions of the late Sadr Court for four years and of the High Court for about nine years more was quite inadequate to effect so important an alteration in the ancient and well-recognised terms of contract throughout the country. Had any alteration of this character taken place, I should have expected to find a modification in the language of the contract in the more recent instruments. Assuming that the rulings of the Sadr Court in the few reported cases had penetrated to his village, the party who would be affected might feel secure from the strict enforcement of the stipulations in default. But if they were not to be enforced, why should they be inserted at all?

In my opinion a party who would be prejudicially affected by such terms if they were enforced would not run the risk of insert-[192]ing them, though he was aware of a course of decisions refusing to enforce them, unless he was thoroughly convinced, which he could not well be under the circumstances, that the law as embodied in the recent decisions of the Sadr and High Court would be permanent.

The decisions of the Privy Council proceed upon the supposition that parties contracting by these instruments express what they mean, and, if I may say so without presumption, I think the Privy Council are well-founded in this view. Parties to documents, as a rule, express what they mean and do not insert stipulations merely *in terrorem* and which are not intended to be carried out. And it is improbable *prima facie* that a stipulation which is inserted was intended to be a dead letter.

When, therefore, in an instrument of mortgage since 1858 I find a stipulalation of conditional sale, it would require a very strong array of circumstances to convince me that the parties being aware of the course of decisions of the Sadr Court since 1858, and impressed with the belief that the contract, as far as these provisions were concerned, would not be given effect to, inserted the stipulations merely as a matter of form.

The contract in the present case was entered into in 1865, only seven years after the commencement of the course of decisions of the Sadr Court, when those decisions could have produced but an infinitesimal effect upon the contracting public in the depths of the country.

Construing the contracts according to what I believe to have been the intention of the parties, I would reverse the District Judge's decree and restore that of the Munsif.

Muttusami Ayyar, J.—I concur in the judgment of the Chief Justice.

NOTES.

[I. CONDITIONAL MORTGAGES IN MADRAS BETWEEN, BEFORE AND AFTER 1858; 1875.

The erroneous view held to apply to mortgages between 1858 and 1875 (when Thumbusawmy's case was decided) was held also to govern cases of mortgage between 1875 and 1882 when the Transfer of Property Act was passed :—(1891) 15 Mad. 230 ; 23 Mad. 117 ; (1904) 14 M. L. J., 347. But the mortgages before 1858 were to be given effect to according to the intention of the parties as expressed in the instrument itself :—(1884) 8 Mad., 185.

II. 'STARE DECISIS'—

There must have been a course of decisions for them to become law though erroneous :—(1903) 30 Cal. 883.

III. MODES OF CONDITIONAL MORTGAGES—

Different modes of conditional mortgage were explained by TURNER, C.J., at 183, 184; this was referred to in (1897) 19 All. 434.

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[193] APPELLATE CIVIL.

The 1st August and 22nd September, 1881.

PRESENT :

MR. JUSTICE MUTTUSAMI AYYAR AND MR. JUSTICE TARRANT.

Raja Yarla Gadda Sri Durga Bhavanamma Garu
of Palankipadu.....(Plaintiff), Appellant.

and

Ramasamigaru and another.....(Defendants), Respondents.*

Hindu Law—Zamindari—Grant of land for maintenance, duration of—Value enhanced by irrigation—Right, of parties.

Where a Zamindar granted to his mother in lieu of maintenance two villages, the income of which, upon the introduction of irrigation, was greatly enhanced without any expenditure or labour on the part of the grantee.

Held in a suit by the grantee for damages against parties claiming to have been put in possession of the lands of the two villages by the successor of the grantor—

(1) that in the absence of express words to the contrary the grant enured for the grantee's life ;

*Appeal No. 8 of 1881 against the decree of D. Buick, Acting District Judge of Kistna, dated 29th November 1880.