APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

VENKATASUBBAYYA (Plaintiff), Appellant,

v.

VENKAYYA (Defendant), Respondent.*

Mortgagor and mortgagee—Mortgage by conditional sale before Transfer of Property Act—Redemption.

Suit, in 1889, to redeem a mortgage of 1880, which contained a provision that, if the mortgage money was not paid in March 1882, the mortgage premises should become the absolute property of the mortgagee:

Held, that the plaintiff was entitled to redeem. *Ramasami Sastriyal* v. *Sami-yappanayakan* (I.L.R., 4 Mad., 179) explained and followed.

SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 461 of 1890, reversing the decree of M. Ramayya Pantulu Garu, District Munsif of Bapatla, in original suit No. 279 of 1889.

A suit to redeem the following mortgage :—

" Hypothecation bond, dated the 11th Ausvayuja Bahulam of " the year Vikrama corresponding to 29th October 1880, executed " to Reddy, son of Itturi Vencatramudu, Kamma by caste, living " by cultivation, and residing at Thathapudi Agraharam attached " to the sub-district of Narasarowpet, Narasarowpet taluk, Kistna " district, by Vencatasubbiah, son of Guntupalli Sivaramiah, " Brahman, living by agraharam inams and residing at Mattuki- " pudi attached to the sub-district of Narasarowpet in Narasarow- " pet taluk in the said district.

" The amount taken from you as loan on account of my urgency " is Rs. 500. I bind myself to pay this principal with interest " at 1 per cent. per month on the 30th Chaithra Bahulam of the " year Chithrabhanu (29th March 1882). Particulars of property " hypothecated to you by me until the discharge of the amount " are as follow :—

[Here follow boundaries.]

" As I have hypothecated to you 10 acres 73 cents. situated " within these four boundaries and the inam land of 10 acres 80

" cents. bearing a quit-rent of Rs. 1-4-0 per year out of my half
" share in the inam land bearing D No. 765 held by me and Gantu-
" pali Kotlingayya and Narasayya in the village of Marutur, I
" bind myself to pay your money on the said fixed date and redeem
" my hypothecated property. In default of payment of money on
" the said date, I bind myself to give over possession of the said
" land to you treating this as an absolute sale-deed for the amount
" of the said principal and interest, to file a deed of consent and
" cause your name entered in the accounts. I or my heirs shall
" not raise any claim in respect of this. This hypothecation deed
" is executed with my consent."

> [Signed]   GANTUPALLI VENCATA SUBBAYYA.

The defendant was the grandson of the mortgagee.

The District Munsif passed a decree as prayed.

The District Judge, on appeal, reversed this decree observing :—

"It is thus necessary to inquire what were the relative positions of this plaintiff and of the defendant's grandfather in March 1882, when the stipulated period expired. The defendant's grandfather was in possession of the Tatapudi lands as tenant, so no further transfer of the land was necessary and, on the stipulated date, it became his property. The Marutur land was in possession of the shepherd tenants, and so, from that date, the right to collect rent from them passed to defendant's grandfather. The registered document must be held to have taken effect. I think that the District Munsif, in his finding on the first issue, has overlooked the fact that no further sale was necessary.

" The dates of the mortgage and of the sale are prior to the date upon which the Transfer of Property Act came into force. Upon the authority of *Ramasami Sastrigal* v. *Samiyappanayakan*(1), the District Munsif held that the plaintiff may nevertheless redeem. It is now contended, on behalf of defendant, that the decision upon which the Munsif relies, applied only to mortgages of date prior to 1875, and that, as this mortgage was executed in 1880, after the decision in *Thumbusawmy's case*(2) was published, it must be presumed that the parties knew of that decision. There is much force in this contention."

Mr. *Michell* and R. *Subramanya Ayyar* for appellant.

Bhashyam Ayyangar for respondent.

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(1) I.L.R., 4 Mad, 179.   (2) I.L.R., 1 Mad., 1 ; s.c. L.R., 3 I.A., 241.

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JUDGMENT.—In *Ramasami Sastrigal* v. *Samiyappanayakan*(1), the majority of the Court adopting the rule laid down by the Privy Council in *Thumbusawmy Moodelly* v. *Hossain Rowthen*(2) held that mortgages executed subsequent to 1858 shall be treated according to what the Privy Council considered to be the erroneous course of decisions, nothing was expressly decided in that case as to how long this rule shall be followed, but the principle kept in view appears to be that that which had been, though erroneously, supposed to be the law in Madras should be followed as to mortgages after 1858 until the Legislature interfered to settle the law. In the present case the District Judge has laid down a new rule, that mortgages executed after the date of the Privy Council decision in *Thumbusawmy Moodelly* v. *Hossain Routhen*(2) in 1875 must be treated as governed by the principle of that decision. We are not prepared to adopt this principle, and so still further unsettle rights created by mortgages in this Presidency. We consider that under the Privy Council ruling the Courts of this Presidency are at liberty to apply the doctrine of English Courts of Equity to mortgages executed after 1858 until the Legislature settled the law, as it has now done, by the Transfer of Property Act. It is not in favor of the new rule which the District Judge propounds that there has been no decision to that effect in Madras, though it is now sixteen years since the Privy Council decision in *Thumbusawmy Moodelly* v. *Hossain Rowthen*(2).

We think the District Munsif's view was right, and we reverse the decree of the Lower Appellate Court, and restore that of the Munsif. Respondent must pay appellant's costs in this and the Lower Appellate Court.

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(1) I.L.R., 4 Mad., 179.   (2) I.L.R., 1 Mad., 1 ; s.c. L.R., 2 I.A., 241.