Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sri Raja Papamma Rao v. *Sri Vira Pratapa Korkonda H. V. Ramachandra Razu and another, from the High Court of Judicature at Madras; delivered 22nd February* 1896.

Present:

LORD WATSON.
LORD HOBHOUSE.
LORD SHAND.
LORD DAVEY.
SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

The Plaintiffs in this suit, who are Respondents in the appeal, represent the mortgagors of the property in dispute; and the Defendants who are Appellants, represent the mortgagees. The present question is, what was the effect of a decree of the District Judge which was passed on 16th September 1876, and which directed that the mortgagees should be put into possession of the property.

The mortgage was effected by deed dated 15th July 1870 for securing Rs. 2,011 and interest. The debt was to be paid by four instalments. On failure to pay "you should "recover the same by means of the mortgaged "property, the crops of our cultivation, and our "other property, and from our person." Though it is not here expressed that the mortgagee's remedy is to be by sale under decree, the mortgage falls within the class of "simple

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mortgages," as classified in Sir A. Macpherson's work on Mortgages, page 12, and in the Transfer of Property Act 1882. In such a mortgage there is no transfer of ownership, and the mortgagee must enforce his charge by judicial sale.

In the year 1876 the mortgagee, being unpaid, filed a plaint, and prayed for a decree directing the mortgagors to pay debt and costs, and interest until realization of the money by means of the mortgaged property and other property. That is precisely the relief to which a simple mortgagee is entitled, whether before the Act of 1882 or since.

The difficulty has arisen from the decree which the Court thought fit to make on this plaint. After affirming the mortgagee's right to a decree for the money, the District Judge said that—"In accordance with the custom "prevailing in the Courts in this Presidency "three months' time will be allowed to the "Defendants within which to pay up the whole "sum now decreed, principal and interest and "costs, failing which the Plaintiff shall be put "in possession of the immoveable and moveable "property specified in the bond sued upon and "in the plaint and schedule as provided in the "terms of the bond." And he made a decree accordingly.

That decree was not according to law. In default of payment, a simple mortgage gives to the mortgagee a right, not to possession but to sale, which he must work out in execution proceedings. In referring to a Madras custom, the District Judge probably meant only a practice of the Courts to give three months for payment. If he meant a custom to give possession on a simple mortgage, as the High Court think he did, there is no such custom. And Mr. Mayne frankly admitted that the mortgagee was not entitled to the relief given; and that there is no

ground for thinking that the decree was agreed on in Court, or consented to by the mortgagor.

The mortgagor however did not appeal, and did not seek relief by way of review until it was too late. The decree therefore stands, and is binding on the parties; and the mortgagee took possession under it. He has since sold the property, but that does not affect the rights of the mortgagor. The question is in what character was the possession taken. If in the character of a mortgagee, the mortgagor had a right to redeem, which was not barred by time when this suit began.

Mr. Mayne contends that the decree was intended as a foreclosure, and is so in effect. The only other kind of possession which can be suggested is usufructuary possession, lasting until the debt is discharged by the profits of the estate; and Mr. Mayne urges that there is nothing in the judgment to suggest such a possession, and that "the terms of the bond" do not warrant possession of any kind. All that is true; but it does not compel the inference that the decree amounts to a foreclosure. There is nothing in the judgment to suggest a foreclosure any more than usufructuary possession; nothing indeed to throw light on the terms of the decree. All we know is that possession was given, and given under some error.

If it were necessary to speculate nicely on the meaning of the Judge, their Lordships would be disposed to agree with the High Court, who consider that when the Judge used the expression "as provided in the terms of the bond" he was thinking that the right given by the mortgage to recover by means of the mortgaged property and the crops meant a right to enter and take the profits. That is certainly more in accordance with "the terms of the bond" than is a foreclosure; which is not a recovery of the debt by

means of the property, but a substitution of the property for the debt. If indeed the matter were new, it might reasonably be argued that the terms of a simple mortgage justify usufructuary possession; but long practice, now embodied in a statute, has settled that the remedy of the mortgagee is a judicial sale.

It is however hardly necessary to follow the High Court into this speculation. It is sufficient that the mortgagee, not being entitled to foreclosure, and not asking for it, got a decree which did not purport to work foreclosure. It purported to give possession "as provided in the terms of the bond." That was impossible for there were no such terms; but it purported to do that, and did not purport to put an end to the bond and to the relations of mortgagor and mortgagee altogether. It could, though subject to correction on appeal, give possession, and did so. The mortgagee thereupon became mortgagee in possession; and as such he must submit to be redeemed.

Their Lordships will humbly advise Her Majesty to dismiss this appeal.