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And it seems to me, that it could never have been the intention of the Legislature to prohibit verbal contracts by means of an Act which was passed for a totally different purpose, and which merely professes to regulate the time within which different suits are to be brought.

I think that this case is governed by Art. 115, which virtually provides for the case of all contracts which are not in writing, registered, and not otherwise specifically provided for.

BEVERLEY, J.—I have had some doubt in this case as to whether the suit is properly one for compensation; but, looking at what was decided in *Nobocoomar Mookhopadhaya* v. *Siru Mullick* (1), I am inclined to agree in the view taken by the learned Chief Justice. I quite think, that it cannot and ought not to be inferred that the Legislature intended to prohibit verbal contracts of this nature, merely because there is no express provision in respect to them in the Limitation Act. See the remarks in *Sheikh Akbar* v. *Sheikh Khan* (2).

PRIVY COUNCIL.

P. C.* 1884 *February* 19 & *March* 22.

GOKALDAS GOPALDAS (DEFENDANT) APPELLANT AND RAMBAKSH SEOCHAND (PLAINTIFF) RESPONDENT *v.* PURANMAL PREMSUKHDAS (DEFENDANT) RESPONDENT.

[On appeal from the Court of the Resident at Haiderabad.]

Effect of payment of prior mortgage by a subsequent incumbrancer, as against intermediate charge.

The mortgagor's right, title, and interest in certain immoveables in the Deccan, subject to a first and a second mortgage, were sold in execution of a decree to a purchaser, who afterwards paid off the first mortgage.

Held that, as he had a right to extinguish the prior charge, or to keep it alive, the question was what intention was to be ascribed to him; and that, in the absence of evidence to the contrary, the presumption was that he intended to keep it alive for his own benefit. Where property is subject to a succession of mortgages, and the owner of an ulterior interest pays off an earlier mortgage, it is a matter of course, according to the English

* *Present:* SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

(1) I. L. R., 6 Calc., 94.

(2) I. L. R., 7 Calc., 256 (261).

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practice, to have it assigned to a trustee for his benefit, as against intermediate mortgagees, to whom he is not personally liable. But in India a formal transfer for the purpose of a mortgage is never made, nor is an intention to keep it alive ever formally expressed.

It was ruled in the English Court of Chancery in *Toulmin* v. *Steere* (1) that the purchaser from an owner of an equity of redemption, with actual or constructive notice of another intermediate incumbrance, is precluded, in the absence of any contemporaneous expression of intention, from alleging that, as against such other incumbrance, the prior mortgage, paid off out of the purchase-money, is not extinguished. That case was not identical with this, where the prior mortgage was not paid off out of the purchase-money, but was paid off afterwards by the purchaser. The above ruling, however, is not to be extended to India ; where the question to ask is, in the interests of justice, equity, and good conscience, there applicable,—what was the intention of the party paying off the charge.

APPEAL from a decree of the Resident at Haiderabad (24th June 1880), affirming a decree of the Judicial Commissioner of the Haiderabad Assigned Districts (28th February 1880), affirming a decree of the Deputy Commissioner of Amraoti, (8th August 1879.)

The principal question here raised was whether or not the purchaser of a mortgagor's right, title, and interest in mortgaged property, having afterwards paid off a balance due on a prior mortgage, was entitled to use this paid-off charge as against an intermediate incumbrance, of which he had notice at the time of his purchase.

This appeal was preferred by one of two co-defendants against the other of them, together with the plaintiff in the suit, the latter having obtained a decree. The appellant, Gokaldas, who carried on a banking business at Jabalpur, had obtained a money-decree against the second respondent, Puranmal Premsukhdas, a *shráf* at Amraoti, and had issued execution against the property of the latter. At the auction sale this judgment-creditor, on the 12th September 1876, bought the right, title, and interest of Puranmal Premsukhdas in nine houses situate in Amraoti, and obtained possession. Three of these nine houses were already subject to a mortgage made by Puranmal Premsukhdas to the Bank of Bombay, originally for Rs. 30,000,

(1) 3 Mer., 210.

but reduced by payments to Rs. 5,137. This balance Gokaldas, in April and May 1877, paid off. On the 11th July 1877 Rambaksh Seochand brought this suit, alleging that the nine houses had been mortgaged to him by two registered mortgages, dated respectively in June and December 1873, for a mortgage debt of Rs. 37,985. In the latter of these two mortgages it was stated that three of the houses were then in the possession of the Bank of Bombay, under a prior deed of mortgage to secure Rs. 30,000; and it was provided that as soon as they should be redeemed, they should be made over to Rambaksh Seochand. The latter, accordingly, claimed that the second defendant should give him possession of all the nine houses.

The defence of Gokaldas was: First, that the mortgages of 1873 had not been *bonâ fide* made, but had been put forward to defeat the execution of the decree against Puranmal Premsukhdas. Secondly, that, as regards the three houses mortgaged to the Bank of Bombay, Rambaksh Seochand could not claim possession of them, until he had repaid Gokaldas, who had, by paying the mortgage debt due to that Bank, acquired the rights of the first mortgagee, as against a subsequent incumbrancer. Puranmal Premsukhdas, the second defendant, admitted the execution of the mortgages of June and December 1873 with the debt due thereon. Issues were fixed, raising questions as to the *bona fides* of the mortgages of 1873; and as to the legal effect of the payment by the plaintiff of the balance due to the Bank of Bombay in regard to the right to the three houses.

The Deputy Commissioner of Amraoti, holding that the burden of proving that the mortgages of 1873 were *bonâ fide* was on the plaintiff, and also that he was responsible for the return to a commission to take evidence at Haiderabad not having been made in due time, dismissed the suit, on 17th October 1877, on the ground that the plaintiff's case had not been proved.

On appeal to the Judicial Commissioner of the Haiderabad Assigned Districts, a different opinion in regard to the delay led to the remand of the suit for hearing on the merits.

The Court of first instance then decided that the mortgages in favour of the plaintiff were *bonâ fide*; but that the second

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defendant, by reason merely of his having discharged the debt due from the first defendant to the Bank of Bombay, stood in no better position than the first defendant as mortgagor would have been as regards the second mortgage, had he redeemed the first. It was accordingly determined that the effect of the second defendant's payment off of the balance due on the first mortgage was to entitle the plaintiff to immediate possession of the three houses according to the agreement in the mortgage of December 1873. The plaintiff, therefore, obtained a decree for possession of the nine houses as mortgagee, subject to the second defendant's equity of redemption.

This was affirmed by the Judicial Commissioner on regular appeal; and a second or special appeal having been preferred to the Court of the Resident of Haiderabad under the provisions of s. 584 of Act X of 1877 was dismissed. The decree of the lower Court was confirmed in accordance with the provisions s. 551 of the Code, read with s. 587.

On this appeal,—

Mr. *A. Kekewich, Q.C.*, and Mr. *R. Hornel* appeared for the appellant.

Mr *J. D. Mayne* and Mr. *J. T. Woodroffe* for the respondent Rambaksh Seochand.

For the appellant it was argued: First, that on the evidence it should not have been decided that the two mortgages of 1873, on which the respondent Rambaksh Seochand claimed, were *bonâ fide*, and made for good consideration. Secondly, that the appellant was entitled to retain, even if the two mortgages were established, possession of the three houses previously mortgaged to the Bank of Bombay against the intermediate incumbrancer, until the amount paid by him to the first mortgagee should have been repaid. The appellant was entitled to do so, because the presumption was that when he paid off the balance of the debt due on the first mortgage, he intended to protect himself with it against the subsequent one. This was the presumption, and thus the charge was kept alive. There was no formal declaration of this intention; but the presumption was sufficient.

The proposition stated in Dart's Vendors and Purchasers, Chapter XXV, s. 7, *viz*: "It has long been considered that where a mortgagee purchases and takes a conveyance to himself of the equity of redemption he thereby lets in all the intermediate encumbrances of which he had notice, unless the property is conveyed to a trustee for the express purpose of keeping the charge alive," was not applicable here. The decision in *Toulmin* v. *Steere* (1) upon which that proposition rested had been questioned; and, at all events, had not been adopted by this Committee as applicable to mortgages in India. Reference was made to 2 Dart's Vendors and Purchasers, 5th edition, page 917, and to *Toulmin* v. *Steere* (1), *Greswold* v. *Marsham* (2), *Mocatta* v. *Murgatroyd* (3), *Gregg* v. *Arrot* (4), *Parry* v. *Wright* (5), *Adams* v. *Angell* (6), *Stevens* v. *The Mid-Hants Railway Company* (7), *Otter* v. *Lord Vaux* (8), *Watts* v. *Symes* (9), *Bell* v. *Sunderland Building Society* (10), *Cracknall* v. *Janson* (11), *Hayden* v. *Kirkpatrick* (12), *Bekon Singh* v. *Deen Dyal Lall* (13), *Gopee Bundhoo Shantra Mohapattar* v. *Kalee Pudo Banerjee* (14).

Mr. *J. D. Mayne* referred to *Mohesh Lal* v. *Mohant Bawan Das* (15), on reference being made to *Bhughubutty Dossee* v. *Shama Churn Bose* (16).

For the first respondent, Rambaksh Seochand, as to the first point, reliance was placed on the Courts in India having con-

(1) 3 Mer., 210.
(2) 2 Ch. Ca., 170.
(3) 1 P. Wms., 393.
(4) Lloyd and Gould, Ch. Ca., Ireland, 246.
(5) 5 Russ., 142.
(6) L. R. 5 Ch. D., 634.
(7) L. R. 8 Ch. App., 1064.
(8) 2 Kay and J., 650; 6 DeG., M. and G., 638.
(9) 1 DeG., M. and G., 240.
(10) L. R. 24 Ch. D., 618.
(11) L. R. 6 Ch. D., 735.
(12) 34 Beav., 645.
(13) 24 W. R., 47.
(14) 23 W. R., 338; 14 B. L. R., 480.
(15) I. L. R. 9 Calc., 961.
(16) I. L. R. 1 Calc., 337.

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curred in finding that the mortgages of 1873 had been *bonâ fide* made; and, as to the second point, it was argued that the respondent having paid off the balance that was due on the mortgage to the Bank of Bombay had extinguished that incumbrance on the property. Having only his rights as purchaser of the right, title, and interest of the mortgagor who had created the intermediate charge, he took the property charged with all existing incumbrances, and in effect from the nature of his purchase had notice of them. He therefore stood in no better position than the mortgagor himself in regard to the second mortgage when the first was paid off.

As well as to the above cases cited for the appellant, reference was made to *Oojagur Roy* v. *Ram Kelawan Singh* (1), *Ranchoddas Dayaldas* v. *Ranchoddas Nanabhai* (2), *Land Mortgage Bank* v. *Ramruttun Neogy* (3), *Chintamam Bhaskar* v. *Shiv Ram Hari* (4), *Ramu Naikan* v. *Subbaraya Mudali* (5), in which last case it was held that a prior mortgagee having purchased the interest of the mortgagor may still use his mortgage to protect himself against the claims of subsequent mortgagees, also to *Garnett* v. *Armstrong* (6).

Mr. *A. Kekewich, Q.C.*, replied.

Their Lordships' judgment was delivered on a subsequent day, March 22nd, by

SIR RICHARD COUCH.—This is an appeal from an order of the Court of the Resident at Haiderabad, in the Deccan, dismissing an appeal from a decree of the Judicial Commissioner of the Haiderabad Assigned Districts, by which a decree of the Deputy Commissioner of the Amraoti District was affirmed. This decree was dated the 8th of August 1879, and it was decreed by it that the respondent, Rambaksh Seochand, who was the plaintiff in the suit, was entitled, as mortgagee, to possession of nine houses thereinafter described, and it was directed that he be put in possession thereof. The facts out of which the suit arose are as follows:—On the 22nd of June 1873, a firm carrying

(1) 10 W. R., 384.
(2) I. L. R., 1 Bom., 581.
(3) 21 W. R., 270.
(4) 9 Bom. H. C. Rep., 304.
(5) 7 Mad. H. C. Rep., 229.
(6) 4 Dru. and War., 182.

on business as bankers at Amraoti under the name of Puranmal Premsukhdas, by which name it has been sued, executed, by their manager Bhairaodin, a mortgage to Rambaksh Seochand of immoveable and moveable property at Amraoti for Rs. 26,500 and interest. On the 18th of December the firm, having become further indebted to Rambaksh Seochand in Rs. 40,000, executed in like manner to him a mortgage of other immoveable property in Amraoti, to secure the repayment of that sum, with interest. Of the nine houses which were the subject of the suit, and are described in the decree of the 8th of August 1879, one was included in the former mortgage, and the other eight in the latter. The mortgagee was put in possession of six of the houses. As to the remaining three, the latter mortgage contained the following provision :—

"On account of the following three houses, which we have already mortgaged to the New Bombay Bank for Rs 30,000, reserving the mortgaged lien of the Bank on these houses, we mortgage them to you in payment of the sum of Rs. 16,000, subject to the condition that the New Bombay Bank has a prior right for the recovery of money due to it from these houses, and, after full recovery by it, you will be entitled to the balance, if any left. If the balance falls short, we ourselves will be responsible for the payment. At present, these houses being in the possession of the New Bombay Bank, we cannot put you in possession of them, and as soon as they will be redeemed, that is, as soon as the Bank's possession of them ceases, you should understand that they are put in your possession."

The appellant, Gokaldas Gopaldas, having obtained a decree for about Rs. 19,000, against Puranmal Premsukhdas, caused the nine houses to be attached and sold in execution of it, and in September 1876 himself purchased the right, title, and interest of Puranmal Premsukhdas in them. On the 21st of April 1877 he paid the Bank Rs. 5,000 on account of the mortgage debt, and on the 10th of May 1877 Rs. 137-2-10 as payment in full of its claim upon the mortgage. The debt to the Bank had previously been reduced. He appears to have taken possession of the nine houses, and on the 11th of July 1877 Rambaksh Seochand brought a suit against him, and Puranmal Premsukhdas, who was made the first defendant, to recover possession of them, alleging that he was entitled to it under the two mortgages to him. And if the houses were not restored to him, he claimed the mortgage money and interest.

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The defence of Gokaldas Gopaldas was that the mortgages to the plaintiff were fraudulent and without consideration, and made to defeat creditors, and that the agent had no authority to execute them. And, further, as to the houses mortgaged to the New Bombay Bank, that he had paid the money due to the Bank, and had obtained the right of mortgage thereon, and the plaintiff could not claim them until they had been redeemed by Puranmal Premsukhdas. Issues were framed, the fourth being :—

"What was the effect of the payment made to the Bank of Bombay in satisfaction of Puranmal's debt on the rights of the plaintiff as mortgagee? Did possession vest in him thereupon?"

There was a dismissal of the suit by the Deputy Commissioner, and a remand by the Judicial Commissioner, of which it is not necessary to take any further notice. On the remand, the Deputy Commissioner found that the mortgages to the plaintiff were *bonâ fide*, that there was good consideration, that "possession passed to the plaintiff in accordance with the terms of those deeds," and the plaintiff was in possession when the defendant attached the houses. Upon the fourth issue he held that when Gokaldas had paid the debt to the Bank, he stood to the plaintiff in the exact position in which the mortgagor, first defendant, would have stood had he redeemed the Bank's mortgage, and that the effect of the payment to the Bank was to entitle the plaintiff to immediate possession of the houses mortgaged to it. He gave the plaintiff a decree for possession of the nine houses, and directed him to be put into possession.

This judgment was affirmed on appeal by the Judicial Commissioner, and a special appeal therefrom to the Court of the Resident at Haiderabad was dismissed.

Two grounds have been taken in the appeal to Her Majesty in Council from the decree of the Resident: (1) that the mortgages to Rambaksh Seochand were not *bonâ fide* or made for good consideration; (2) that as regards the three houses in mortgage to the Bombay Bank, the appellant was entitled to stand in the place of the Bank, and to retain possession of them until the amount paid by him to the Bank was repaid.

As to the first ground, there are concurrent judgments of the lower Courts against the appellant, and the propriety of them was not disputed at the bar. Consequently the appeal fails as to this ground, and altogether so far as it relates to six of the houses.

Upon the second ground the question is whether the doctrine in *Toulmin* v. *Steere* (1) should be applied in this case. In the judgment of Sir William Grant, M.R., in that case there is a passage to the following effect:—

"The cases of *Greswold* v. *Marsham* (2) and *Mocatta* v. *Murgatroyd* (3) are express authorities to show that one purchasing an equity of redemption cannot set up a prior mortgage of his own, nor consequently a mortgage which he has got in, against subsequent incumbrances of which he had notice."

The authority of *Toulmin* v. *Steere* has been much questioned, and it has been found upon examining the Registrar's book that *Greswold* v. *Marsham* (2) is no authority whatever for the proposition in support of which it has been usually cited (2 Dart's Vendors and Purchasers," 5th ed., 917). Vice-Chancellor Hall, in *Adams* v. *Angell* (4) shows in how unsatisfactory a state the law is upon this point. He says (p. 641):—

"Doubtless those cases have been questioned. In *Gregg* v. *Arrott* (5) Sir E. Sugden said that he and Sir Samuel Romilly thought 'at the time' it was wrong; and, in *Watts* v. *Symes* (6), Lord Justice Knight Bruce expressed doubts as to the decision. In the recent case of *Stevens* v. *Mid-Hants Railway Company* (7) Lord Justice James said as to *Mocatta* v. *Murgatroyd* (3), *Toulmin* v. *Steere* (1) and *Parry* v. *Wright* (8): 'Those cases, perhaps, some day will have to be reconsidered, but it is quite clear that their principle is not to be extended. Probably they are rendered innocuous by this, that conveyancers exclude their application by putting in three or four lines saying that the original debt is to be considered as subsisting for the benefit of the person who has paid it off.' But the decision in *Toulmin* v. *Steere* (1) was recognized by Sir George Tunner in *Squire* v. *Ford* (9), by Sir J. Leach and Lord Lyndhurst in *Parry* v. *Wright* (8), in effect by Lord St. Leonards in *Armstrong* v. *Garnett* (10), and by Lord

(1) 3 Mer. 210.
(2) 2 Ch. Cas., 170.
(3) P. Wms. 393.
(4) L. R. 5 Ch. D. 634.
(5) 1 Lloyd & Gould, 246.
(6) 1 De G. M. & G., 240.
(7) L. R. 8 Ch. Ap., 1064.
(8) 5 Rus., 142, 148.
(9) 9 Hare, Ca. in Chanc., 47.
(10) 4 Dru. & War. 182.

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Cranworth in *Otter* v. *Lord Vaux* (1). In *Anderson* v. *Pignet* (2), it was referred to by Lord Selborne as having been questioned by some persons, but His Lordship did not say that he approved or disapproved of it. It is said in some of the cases that the priority may be preserved."

When *Adams* v. *Angell* came before the Court of Appeal, Sir George Jessel, M.R., said as to *Toulmin* v. *Steere*: "Assuming it, however, to be binding upon us, it amounts to no more than this, that, in the case of a purchase from the owner of an equity of redemption, the purchaser with notice, whether actual or constructive, of other incumbrances, is not, in the absence of any contemporaneous expression of intention, entitled as against the other incumbrancers of whose securities he has notice, to say afterwards that the incumbrances so paid off are not extinguished. It does not go beyond that, and there are several authorities which say that this doctrine is not to be carried further." This principle was acted upon in *Watts* v. *Symes* (3), where, as in *Toulmin* v. *Steere* (4), a first mortgage was paid off by the purchaser of the ultimate equity of redemption at the time of his purchase, and out of the purchase-money, but a declaration by the vendor that the first mortgage should be kept alive was considered sufficient to prevent a second mortgagee from treating it as extinguished.

In the case before their Lordships, the debt to the Bank was not paid off out of the purchase-money. The appellant purchased the interest of the mortgagor only, and did not in any way bind himself to pay off that debt. When he paid the Bank, some six months afterwards, it was not because he was under an obligation to do so. This case might therefore be distinguished from *Toulmin* v. *Steere* (4), but their Lordships do not think it necessary to do this, as they are not prepared to extend its doctrine to India.

There are some decisions in India which their Lordships think they ought to notice. In *Gaur Narayan Mazumdar* v. *Brajanath Kundu Chowdhry* (5), *A* mortgaged certain lands to *B*, and afterwards mortgaged the same to *C*, who, having obtained

(1) 2 Kay & J., 650; 6 De G. M. & G. 642.
(2) L. R., 8 Ch. App. Cas. 180.
(3) 1 De G. M. & G. 240.
(4) 3 Mer., 210.
(5) 5 B. L. R., 463.

a decree for the redemption of the mortgage to *B*, paid off the debt to him; but it did not appear that he took an assignment of the mortgage. It was held by the High Court at Calcutta, on the authority of *Toulmin* v. *Steere*, that the first mortgage was extinguished, and a lease made by *A* between the two mortgages was binding upon *C*. In *Itcharam Dayaram* v. *Raiji Jaga* (1), the High Court at Bombay held that, generally speaking, the purchaser of an equity of redemption, with notice of subsequent incumbrances, stands in the same situation as regards such subsequent incumbrances, as if he had been himself the mortgagor; he can neither set up against such subsequent incumbrances a prior mortgage or his own, nor consequently a mortgage which he or the mortgagor may have got in. For this, *Toulmin* v. *Steere*, *Greswold* v. *Marsham*, and *Mocatta* v. *Murgatroyd* are quoted. On the other hand, the High Court at Madras in *Ramu Naikan* v. *Subaraya Madali* (2), held that a prior mortgagee, having purchased the ultimate interest, may still use his mortgage as a shield against the claims of subsequent mortgagees, saying that in later cases the Judges had sought to mitigate the rigidity of the doctrine of Sir W. Grant in *Toulmin* v. *Steere* (3). The doubts as to that case, or the propriety of introducing the doctrine of it into India as a rule of justice, equity, and good conscience, do not seem to have been considered by the High Court at Calcutta or Bombay.

The doctrine of *Toulmin* v. *Steere* (3) is not applicable to Indian transactions, except as the law of justice, equity, and good conscience. And if it rested on any broad intelligible principle of justice it might properly be so applied. But it rests on no such principle. If it did it could not be excluded or defeated by declarations of intention or formal devices of conveyancers, whereas it is so defeated every day. When an estate is burdened by a succession of mortgages, and the owner of an ulterior interest pays off an earlier mortgage, it is a matter of course to have it assigned to a trustee for his benefit as against intermediate mortgagees to whom he is not personally liable.

In India the art of conveyancing has been and is of a very simple character. Their Lordships cannot find that a formal

(1) 11 Bom. H. C. R., 41. (2) 7 Mad. H. C. Rep., 229. (3) 3 Mer., 210.

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transfer of a mortgage is ever made, or an intention to keep it alive ever formally expressed. To apply to such a practice the doctrine of *Toulmin* v. *Steere*, seems to them likely, not to promote justice and equity, but to lead to confusion, to multiplication of documents, to useless technicalities, to expense, and to litigation.

The obvious question to ask in the interests of justice, equity and good conscience, is, what was the intention of the party paying off the charge? He had a right to extinguish it and a right to keep it alive. What was his intention? If there is no express evidence of it, what intention should be ascribed to him? The ordinary rule is that a man having a right to act in either of two ways, shall be assumed to have acted according to his interest. In the familiar instance of a tenant for life paying off a charge upon the inheritance, he is assumed, in the absence of evidence to the contrary, to have intended to keep the charge alive. It cannot signify whether the division of interests in the property is by way of life estate and remainder, or by way of successive charges. In each case it may be for the advantage of the owner of a partial interest to keep on foot a charge upon the corpus which he has paid.

Their Lordships are of opinion that the lower Courts in this case were wrong in holding that the appellant was in the same position as the mortgagor. They hold that the mortgage to the Bank was not extinguished, and that the appellant, the second defendant, had a good defence to the suit for possession of the three houses included in that mortgage. They will therefore humbly advise Her Majesty that the decree appealed from should be modified by omitting from it the houses which are described in it under the numbers 4, 5, and 6, and by dismissing the suit so far as it regards those houses with costs in the lower Courts in proportion. And as the appellant has failed on the question of the validity of the mortgages to Rambaksh Seochand, they make no order as to the costs of this appeal.

Solicitors for the appellant: Messrs. *Merriman, Pike, & Merriman.*

Solicitors for the respondent, Rambaksh Seochand: Messrs. *Sanderson & Holland.*