PRIVY COUNCIL.

KALA MEA
v.
HARPERINK.

P. C.*
1908
November 12.
December 15.

[On Appeal from the Chief Court of Lower Burma.]

Sale—Decree—Execution of decree—Sale by Court under decree on a mortgage—Misrepresentation by auctioneer an officer of Court—Contract Act (IX of 1872), ss. 18 and 19, exception—Bid made under misapprehension caused by such misrepresentation—Suit to set aside sale—Purchaser of worthless equity of redemption—Reference of the matter to the Court—Civil Procedure Code (Act XIV of 1882), s. 306.

A sale of mortgaged property in execution of a decree was conducted by two officers of the Court, one a chief clerk and officiating bailiff and the other his deputy, the assistant bailiff, who acted as auctioneer. The latter read a proclamation of sale in English, a language not understood by the native bidders present, which stated that only the interest of the judgment debtor was for sale.

Being asked by a native present to explain the terms of the proclamation, the auctioneer made a statement in Hindustani to the effect that "there are four mortgages; on this account there is a sale by order of the Court, the title-deeds can be seen at the Registrars' Office," from which the plaintiff, who casually attended the sale, was led to believe that the property was being sold at the instance of the mortgagees and free of incumbrances, and he bid for the property, which was knocked down to him for a sum nearly equal to its full value.

After the sale he discovered that it had been sold subject to mortgages amounting to more than its value, and that he was the purchaser of the equity of redemption, which was worthless. In a suit to set aside the sale on the ground that he bid for the property under a misapprehension caused by the misrepresentation made by the auctioneer, the Appellate Court in India held that there was misrepresentation under section 18 of the Contract Act (IX of 1872), but that the case fell within the exception in section 19, as the plaintiff might with ordinary diligence have discovered the truth, and dismissed the suit.

Held, by the Judicial Committee, that in sales under the direction of the Court it was incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. Here the plaintiff had been misled by the accredited agents of the Court, which could not under such circumstances enforce against him so illusory and unconscientious a bargain as the sale to the plaintiff was shown to be.

* *Present*:—Lord Macnaghten, Lord Atkinson, Sir Andrew Scoble, and Sir Arthur Wilson.

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Held also that the plaintiff had no means of discovering the truth, while the sale was going on, and he was perfectly justified in relying on the statement, as to the property, which was being sold, made by the auctioneer. The exception in section 19 of the Contract Act had no application to the case.

Held further that the Chief Clerk was right in referring the matter to the Court, and in not proceeding under section 306 of the Civil Procedure Code.

APPEAL from a judgment and decree (February 13th, 1907) of the Chief Court of Lower Burma on its Appellate Side, which affirmed a judgment and decree (June 12th, 1906) of the Judge of the same Court on its Original Side.

The plaintiff was the appellant to His Majesty in Council.

Mahomed Kala Mea, the plaintiff, was the highest bidder at an auction-sale of certain property in Rangoon, which took place on 2nd May 1905 under a decree of the Chief Court of Lower Burma obtained by the first respondents, the members of the firm of Harperink Smith and Company against one Kani Choay, the second respondent: and the suit was brought on the 16th May 1905 to set aside the sale, on the ground that the plaintiff had purchased the property under a *bona fide* misapprehension of fact.

The plaintiff in his plaint, after stating that the property was subject to charges amounting to Rs. 64,500 with interest, and that at the auction-sale he bid for it and it was knocked down to him for Rs. 38,000, alleged in paragraph 4 that "before the bidding commenced one Hadji Shah Mahomed Ali said that he did not understand the proclamation, which had been read in English, and asked the bailiff what was being sold. The deputy bailiff Mr. Innes thereupon said in Hindustani 'Char mortgage hai; is waste Court ka hukum se bikri hota. Title deeds Registrarka office men dekne sakta.'" He also alleged that he bid for the property under the *bona fide* belief that it was being sold free of the mortgages upon it; that as it was not worth in any case more than Rs. 40,000 he would not have bid anything if he had known that it remained liable to the mortgages; and that under all the circumstances he was desirous of having the sale set aside on the ground of his *bona fide* mistake, a course to which Harperink Smith and Company consented

and he had added them merely as *pro forma* defendants. The plaintiff prayed that the sale might be set aside; that all proceedings for the recovery of the amount bid by him might be stayed; and that Kani Choay, the second defendant, might be ordered to pay the costs of the suit.

The first defendants put in no written statement in answer to the suit. In his written statement the second defendant admitted that the property the subject of the sale belonged to him, but had been attached by the first defendants; that it was subject to the charges stated in the plaint; and that it had been knocked down to the plaintiff for Rs. 38,000. But he put the plaintiff to strict proof of the allegations contained in paragraph 4 of the plaint, and also as to the statement that the plaintiff bid for the property under a *bona fide* mistake. He alleged that the property was worth much more than Rs. 40,000, and submitted that the allegations and circumstances relied on in the plaint afforded no ground for setting aside the sale.

The only issue was "are the allegations in paragraph 4 of the plaint correct; and if so, do they afford any grounds for setting aside the sale?"

The plaintiff's evidence was to the effect that he was driving past the place, where the property was to be sold, when a Court messenger told him that a sale was about to take place; he accordingly alighted and attended the sale without having seen the proclamation or being cognisant of its terms. Mr. Innes, the deputy bailiff of the Court, acted as auctioneer and at the opening of the proceedings read the proclamation in English, a language unknown to the plaintiff. Upon this being read, Hadji Shah Mahomed Ali said he did not understand it and would like to know the meaning of its contents, whereupon Mr. Innes made a statement in Hindustani as above-mentioned, which the Court interpreter translated: "There are four mortgages: therefore the sale takes place by order of the Court. The title deeds can be seen at the Registrar's Office." From this statement the plaintiff said he understood that the property was mortgaged, but that it

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was being sold free of the mortgages, as they would be paid from the purchase-money, and in this belief he made a final bid of Rs. 38,000 at which price the property was knocked down to him. Immediately after the sale he learned that the property had been offered subject to four mortgages upon it. Thereupon he refused to pay a deposit or any part of the purchase money, and took proceedings to get the sale set aside.

The plaintiff's evidence was corroborated by Mr. Wesha (one of the four mortgagees) as to the reading of the proclamation and the words in Hindustani spoken by Mr. Innes. He stated that he understood the words to mean that the property was mortgaged and had to be realized under the order of the Court, and he further understood that the proceeds of the sale would go to pay the mortgages upon the property. Two other witnesses, Ebrahim Bymeah and Issac Sofaer, gave the same account of what occurred and said that the Hindustani words conveyed the same impression to their minds. The latter said that he had bought and sold a good deal of land and owned property near to that which was the subject of the sale : that he valued the land sold at Rs. 40,000 or Rs. 45,000 at most and that he bid up to Rs. 37,000 for it. But, if he had known that, if he bought the property, he would have had to pay Rs. 64,000 to the mortgagees he would not have bid. Mr. Spencer, an official of the Court, who was acting as bailiff at the time of the sale, was another witness for the plaintiff, but was less certain than the others as to what was said, and his evidence was described by the Court of first instance as "vacillating." What he said sufficiently appears from the judgment of Mr. Justice Irwin on appeal. Mr. Innes' evidence was not taken as he was ill at the time the case was heard :—

The Judge, who tried the case (Begge J.), said :—

" The plaintiff soon after the sale informed the officiating bailiff, according to the report made on the day of sale, that he was not aware that the words '*subject to the mortgage*' meant that he was responsible for the aggregate amount of the mortgages as well as for the amount of his bid ; and the officiating bailiff, instead of proceeding under section 306 of the Civil Procedure Code, put in his report I have referred to, in which he said that, as the bidders' statements

that they 'were bidding under a misapprehension appears to be perfectly genuine,' he thought it was his duty to refer to the Court for orders whether, under the circumstances, the sale should be set aside, and the property put up for sale again. Of course the Court could not give any such 'orders'."

And he was of opinion that—

"Even if the words spoken by Mr. Innes were used, an intimation that the property was to be sold free of mortgages cannot by any process of interpretation be found in them directly, or inferred from them indirectly."

After commenting on the evidence of the plaintiff's witnesses, the Judge said :—

"I give Mr. Spencer credit for trying to give straightforward evidence, and acquit him of all intention of trying to deceive me ; but it is obvious that such confused and incoherent testimony is perfectly useless. Hadji Shah Mahomed Ali has not been called ; and I have nothing to say against the discretion of plaintiff's counsel in that respect. But the absence of Innes' evidence is a serious omission as regards the proof of the Hindustani words said to have been used by him, though, as I have said, even if they were proved to demonstration, they would not prove, or even suggest, that the plaintiff had been induced to bid under the belief that the property was to be sold free of the mortgages, or, in other words, that he had been induced to buy by misrepresentation. Innes was summoned as a witness, and I was told late in the hearing on the 7th of June that he was ill ; but, of course, it was then out of the question to grant any postponement. It has not been proved that he did, in fact, use the words relied on, and if he had—as I have said—they could not have raised the impression under which the plaintiff wishes me to believe he bid, and ultimately became the purchaser. Consequently there is no proof, or indeed suggestion, that his conduct caused, however innocently, the plaintiff to make a mistake as to the substance of the thing, which is the subject of the agreement.

"The plaintiff has made out no case for relief under section 35 of the Specific Relief Act, as the contract of sale is not voidable or terminable by him. As for section 36 of the same Act, I do not think there was any mistake at all. The terms, under which the property was sold, were clearly set out in the proclamation, which was made in the language of the Court as required by section 287 of the Code of Civil Procedure, and which had been previously advertised ; and, if the plaintiff did not take the trouble to ascertain clearly under what terms he was bidding, that was his fault and no one else's, and he must take the consequences of his own carelessness."

The suit was therefore dismissed.

The appeal was heard by a Divisional Bench of the Court consisting of Irwin and Hartnoll JJ. The material portions of whose judgments were as follows :—

"IRWIN J. I think there can be no doubt at all that the plaintiff believed that the land was being sold free of the mortgages. He values the land at

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Rs. 40,000. Another bidder, Issac Sofaer, says it is not worth more than Rs. 40,000 to Rs. 45,000. This evidence receives the best possible corroboration from the bailiff's report made on the day of sale, *viz*: 'Their statements (of the three bidders) that they were bidding under a misapprehension appear to be perfectly genuine, and as the property in my opinion is not worth more than Rs. 40,000 to Rs. 45,000 at the most, I think it my duty,' etc. It is preposterous to suppose that any sane man would bid several thousands of rupees for an equity of redemption, which he believed to be worth less than nothing. The plaintiff's statement that he would not have bid a pice, if he had known that the property was sold subject to four mortgages, must be held to be perfectly true.

"This brings me to the two issues involved in the main question. Was the mistake caused by what the assistant bailiff said before the sale?

"On the one hand, the certainty that the plaintiff and the other bidders were under a misapprehension raises a considerable probability that there was a reasonable cause for that misapprehension. On the other hand, the extreme levity, with which the plaintiff entered on this important transaction, suggests that he may have made a mistake without any adequate cause. One would expect that an average man of business, before offering a large sum of money for any property, would take some effective means to ascertain exactly what was being sold and would make some examination of the seller's title. But what does the plaintiff say? 'I heard of the sale on the day of the auction, as I was going along the road in a *ghari*. A Court peon called to me and said a Court sale was taking place. I went to the spot.' He knew no English, and the few words set out in Hindustani above was the only information he got. To bid a large sum under such circumstances as these might almost be called frivolity. I have no sympathy whatever with the plaintiff, and I think he richly deserved to lose heavily over the transaction.

"On the question what were the exact words used by the assistant bailiff, it is unfortunate that he was not examined, but no inference adverse to the plaintiff can be drawn from his absence. He was duly summoned, and was reported absent from illness."

After commenting on the evidence of the plaintiff's other witnesses the Judge said:—

"The evidence of Mr. Spencer, acting bailiff, is fully described by the learned Judge as extremely vacillating, but with all respect I cannot agree in thinking it is perfectly useless. Mr. Spencer was present. He was in charge of the sale and was responsible for the conduct of the sale, although his assistant was the actual auctioneer. The primary cause of the present unfortunate litigation was Mr. Spencer's omission to obey the plain directions contained in section 306 of the Civil Procedure Code when the deposit of 25 per cent. was not paid. This was bad enough, but his official competency must appear in a much worse light if the plaintiff succeeds in proving that he was misled by Mr. Innes' words spoken in Mr. Spencer's presence and without any attempt made by Mr. Spencer to put him right. Mr. Spencer has a strong motive for making his evidence as little damaging as possible to himself

and his assistant; and that I take to be the cause of the vacillation in his evidence. Mr. Justice Bigge acquitted him of all intention of trying to deceive, and so do I; but the motive alluded to above must have had an effect on him, and in my opinion much weight should be given to any admissions he makes in favour of the plaintiff. He first said that Innes said 'Char mortgage hai is ko upar;' but his final statement on this point was 'I cannot say for certain that Innes before the sale used the words, 'Char mortgage hai; is waste Court ka hukum se bikri hota hai.' It seems to me, considering the position Mr. Spencer was in, that, if he could have flatly denied that Innes used the words 'is waste,' he would have done so, and therefore I think his evidence goes a long way to corroborate the plaintiff.

"Notwithstanding the careless and irresponsible way in which the bidders behaved, I think it is proved that the assistant bailiff used the words attributed to him by the plaintiff.

"I am quite unable to agree with the learned Judge on the Original Side in thinking that the words in question could not bear the meaning the plaintiff assigns to them. I do not claim to be a good Hindustani scholar, but the sort of mixed patois, which Innes spoke, is quite familiar to me, and the use of the words 'is waste' would cause me to think that the land was being sold at the instance of the mortgagees. This is the meaning assigned to the words by four witnesses, and the fifth, Mr. Spencer, actually says, 'I think any reasonable man would have thought that the land was being sold free of mortgages, had he not read the proclamation.' I may add that considering Mr. Spencer's knowledge of the value of the land he can have had no doubt while the bidding was going on, if he thought of the matter at all, that all the bidders were under a misapprehension. He cannot have thought that they were all irresponsible lunatics.

"The suit was based on section 19 of the Contract Act. My finding on the facts is that plaintiff was induced to bid for the land by misrepresentation as defined in section 18, clause (3) of the same Act. But I have also found that the plaintiff had the means of discovering the truth with ordinary diligence and that he was culpably careless in failing to ascertain the truth in the obvious way, namely, by having the proclamation read and carefully translated to him. That being so, the exception to section 19 of the Contract Act puts him out of Court and the contract is not voidable by reason of the misrepresentation."

HARTNOTT J. I take the same view of the facts as my learned colleague and I have no doubt that the bidders were bidding under a misapprehension. There is evidence, the reliability of which there is no ground for questioning, that the property free of encumbrances was not worth more than Rs. 40,000 to Rs. 45,000, and it is impossible to believe that appellant and Sofaer would have made the bids they did if they had known that they would have to take it subject to the heavy mortgages existing on it. In my opinion, the words alleged to have been used by the deputy bailiff are proved to have been so used. They are a mixture of English and Hindustani and their tenor is—'There are four mortgages. On this account (*or* therefore) there is a sale by order of Court. The title deeds can be seen in the Office of [the Registrar,'

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They do not give full details; but they may certainly lead persons to believe that the property was not being sold subject to them, and that, on the other hand, it was being sold free of them. The bailiff allows that the property in his opinion was not worth more than Rs. 40,000 to Rs. 45,000; and it is strange that he did not clearly explain beyond a shadow of doubt the exact conditions of the sale when he found that bids so far in excess of the value estimated by him were being made. I certainly find that there was misrepresentation as defined in section 18 (*3*) of the Contract Act. There remains for consideration the important question as to whether the exception laid down in section 19 of the same Act is not applicable to the case. It was apparently not argued in the Court of first instance, nor was it argued on appeal. The exception runs as follows:—'If such consent is caused by misapprehension . . . . the contract, nevertheless, is not voidable, if the party, whose consent was so caused, had the means of discovering the truth with ordinary diligence.' To my mind the appellant had such means. He could have gone to the Court, and could have ascertained the exact conditions of the sale. He could have read the advertisement in the newspaper. Further, the conditions were read out in English at the sale. The purchase of immoveable property of such value was no light matter, and the casual manner in which the appellant acted seems to me to display great negligence on his part. The exercise of ordinary diligence on his part, in my opinion, would have prevented him from being misled. A few questions to the Court officers at the auction answered in a mixture of English and Hindustani was not to my mind the exercise of ordinary diligence in a matter of so important a nature. The appellant undoubtedly had the means of discovering the truth with ordinary diligence: and I hold that the exception applies to him, and therefore that the contract is not voidable."

The appeal was therefore dismissed.

On this appeal, which was heard *ex parte*.

Roskill, *K.C.*, and *J. W. McCarthy* for the appellant, contended that the case was one of *bona fide* mistake on his part owing to his being misled by the statement of Mr. Innes, the assistant bailiff, before the sale commenced. The appellant bid for the property under the *bona fide* belief that on the terms of Mr. Innes' announcement the property was being sold free from the mortgages and he was therefore clearly at the time of bidding under a misapprehension of the true conditions of sale. The appellant was justified in accepting the announcement of Mr. Innes, who was, for the purposes of the sale, the responsible officer of the Court, as to the terms on which the sale was taking place, and any misrepresentation

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by that officer invalidated the sale to the appellant. The fact that he might have ascertained the truth by inquiry was no sufficient defence. There was therefore no negligence on the appellant's part in his not making an inquiry, and therefore section 19 of the Contract Act (IX of 1872) was not applicable. Moreover, to be a good defence under that section, the negligence must be established by facts found on the evidence in the case, and could not be set up, as in the present case, for the first time by the Court of Appeal. Reference was made to *Redgrave* v. *Hurd* (1): Leake on Contracts, 3rd edition, Chap. VI, page 315, 5th edition, pages 251, 252: Pollock on Contract, 7th edition (1902), pages 556, 566: and *Morgan* v. *Government of Haiderabad* (2). From the amount of the appellant's bids it must have been clear to the officer of the Court offering the property for sale that the appellant was under a misapprehension as to the nature of the property he was buying; and therefore the parties to the offer and its acceptance were never *ad idem*, and there was consequently no contract between them. There had also been no compliance with the conditions of sale of the Civil Procedure Code (Act XIV of 1882); and under the circumstances the appellant was entitled to equitable relief.

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The judgment of their Lordships was delivered by—

LORD MACNAGHTEN. Their Lordships regret to say that in their opinion there has been a lamentable miscarriage of justice in this case. It is an appeal from the Chief Court of Lower Burma. It was heard *ex parte*. But the facts are not open to dispute.

At an auction sale in execution held under the direction of the Court the appellant, who had dropped in quite casually, was tempted to bid and was declared the purchaser. The thing put up for sale was knocked down to him for Rs. 38,000. The sale was conducted by two officers of the Court—a Mr. Spencer, who was Chief Clerk and officiating bailiff, and a Mr. Innes, his

(1) (1881) L. R. 20 Ch. D. 1, 13, 17. (2) (1888) I. L. R. 11 Mad. 419.

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deputy, who was the auctioneer. Mr. Innes read the proclamation in English, a language which no native present seems to have understood. It stated clearly enough that only the interest of the judgment debtor was for sale. Then, in answer to a native, who asked what the proclamation said, Mr. Innes made a statement in the vernacular to the effect that the land was being sold at the instance of the mortgagees. The appellant was thus led to believe that the invitation was an invitation to bid for a substantial property freed and discharged from all encumbrances. In the result he found himself the purchaser of a shadowy equity of redemption not worth one farthing. The value of the lot unencumbered was not more than Rs. 45,000. The charges upon it were over Rs. 64,000.

As soon as the appellant realised his position he explained to Mr. Spencer that he had bid for the property under a misapprehension. Mr. Spencer reported to the Court that the appellant's statement was supported by Mr. I. Sofaer and Mr. Hadji Shah Mahomed, the other two bidders at the sale, whom he had sent for and questioned. They too, it seems, were under the same misapprehension. He added that, as their statements appeared to be perfectly genuine, and as the property in his opinion was not worth more than from Rs. 40,000 to Rs. 45,000 at the most, he thought it his duty to refer the matter to the Chief Court for orders whether, under the circumstances, the sale should be set aside and the property put up again.

The learned Judge, to whom the matter was referred, declined to interfere.

The appellant then applied to the Court to be discharged from his purchase, submitting affidavits, which showed that the misapprehension on his part was caused by a misrepresentation on the part of the auctioneer. Owing, however, to the opposition of the judgment debtor—though there was no opposition on the part of anyone else—it was thought advisable to proceed by a regular suit.

The learned Judge of first instance dismissed the suit. Then there was an appeal to the Chief Court.

The two learned Judges, who formed the Court of Appeal, were both satisfied that the appellant did bid for the property under a misapprehension, and that the misapprehension was caused by a misrepresentation made by the auctioneer. But they both held that the appellant's claim to relief failed for a reason which was not even suggested in argument either before the Court of Appeal, or before the Court of first instance. They held that, although there was a misrepresentation as defined by section 18, clause 3, of the Indian Contract Act, the case fell within the exception in section 19, which provides that in case of "consent caused by misrepresentation" the contract is not voidable, if the party, whose consent is so caused, had the means of discovering the truth with ordinary diligence. "To my mind," says one of the learned Judges, "the appellant had such means. He could have gone to the Court and could have ascertained the exact conditions of the sale. He could have read the advertisement in the newspaper. Further, the conditions were read out in English at the sale." No doubt the conditions were read out at the sale, and in English. But the appellant speaks and understands nothing but Hindustani. English is an unknown tongue to him. The other learned Judge takes the same view. He finds that the appellant was "culpably careless in failing to ascertain the truth in the obvious way, namely, by having the proclamation read and carefully translated for him." It is plain from these remarks that the negligence for which the learned Judges condemn the appellant is want of prudence in embarking so rashly on a transaction so important. The appellant had no means of discovering the truth when the auction was going on. He was perfectly justified in relying on what was said by the auctioneer in the presence and hearing of the Chief Clerk, who had charge of the sale. The exception in section 19 of the Contract Act has no application to the case. And there is no defence to the suit.

So the matter would have stood, if the question had arisen between outsiders, and the Court had had no concern in the matter beyond the duty of exercising its judicial functions. But over and above all this there is involved in this case a principle

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of supreme importance, which the learned Judges of the Chief Court entirely disregarded.

It has been laid down again and again that in sales under the direction of the Court it is incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. The Court, it is said, must at any rate not fall below the standard of honesty which it exacts from those on whom it has to pass judgment. The slightest suspicion of trickery or unfairness must affect the honour of the Court and impair its usefulness. It would be disastrous, it would be absolutely shocking, if the Court were to enforce against a purchaser misled by its duly accredited agents a bargain so illusory and so unconscientious as this.

Their Lordships are somewhat surprised to find that the learned Judges have nothing to say on this aspect of the case. They are still more surprised at the moral lesson, which the presiding Judge draws from the story of this auction. He points out that the appellant made no investigation into the title beforehand and that he had absolutely nothing to depend upon but the announcement of the auctioneer. And his conclusion is that the appellant "richly deserved to lose heavily over the transaction."

Mr. Spencer was of course wrong in not keeping a stricter watch on the proceedings of his subordinate, but he was perfectly right in referring the matter to the Court. Both Courts censure him for not having proceeded under section 306 of the Civil Procedure Code. But that course was out of the question. If the truth had been published, nobody but a lunatic would have bid on the property being put up again. If the truth had been kept back, there would have been a gross and deliberate fraud. In either case a claim against the present appellant would have been both dishonest and futile.

Their Lordships think that the appeal should be allowed, the order of the Court of Appeal and the judgment of the Lower Court discharged with costs, to be paid by the judgment-debtor,

and a decree made setting aside the sale with costs against the judgment-debtor.

Their Lordships will therefore humbly advise His Majesty accordingly.

The judgment-debtor must pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellant: *Bramall & White.*

J. V. W.