Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Gokuldoss Gopaldoss v. *Rambux Seochand and another, from the Court of the Resident at Hyderabad (Deccan); delivered 22nd March* 1884.

Present:

SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

This is an appeal from an order of the Court of the Resident at Hyderabad, in the Deccan, dismissing an appeal from a decree of the Judicial Commissioner of the Hyderabad 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 Rambux 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 on business as bankers at Amraoti under the name of Pooranmull Premsookdoss, by which name it has been sued, executed, by their manager Bhairaodin, a mortgage to Rambux Seochand of immoveable and moveable property at Amraoti for Rs. 26,500, and interest. On the 18th of December the firm,

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having become further indebted to Rambux 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, Gokuldoss Gopaldoss, having obtained a decree for about Rs. 19,000 against Puranmull Premsukdoss, 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 Puranmull Premsukdoss 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 Rambux Seochand brought a suit against him and Puranmull Premsookdoss, who was made the 1st 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.

The defence of Gokuldoss Gopaldoss 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 Puranmull Premsookdoss. Issues were framed, the fourth being :—

"What was the effect of the payment made to the Bank of Bombay in satisfaction of Pooranmull'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 Gokuldoss had paid the debt to the Bank, he stood to the Plaintiff in the exact position in which the mortgagor, 1st 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 judgement was affirmed on appeal by the Judicial Commissioner, and a special appeal

therefrom to the Court of the Resident at Hyderabad 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 Rambux 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 judgements 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 (3 Merivale, 210) should be applied in this case. In the judgement of Sir William Grant, M.R., in that case there is a passage to the following effect:—

"The cases of Greswold *v.* Marsham and Mocatta *v.* Murgatroyd 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 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 (5 Chancery Division, 834), shews 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, Sir E. Sugden said that he and Sir Samuel Romilly

thought 'at the time' it was wrong; and, in Watts *v.* Symes, Lord Justice Knight Bruce expressed doubts as to the decision. In the recent case of Stevens *v.* Mid-Hants Railway Company, Lord Justice James said as to Mocatta *v.* Murgatroyd, Toulmin *v.* Steere, and Parry *v.* Wright, '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 was recognized by Sir George Turner in Squire *v.* Ford, by Sir J. Leach and Lord Lyndhurst in Parry *v.* Wright, in effect by Lord St. Leonards in Armstrong *v.* Garnett, and by Lord Cranworth in Otter *v.* Lord Vaux. In Anderson *v.* Pignet 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 in-"cumbrancers 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 (1 De G. M. & G., 240), where, as in Toulmin *v.* Steere, 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; 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 Gam Narayan Mazumdar *v.* Brajanath Kundu Chowdhry, 5 Bengal L.R., 463, *A* mortgaged certain lands to *B*, and afterwards mortgaged the same to *C*, who, having obtained 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 Jagha, 11 Bombay H.C.R., 41, 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 of 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.* Subbaraya Madali, 7 Madras H.C.R., 229, 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. 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 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 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 2nd 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 Rambax Seochand, they make no order as to the costs of this Appeal.