REPORTS OF CASES IN HOUSE OF LORDS AND PRIVY COUNCIL DEALING WITH QUESTIONS OF INTEREST IN SCOTS LAW. *(Continued from page 593 ante.)*

HOUSE OF LORDS.

Thursday, November 20, 1913.

(Before the Lord Chancellor (Viscount Haldane), Earl of Halsbury, Lords Atkinson, Mersey, and Parker.)

KREGLINGER *v.* NEW PATAGONIA MEAT AND COLD STORAGE COMPANY, LIMITED.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Right in Security—Mortgage—Validity of a Condition Limiting the Right of Redemption—Stipulation for a Collateral Advantage—Floating Charge.

The appellants sought to enforce an option granted them under an agreement by the respondents in consideration for a loan on the security of a mortgage. The loan having been repaid prior to the expiry of the option, the respondents declined to further implement the agreement, on the ground that the option granted to the appellants was of the nature of a collateral advantage limiting the debtor's right of redemption.

Held that the stipulation in the agreement did not limit the right of redemption, and was therefore valid.

Observed per Lord Parker—There is now no rule in equity which precludes a mortgagee from stipulating for any collateral advantage, provided it is not either (1) unfair and unconscionable, or (2) in the nature of a penalty clogging the equity of redemption, or (3) inconsistent with the contractual and equitable right to redeem.

Observed per Lord Chancellor—The same general principles apply to a floating charge (*vide De Beers, Limited* v. *British South Africa Company*, 1912 A.C. 52, where there are dicta to the contrary).

Observations per Lord Chancellor on "the true limits of the use of authority."

Noakes v. *Rice*, 1902 A.C. 24; *Bradley* v. *Carritt*, 1903 A.C. 253; *Samuel* v. *Jarrah Timber, &c., Corporation*, 1904 A.C. 323, *distinguished.*

The judgment of the Lord Chancellor contains the following statement of the *facts* and the arguments of the parties:—"The appellants are a firm of merchants and wool brokers. The respondents carry on the business of preserving and canning meat, and of boiling down the carcases of sheep and other animals. In the course of this business they have at their disposal a large number of skeepskins. It appears that in the summer of 1910 the respondents were desirous of borrowing £10,000, and requested the appellants to advance that sum. The appellants, who were desirous of obtaining an option to purchase for a term of five years all the sheepskins at the respondents' disposal, agreed to lend the money in consideration of being given such an option. The negotiations which followed resulted in an agreement dated the 24th August 1910. Under this agreement the appellants were to lend the respondents the sum of £10,000, repayable on demand, with interest at 6 per cent. If, however, among other conditions to be observed, the interest was duly paid, the appellants were not to demand repayment till the 30th September 1915, but the respondents were to be at liberty to pay off the loan earlier. To secure the loan the respondents by the agreement charged their undertaking and all their property, both present and future, with the payment of the principal sum and interest, to the intent that the charge should be a floating security on the undertaking and property, but so that the respondents should not create any mortgage or charge in priority without the appellants' consent, or without such consent sell their farms or lands. The principal sum was to become payable in certain prescribed events. By clause 8 of the agreement the respondents were not for five years from the date of the agreement, *i.e.*, till the 24th August 1915, to sell sheepskins to anyone excepting the appellants so long as the latter were willing to buy at a price equal to the best price (c.i.f. London) offered by anyone else, and the respondents were to pay to the appellants a commission of 1 per cent. on the sale price of all sheepskins sold by the respondents to anyone else.

"The respondents have now, as they were entitled to do under the agreement, paid off the loan. They claim that such payment has put an end to the option of the appellants to buy the respondents' sheepskins. Under the terms of the agreement this option, as I have already stated, will, if it is

valid, continue operative until the 24th August 1915. What the respondents say is that the stipulation is one that restricts their freedom in conducting the undertaking or business which is the subject of the floating charge, that it was consequently of the nature of a clog of their right to redeem and invalid, and that whether it clogged the right to redeem or was in the nature of a collateral advantage, it was not intended and could not be made to endure after redemption. The appellants, on the other hand, say that the stipulation in question was one of a kind usual in business, and that it was in the nature, not of a clog, but of a collateral bargain outside the actual loan which they only agreed to make in order to obtain the option itself. They further say that even if the option could be regarded as within the doctrine of equity which forbids the clogging of the right to redeem, that doctrine does not in a case such as this extend to a floating charge.

"The controversy which has thus arisen was brought before Swinfen Eady, J., on a motion for an interlocutory injunction to restrain the respondents from selling sheepskins to anyone else than the appellants. The learned Judge refused this motion on the ground that the point had been settled adversely to the appellants by decisions of your Lordships' House. The case was brought formally before the Court of Appeal, but was disposed of there without argument with a view to taking the point as speedily as possible before your Lordships for review."

The respondents founded on *Noakes* v. *Rice*, *Bradley* v. *Carritt*, and *Samuel* v. *Jarrah Timber, &c., Corporation* (*vide supra*) to show that a collateral stipulation relating to a mortgage formed part of and ended with the mortgage itself.

Their Lordships took time to consider their judgment.

LORD CHANCELLOR — [*After stating the facts set out above, continued*]—Before I refer to the decisions of this House which the Courts below have considered to cover the case, I will state what I conceive to be the broad principles which must govern it.

The reason for which a court of equity will set aside the legal title of a mortgagee and compel him to reconvey the land on being paid principal, interest, and costs is a very old one. It appears to owe its origin to the influence of the Church in the courts of the early Chancellors. As early as the Council of Lateran in 1178 we find, according to Matthew Paris—Historia Major, at pp. 114-5—that famous assembly of ecclesiastics condemning usurers, and laying down that when a creditor had been paid his debt he should restore his pledge. It was therefore not surprising that the Court of Chancery should at an early date have begun to exercise jurisdiction *in personam* over mortgagees. This jurisdiction was merely a special application of a more general power to relieve against penalties and to mould them into mere securities. The case of the common law mortgagee of land was indeed a gross one. The land was conveyed to the creditor upon the condition that if the money he had advanced to the feoffor was repaid on a date and at a place named the fee-simple should revest in the latter, but that if the condition was not strictly and literally fulfilled he should lose the land for ever. What made the hardship on the debtor a glaring one was that the debt still remained unpaid and could be recovered from the feoffor, notwithstanding that he had actually forfeited the land to his mortgagee. Equity, therefore, at an early date began to relieve against what was virtually a penalty by compelling the creditor to use his legal title as a mere security.

This was the origin of the jurisdiction which we are now considering, and it is important to bear that origin in mind, for the end to accomplish which the jurisdiction has been evolved ought to govern and limit its exercise by equity judges. That end has always been to ascertain, by parole evidence if need be, the real nature and substance of the transaction, and if it turned out to be in truth one of mortgage simply to place it on that footing. It was in ordinary cases only where there was conduct which the Court of Chancery regarded as unconscientious that it interfered with freedom of contract. The lending of money on mortgage or otherwise was looked on with suspicion, and the Court was on the alert to discover want of conscience in the terms imposed by lenders. But whatever else may have been the intention of those judges who laid the foundations of the modern doctrines with which we are concerned in this appeal, they certainly do not appear to have contemplated that their principle should develop consequences which would go far beyond the necessities of the case with which they were dealing, and interfere with transactions which were not really of the nature of a mortgage and which were free from objection on moral grounds. Moreover, the principle on which the Court of Chancery interfered with contracts of the class under consideration was not a rigid one. The equity judges looked not at what was technically the form, but at what was really the substance of transactions, and confined the application of their rules to cases in which they thought that in its substance the transaction was oppressive. Thus in *Howard* v. *Harris*, 1 Vern. 32, Lord Keeper North in 1683 set aside an agreement that a mortgage should be irredeemable after the death of the mortgagor and failure of the heirs of his body, on the ground that such a restriction on the right to redeem was void in equity. But he went on to intimate that if the money had been borrowed by the mortgagor from his brother, and the former had agreed that if he had no issue the land should become irredeemable, equity would not have interfered with what would really have been a family arrangement. The exception thus made to the rule, in cases where the transaction includes a family arrangement as well as a mortgage, has been recognised in later authorities.

The principle was thus in early days limited in its application to the accomplishment of the end which was held to justify

interference of equity with freedom of contract. It did not go further. As established it was expressed in three ways.

The most general of these was that if the transaction was once found to be a mortgage, it must be treated as always remaining a mortgage and nothing but a mortgage. That the substance of the transaction must be looked to in applying this doctrine, and that it did not apply to cases which were only apparently or technically within it, but were in reality something more than cases of mortgage—*Howard* v. *Harris* and other authorities show this. It was only a different application of the paramount doctrine to lay it down in the form of a second rule that a mortgagee should not stipulate for a collateral advantage which would make his remuneration for the loan exceed a proper rate of interest. The Legislature during a long period placed restrictions on the rate of interest which could legally be exacted. But equity went beyond the limits of the statutes which limited the interest, and was ready to interfere with any usurious stipulation in a mortgage. In so doing it was influenced by the public policy of the time. That policy has now changed, and the Acts which limited the rate of interest have been repealed. The result is that a collateral advantage may now be stipulated for by the mortgagee, provided that he has not acted unfairly or oppressively, and provided that the bargain does not conflict with the third form of the principle. This is that a mortgage (subject to the apparent exception in the case of family arrangements to which I have already alluded) cannot be made irredeemable, and that any stipulation which restricts or clogs the equity of redemption is void. It is obvious that the reason for the doctrine in this form is the same as that which gave rise to the other forms. It was simply an assertion in a different way of the principle that once a mortgage always a mortgage and nothing else.

The rules I have stated have now been applied by courts of equity for nearly three centuries, and the books are full of illustrations of their application. But what I have pointed out shows that it is inconsistent with the objects for which they were established that these rules should crystallize into technical language so rigid that the letter could defeat the underlying spirit and purpose. Their application must correspond with the practical necessities of the time.

The rule as to collateral advantages, for example, has been much modified by the repeal of the usury law and by the recognition of modern varieties of commercial bargaining. In *Biggs* v. *Hoddinot* (1898, 2 Ch. 307) it was held that a brewer might stipulate in a mortgage made to him of an hotel that during the five years for which the loan was to continue the mortgagor would deal with him exclusively for malt liquor. In the seventeenth and eighteenth centuries a court of equity could hardly have so decided, and the judgment illustrates the elastic character of equity jurisdiction and the power of equity judges to mould the rules which they apply in accordance with the exigencies of the time. The decision proceeded on the ground that a mortgagee may stipulate for a collateral advantage at the time and as a term of the advance, provided, first, that no unfairness is shown, and secondly, that the right to redeem is not thereby clogged. It is no longer true that, as was said in *Jennings* v. *Ward* (2 Vern. 520), "a man shall not have interest for his money and a collateral advantage besides for the loan of it." Unless such a bargain is unconscionable it is now good. But none the less the other and wider principle remains unshaken that it is the essence of a mortgage that in the eye of a court of equity it should be a mere security for money, and that no bargain can be validly made which will prevent the mortgagor from redeeming on payment of what is due, including principal, interest, and costs. He may stipulate that he will not pay off his debt and so redeem his mortgage for a fixed period. But whenever a right to redeem arises out of the doctrine of equity he is precluded from fettering it. This principle has become an integral part of our system of jurisprudence and must be faithfully adhered to.

The question in the present case is whether the right to redeem has been interfered with. And this must, for the reasons to which I have adverted in considering the history of the doctrine of equity, depend on the answer to a question which is primarily one of fact. What was the true character of the transaction? Did the appellants make a bargain such that the right to redeem was cut down, or did they simply stipulate for a collateral undertaking, outside and clear of the mortgage, which would give them an exclusive option of purchase of the sheepskins of the respondents? The question is, in my opinion, not whether the two contracts were made at the same moment and evidenced by the same instrument, but whether they were in substance a single and undivided contract or two distinct contracts. Putting aside for the moment considerations turning on the character of the floating charge, such an option no doubt affects the freedom of the respondents in carrying on their business even after the mortgage has been paid off. But so might other arrangements which would be plainly collateral—an agreement, for example, to take permanently into the firm a new partner as a condition of obtaining fresh capital in the form of a loan. The question is one, not of form but of substance, and it can be answered in each case only by looking at all the circumstances and not by mere reliance on some abstract principle, or upon the dicta which have fallen *obiter* from judges in other and different cases. Some at least of the authorities on the subject disclose an embarrassment which has, in my opinion, arisen from neglect to bear this in mind. In applying a principle, the ambit and validity of which depend on confining it steadily to the end for which it was established, the analogies of previous instances where it has been applied are apt to be misleading. For each case forms a real precedent only in so far as it affirms a principle,

the relevancy of which in other cases turns on the true character of the particular transaction, and to that extent on circumstances.

If in the case before the House your Lordships arrive at the conclusion that the agreement for an option to purchase the respondents' sheepskins was not in substance a fetter on the exercise of their right to redeem, but was in the nature of a collateral bargain the entering into which was a preliminary and separable condition of the loan, the decided cases cease to present any difficulty. In questions of this kind the binding force of previous decisions, unless the facts are indistinguishable, depends on whether they establish a principle. To follow previous authorities, so far as they lay down principles, is essential if the law is to be preserved from becoming unsettled and vague. In this respect the previous decisions of a court of co-ordinate jurisdiction are more binding in a system of jurisprudence such as ours is than in systems where the paramount authority is that of a code. But when a previous case has not laid down any new principle, but has merely decided that a particular set of facts illustrates an existing rule, there are few more fertile sources of fallacy than to search in it for what is simply resemblance in circumstances, and to erect a previous decision into a governing precedent merely on this account. To look for anything except the principle established or recognised by previous decisions is really to weaken and not to strengthen the importance of precedent. The consideration of cases which turn on particular facts may often be used for edification, but it can rarely yield authoritative guidance. I desire to associate myself with what was said on this subject by Sir George Jessel in the case of *re Hallett's Estate* (13 Ch. Div. 696), and I will add that the view of the true limits of the use of authority, which I agree with him in holding is of especial importance where, as here, the principle to be applied arises in the elastic jurisdiction of a court of equity, and has been established simply as an instrument to give effect to well-defined and governing purpose.

It is not, in my opinion, necessary for your Lordships to form an opinion as to whether you would have given the same decisions as were recently given by this House in certain cases which were cited to us. These cases, which related to circumstances differing widely from those before us, have been disposed of finally, and we are not concerned with them excepting in so far as they may have thrown fresh light on questions of principle. What is vital in the appeal now under consideration is to classify accurately the transaction between the parties. What we have to do is to ascertain from scrutiny of the circumstances whether there has really been an attempt to effect a mortgage with a provision preventing redemption of what was pledged merely as security for payment of the amount of the debt and any charges besides that may legitimately be added. It is not, in my opinion, conclusive in favour of the appellants that the security assumed the form of a floating charge. A floating charge is not the less a pledge because of its floating character, and a contract which fetters the right to redeem, on which equity insists as regards all contracts of loan and security, ought on principle to be set aside as readily in the case of a floating security as in any other case. But it is material that such a floating charge, in the absence of bargain to the contrary effect, permits the assets to be dealt with freely by the mortgagor until the charge becomes enforceable. If it be said that the undertaking of the respondents which was charged included their entire business, including the right to dispose of the skins of which they might from time to time become possessed, the comment is that at least they were to be free, so long as the security remained a floating one, to make contracts in the ordinary course of business in regard to these skins. If there had been no mortgage such a contract as the one in question would have been an ordinary incident in such a business. We are considering the simple question of what is the effect on the right to redeem of having inserted into the formal instrument signed when the money was borrowed an ordinary commercial contract for the sale of skins extending over a period. It appears that it was the intention of the parties that the grant of the security should not affect the power to enter into such a contract either with strangers or with the appellants, and if so I am unable to see how the equity of redemption is affected. No doubt it is the fact that on redemption the respondents will not get back their business as free from obligation as it was before the date of the security. But that may well be, because outside the security and consistently with its terms there was a contemporaneous but collateral contract, contained in the same document as constituted the security but in substance independent of it. If it was the intention of the parties, as I think it was, to enter into this contract as a condition of the respondents getting their advance, I know no reason either in morals or in equity which ought to prevent this intention from being left to have its effect. What was to be capable of redemption was an undertaking which was deliberately left to be freely changed in its details by ordinary business transactions with which the mortgage was not to interfere. Had the charge not been a floating one, it might have been more difficult to give effect to this intention.

In *Noakes* v. *Rice* (1902 A.C. 24) this difficulty is illustrated, for the House held that what had been inserted in the shape of a covenant by the mortgagor to buy the beer of the mortgagee after redemption of the public-house mortgaged was really a term of the mortgage and was inoperative as being, not merely a collateral agreement, but in truth a restriction on the right to get back the security free from the terms of the mortgage. That was the case of a mortgage of a specific property. The decision that the transaction was what it was held to be is, at all events, readily intelligible. In *Bradley* v. *Carritt* (1903 A.C.

253) it was decided that the mortgagor of shares in a tea company who had covenanted that he would use his best endeavours to secure that always thereafter the mortgagee should have the sale of the company's tea had permanently fettered himself in the free disposition and enjoyment of the shares. It was held that though the covenant did not operate *in rem* of the shares it amounted to a device or contrivance designed to impede redemption. The decision was a striking one. It was not unanimous, for Lord Lindley dissented from the conclusions of Lord Macnaghten and Lord Davey. It is binding on your Lordships in any case in which the transaction is really of the same kind, although it does not follow that all the dicta in the judgments of those of your Lordships' House, who were in a majority, must be taken as of binding authority. And it certainly cannot, in my opinion, be taken as authoritatively laying down that the mere circumstance that after redemption the property redeemed may not, as the result of some bargain made at the time of the mortgage, be in the same condition as it was before that time is conclusive against the validity of that bargain. To render it invalid, the bargain must when its substance is examined turn out to have formed part of the terms of the mortgage and to have really cut down a true right of redemption.

I think that the tendency of recent decisions has been to lay undue stress on the letter of the principle which limits the jurisdiction of equity in setting aside contracts. The origin and reason of the principle ought, as I have already said, to be kept steadily in view in applying it to fresh cases. There appears to me to have grown up a tendency to look to the letter rather than to the spirit of the doctrine. The true view is, I think, that judges ought in this kind of jurisdiction to proceed cautiously, and to bear in mind the real reasons which have led courts of equity to insist on the free right to redeem and the limits within which the purpose of the rule ought to confine its scope. I cannot but think that the validity of the bargain in such cases as *Bradley* v. *Carritt* and *Santley* v. *Wilde* (1899, 2 Ch. 474) might have been made free from serious question if the parties had chosen to seek what would have been substantially the same result in a different form. For form may be very important when the question is one of the construction of ambiguous words in which people have expressed their intentions. I will add that if I am right in the view which I take of the authorities, there is no reason for thinking that they establish another rule suggested by the learned counsel for the respondents that even a mere collateral advantage stipulated for in the same instrument as constitutes the mortgage cannot endure after redemption. The dicta on which he relied are really illustrations of the other principles to which I have referred.

There is a further remark which I wish to make about *Bradley* v. *Carritt*. It is impossible to read the report without seeing that there was a marked divergence of opinion among those members of your Lordships' House who took part in the decision as to the test by which the validity of contracts collateral to a mortgage is to be determined. Lord Davey observes that he cannot understand how, consistently with the doctrine of equity, a mortgagee can insist on retaining the benefit of a covenant in the mortgage contract materially affecting the enjoyment of the mortgaged property after redemption. Lord Lindley, on the other hand, doubts whether the covenant in question, a covenant that the mortgagor would use his influence as a shareholder to secure for the mortgagee in permanence the brokerage business of the company, ought to be looked on as really forming part of the terms of the security. He points out that when the usury laws were in force, and when every device for evading them had to be defeated by equity, the proposition that everything that was part of the mortgage transaction must cease with it, if it was not to infringe the doctrine that once a mortgage always a mortgage, was a convenient statement, and as free from objection as most concise statements are, but that when the usury laws were abolished the language was too wide to be accurate.

The views expressed by Lord Davey and Lord Lindley are not, so far as the mere words go, contradictory. But I cannot shut my eyes to the fact that they represent divergent tendencies. Lord Davey seems to suggest that the doctrine about which, when expressed in general terms, there is little controversy, had become finally crystallised in the particular expressions used in certain of the earlier authorities, and that, having become thus rigid, it is to-day fatal to the freedom of mortgagor and mortgagee to make their own bargains even in cases where the reason for applying the doctrine has ceased to exist. The tendency of Lord Lindley's language is, on the other hand, to treat the application of such a rule as a question in which the courts must not lose sight of the the dominating principle underlying the reasons which originally influenced the terms of the rule—reasons which have in certain cases become modified as public policy has changed. Speaking for myself, and notwithstanding the high authority of Lord Davey, I think that the tendency of Lord Lindley's conclusion is the one which is most consonant with principle, and I see no valid reason why this House should not act in accordance with it in the case now under consideration.

The decision of this House in *De Beers Consolidated Mines, Limited* v. *British South Africa Company* (1912, A.C. 52) does not assist us much, because it really turned on the facts. It was held that the stipulation for the licence in question was not part of the mortgage transaction, and this disposed of the appeal. The question was, however, raised, whether the general principles of equity in regard to the right to redeem apply in their integrity to mortgages by way of floating charge. I have

already expressed all that it seems to me necessary to say on the point.

The EARL OF HALSBURY said he had read the judgments of the Lord Chancellor and Lord Parker and concurred in them and did not desire to add anything.

LORD ATKINSON said he had also read these judgments and concurred.

LORD MERSEY—I agree, and I desire to add only a few words. The transaction out of which this dispute arises is sufficiently described in the judgment of the Lord Chancellor. Though embodied in one document it is an agreement made up of two parts. The first part consists of a promise by the appellants, who are merchants, to lend to the respondents, who are a trading company, money at interest on the security of a floating charge over the company's undertaking; the second part consists of an agreement by the company to give to the lenders the option of purchasing for a time their periodical production of sheepskins. The whole transaction is of a most ordinary commercial kind.

If is contended that the contract is a mortgage to which the equitable doctrine prohibiting the imposition of a clog on the mortgagor's right to redeem applies, and that therefore on payment off of the loan the borrowers are entitled to have back their undertaking freed from any further obligation to sell or deliver sheepskins. Now whether a transaction is or is not such a mortgage is a question of intention, and it seems that it has always been the practice of the Court of Chancery to admit oral evidence to assist in solving the question. No such evidence is forthcoming in this case, so that your Lordships are left (I think rightly) to determine the intention merely from the words which the parties have used in drawing up their agreement, These words are, in my opinion, too plain and simple to leave any doubt as to their meaning. The obligation to sell sheepskins created by clause 8 of the agreement was to endure in any event until August 1915. That was the plain intention of both parties to the agreement, and the only effect of applying to the contract the equitable doctrine against clogging the right to redeem would be to defeat that intention and to enable one of the parties to inflict an injustice on the other.

I have nothing to say about the doctrine itself. It seems to me to be like an unruly dog, which if not securely chained to its own kennel is prone to wander into places where it ought not to be. Its introduction into the present case would give effect to no equity and would defeat justice.

LORD PARKER—The defendants in this case are appealing to the equitable jurisdiction of the Court for relief from a contract which they admit to be fair and reasonable, and of which they have already enjoyed the full advantage. Their title to relief is based on some equity which they say is inherent in all transactions in the nature of a mortgage. They can state no intelligible principle underlying thei alleged equity, but contend that your Lordships are bound by authority. That the Court should be asked in the exercise of its equitable jurisdiction to assist in so inequitable a proceeding, or the repudiation of a fair and reasonable bargain, is somewhat startling, and makes it necessary to examine the point of view from which courts of equity have always regarded mortgage transactions. For this purpose I have referred to most, if not all, of the reported cases on the subject, and propose to state shortly the conclusions at which I have arrived.

A legal mortgage has generally taken the form of a conveyance, with a proviso for reconveyance on the payment of money by a specified date. But a conveyance in this form is by no means necessarily a mortgage. In order to determine whether it is or is not a mortgage, equity has always looked to the real intentions of the parties, to be gathered not only from the terms of the particular instrument but from all the circumstances of the transaction, and has always admitted parole evidence in cases where the real intention is in doubt. Only if according to the real intention of the parties the property was to be held as a pledge or security for the payment of the money, and as such to be restored to the mortgagor when the money was paid, was the conveyance considered to be a mortgage. Further, the mortgage might be given to secure not only a single money payment but a series of money payments extending over many years, and again, the money secured might or might not, according to the circumstances, constitute a debt due from mortgagor to mortgagee. There might also be mortgages by way of security for something other than a money payment or series of money payments—for example, mortgages by way of indemnity—but these may be disregarded for the purposes of this case.

Taking the simple case of a mortgage by way of conveyance, with a proviso for reconveyance on payment of a sum of money upon a specified date, two events might happen. The mortgagor might pay the money on the specified date, in which case equity would specifically perform the contract for reconveyance. On the other hand, the mortgagor might fail to pay the money on the date specified for that purpose. In this case the property conveyed became at law an absolute interest in the mortgagee. Equity, however, did not treat time as of the essence of the transaction, and hence on failure to exercise what may be called the contractual right to redeem there arose an equity to redeem notwithstanding the specified date had passed. Till this date had passed there was no equity to redeem, and a bill either to redeem or foreclose would have been demurrable. The equity to redeem, which arises on failure to exercise the contractual right of redemption, must be carefully distinguished from the equitable estate, which from the

first remains in the mortgagor, and is sometimes referred to as an equity of redemption.

Now if, as was not infrequently the case, such a legal mortgage as above described contained a further stipulation that if default were made in payment of the money secured on the date specified, the mortgagor should not exercise his equitable right to redeem, or should only exercise it as to part of the mortgaged property, or on payment of some additional sum, or performance of some additional condition, such stipulation was always regarded in equity as a penal clause against which relief would be given. This is the principle underlying the rule against fetters or clogs on the equity of redemption. The rule may be stated thus—The equity which arises on failure to exercise the contractual right cannot be fettered or clogged by any stipulation contained in the mortgage or entered into as part of the mortgage transaction. This rule is equally applicable to all transactions of mortgage, whether the mortgagor is or is not under personal liability to pay the money secured, and whether or not the mortgage is given to secure a loan made at the time of the mortgage or some existing debt of the mortgagee. For example, it would be applicable to a mortgage with a proviso for reconveyance on the payment to the mortgagee by the mortgagor or a third party of moneys owing by such third party to the mortgagee.

By way of illustration of this rule I will ask your Lordships' attention to the case of *Salt* v. *Marquis of Northampton* (1892, A.C. 1), which came to your Lordships' House. In that case an insurance society had advanced £10,000 to Lord Compton on the security of a reversionary interest to which he was entitled if he survived his father. Pursuant to the agreement made upon the occasion of the advance, the society insured Lord Compton's life against the life of his father, and paid the premiums on this policy up to the father's death. This agreement contained a provision that if Lord Compton during his father's life repaid to the society this £10,000 and the amount of the premiums with interest, the policy should belong to Lord Compton, but if Lord Compton died in his father's lifetime without having repaid the £10,000 and the premiums with interest the policy should belong to the society. It was this latter event which happened, and the question arose whether the policy belonged to the society or whether it was redeemable on payment of what was due in respect of the moneys advanced and the premiums and interest. If the policy when taken out pursuant to the agreement was in equity the property of the mortgagor, it was part of the property which he had mortgaged to secure the advance, and there being a contractual right to redeem during his father's life, and an equitable right to redeem arising if the contractual right were not exercised, the clause providing that if the contractual right were not exercised the policy should belong to the society was in the nature of a penalty against which equity would relieve. It was a clog on the equity in the proper sense of that expression. It having been held that the policy did in equity from the first belong to the mortgagor, it followed that the provision in question was void as a clog on the equity.

There is another point which has some importance—namely, the terms upon which equity allowed redemption after the estate had become absolute at law. Except in the case of mortgages to secure moneys advanced by way of loan, to which I shall presently refer, equity only allowed redemption on the mortgagor giving effect so far as he could to the terms on which by the bargain between the parties he had a contractual right to redeem the property. Equity might, and most frequently did, confer further terms, *e.g.*, payment of interest up to the date of redemption and proper mortgagees' costs. But except in the case of mortgages to secure moneys advanced by way of loan, I can find no trace in the authorities of any equitable right to redeem without giving effect as far as possible to the terms of the bargain. This is consistent with the principle underlying the rule as to clogging the equity. In relieving from penalties or forfeitures equity has always endeavoured to put the parties as far as possible into the position in which they would have been if no penalty or forfeiture had occurred. It is only in the case of mortgages to secure moneys advanced by way of loan that there was ever any equity to redeem on terms not involving performance of the bargain between the parties. The reason for this exception will appear presently.

There is another point of view from which a clog or fetter on the equitable right to redeem may be properly regarded. The nature of the equitable right is so well known that upon a mortgage in the usual form to secure a money payment on a certain day it must be taken to be a term of the real bargain between the parties that the property should remain redeemable in equity after failure to exercise the contractual right. Any fetter or clog imposed by the instrument of mortgage on this equitable right may be properly regarded as a repugnant condition and as such invalid. There are, however, repugnant conditions which cannot be regarded as mere penalties intended to deter in the exercise of the equitable right which arises when the time for the exercise of the contractual right has gone by, but which are repugnant to the contractual right itself. A condition to the effect that if the contractual right is not exercised by the time specified the mortgagee shall have an option of purchasing the mortgaged property may properly be regarded as a penal clause. It is repugnant only to the equity and not to the contractual right. But a condition that the mortgagee is to have such an option for a period which begins before the time for the exercise of the statutory right has arrived, or which reserves to the mortgagee any interest in the property after the exercise of the

contractual right, is inconsistent not only with the equity but with the contractual right itself, and might, I think, be held invalid for repugnancy even in a court of law.

This consideration affords a possible and reasonable explanation of the rule referred to in some of the authorities to the effect that a mortgagee cannot as a term of the mortgage enter into a contract to purchase or stipulate for an option to purchase any part of or interest in the mortgaged premises. Suppose the following simple case, namely, a conveyance by way of mortgage with a proviso for reconveyance if the mortgagor pay to the mortgagee £500 and interest at the end of six months, and then a further stipulation that the mortgagee should have an option of purchasing the property for another six months. If the mortgagor pays the moneys secured by the specified date the mortgagee comes under a contractual liability to reconvey, and if he does reconvey he reconveys his whole interest in the mortgaged property, thus destroying his option. The option, therefore, is inconsistent with and repugnant to the proviso for reconveyance which embodies the terms of the contractual right to redeem. It may therefore be rejected. It is also inconsistent with and repugnant to the equity of redemption which arises on failure to exercise the contractual right to redeem. It is, therefore, though not strictly a penalty, sometimes referred to as a clog on this equity. The fact that the inconsistency is most apparent in mortgages with an express proviso for redemption may account for Lord Hardwicke's inclination to confine the rule to such mortgages—*Mellor* v. *Lees*, 2 Atk. 494. In *Newcomb* v. *Bonham*, 1 Vern. 7, the objection based on the rule is thus formulated—"Here is a power" (meaning the express proviso) "to redeem, and it shall never be extinct by any covenant at the same time, and the Court hold that this was the usual rule." In the case of mortgages without such an express proviso there might, it is true, be a like inconsistency or repugnancy, but only if the real intention of the parties was that the property should be held as security for the moneys charged thereon and restored intact to the mortgagor as soon as these moneys were paid, but, as in the last-mentioned case, it is always possible that this was not the true intention, and unless it be the true intention the transaction is not really a mortgage under the rule but something more complex. It should be noticed that Lord Henley's explanation of the rule in *Vernon* v. *Bethell* (2 Eden 110) is based on considerations applicable only to mortgages to secure loans, though the rule itself is not confined to such last-mentioned mortgages. Indeed, in the case of mortgages to secure loans, the mortgagee could not in Lord Henley's time have contracted for an interest in or option over the mortgaged property for quite another reason.

All that I have said hitherto as to the equitable considerations affecting legal mortgages in the usual form applies equally to conveyances of equitable interests where there is an express proviso for redemption. The only difference in this case is that there is no legal estate to become absolute on failure to exercise the contractual right though there is a contract for reconveyance for breach of which an action might lie at law. It applies also, but with some important qualifications, to mere equitable charges. In the case of a mortgagor merely charging a property with payment to the mortgagee of a sum of money, not only does the mortgagee take no interest at law in the property charged, but there is no contract for reconveyance at all. The right to redeem is from the very outset a right in equity only, and it is merely the right to have the property freed from the charge on payment of the moneys charged thereon. If the charge is for payment of a specified sum on a specified day, payment on that day will set the property free, and if the day passes without payment there will still be an equity to have the property so freed notwithstanding any provision in the nature of a penalty, such final provision being a clog on the equity. The difference between transactions by way of equitable charge and transactions by way of conveyance with a proviso for reconveyance is chiefly important when, for the purpose of determining whether a particular stipulation ought or ought not to be rejected for inconsistency or repugnancy, the nature of the transaction between the parties has to be investigated.

I have pointed out that in mortgages in common form an option to purchase is inconsistent with and repugnant to the proviso for reconveyance on payment of the money secured. But is there any such repugnancy or inconsistency in the following case? A agrees to give B an option for one year to purchase a property for £10,000. In consideration of such option B agrees to lend, and does lend, A £1000 to be charged on the property without interest and be repayable at the expiration or earlier exercise of the option. I cannot myself see that there is any inconsistency or repugnancy between the provisions of this perfectly simple and straightforward transaction. It would have been very different if A had conveyed the property to B with a proviso that on payment of the £1000 there should be a reconveyance, and the deed had then provided for the year's option. Here the option would be inconsistent with, and would in fact have been destroyed by, the reconveyance.

I desire in connection with what I have just said to add a few words on the maxims in which attempts have been made to sum up the equitable principles applicable to mortgage transactions. I refer to the maxims, "Once a mortgage, always a mortgage," or "A mortgage cannot be made irredeemable." Such maxims, however convenient, afford little assistance where the Court has to deal with a new or doubtful case. They obviously beg the question, always of great importance, whether the particular transaction which the Court has to consider is in fact a mortgage or not, and if they be acted on without a careful consideration of the equit-

able considerations on which they are based, can only, like Bacon's idols of the market place, lead to misconception and error.

We will suppose that money is advanced to a company repayable at the expiration of fifteen years, not an unusual period, and that the company by way of security subdemises (as is often the case) to trustees for the lenders a number of leaseholds, some of which are held for terms less than fifteen years. It would, in my opinion, be a serious error to argue that this was an attempt to make an irredeemable mortgage. There would be the same error in objecting on the like ground to a mortgage of leaseholds to secure an annuity for a period exceeding the term of the lease. If the mortgage is irredeemable at all, this arises from the nature of the property mortgaged, and not from any penal or repugnant stipulation on the part of the mortgagee, and the maxim properly understood is in no way infringed. We will suppose, again, that a firm of manufacturers desires to take in a new partner, proposing to charge a premium of £3000. A wants to buy a partnership, but before entering this firm desires some further acquaintance with the extent and methods of its business. It is thereupon arranged that A shall be taken on as clerk for a year and have a year's option of entering the firm as a partner at a premium of £3000, and in the meantime shall advance the firm £3000, charged on some partnership property, to be set off against the premium if the option be exercised, but otherwise refunded at the end of the year. To suggest that such an arrangement was bad because it infringed the maxim of "Once a mortgage, always a mortgage," would, in my opinion, be absolutely erroneous.

I now come to the particular class of mortgages to which I have already referred —that is to say, mortgages to secure borrowed money. For the whole period during which the Court of Chancery was formulating and laying down its equitable doctrines in relation to mortgages there existed statutes strictly limiting the rate of interest which could be legally charged for borrowed money. If a mortgagee stipulated for some advantage beyond repayment of his principal with interest, equity considered that he was acting contrary to the spirit of these statutes, and held the stipulation bad on this ground. There thus arose the rule, so often referred to in the reported decisions, that in a mortgage to secure borrowed money the mortgagee could not contract for any such advantage. There was said to be an equity to redeem on payment of principal, interest, and costs, whatever might have been the bargain between the parties, and any stipulation by the mortgagee for a further, or as it was sometimes called a collateral advantage, came to be spoken of as a clog or fetter on this equity. It is of the greatest importance to observe that this equity is not the equity to redeem with which I have hitherto been dealing. It is an equity which arises *ab initio*, and not only on failure to exercise the contractual right to redeem. It can be asserted before as well as after such failure. It has nothing to do with time, not being of the essence of a contract, or with relief from penalties, or with repugnant conditions. It is not a right to redeem on the contractual terms, but a right to redeem notwithstanding the contractual terms—a right which depended on the existence of the statutes against usury and the public policy thought to be involved in those statutes. Unfortunately in some of the authorities this right is spoken of as a right incidental to mortgages generally, and not confined to mortgages to secure borrowed money. This is quite explicable when it is remembered that a loan is perhaps the most frequent occasion for a mortgage. But it is, I think, none the less erroneous. I can find no instance of the rule which precludes a mortgagee from stipulating for a collateral advantage having been applied to a mortgage other than a mortgage to secure borrowed money, and there is the authority of Lord Eldon in *Chambers* v. *Goldwin* (9 Ves. 254) for saying that this rule was based on the usury laws. The right (notwithstanding the terms of the bargain) to redeem on payment of principal, interest, and costs is a mere corollary to this rule, and falls with it. It is to be observed that stipulations for a collateral advantage may be classified under two heads. First, those the performance of which is made a term of the contractual right to redeem, and, secondly, those the performance of which is not made a term of such contractual right. In the former case, in settling the terms on which redemption was allowed the Court of Chancery entirely ignored such stipulation. In the latter case, so far as redemption was concerned, the stipulations were immaterial, but it is said that in both cases the Court of Chancery would have restrained an action at law for damages for their breach. This is possible, though I can find no instance of its having been done, but clearly on a bill for an injunction to restrain an action at law the plaintiff would have to show some equity entitling him to be relieved from his contract, and such equity could, I think, have been based only on the usury laws or the public policy which gave rise to them.

The last of the usury laws was repealed in 1854, and thenceforward there was, in my opinion, no intelligible reason why mortgages to secure loans should be on any different footing from other mortgages. In particular, there was no reason why the old rule against a mortgagee being able to stipulate for a collateral advantage should be maintained in any form or with any modification. Borrowers of money were fully protected from oppression by the pains always taken by the Court of Chancery to see that the bargain between borrower and lender was not unconscionable. Unfortunately at the time when the last of the usury laws was repealed the origin of the rule appears to have been more or less forgotten, and the cases decided since such repeal exhibit an extraordinary diversity of judicial opinion on the subject. It is little wonder that with the existence in

the authorities of so many contradictory theories, persons desiring to repudiate a fair and reasonable bargain have attempted to obtain the assistance of the Court in that behalf. To one who, like myself, has always admired the way in which the Court of Chancery succeeded in supplementing our common law system in accordance with the exigencies of a growing civilisation, it is satisfactory to find, as I have found on analysing the cases in question, that no such attempt has yet been successful. In every case in which a stipulation by a mortgagee for a collateral advantage has since the repeal of the usury laws been held invalid, the stipulation has been open to objection, either (1) because it was unconscionable, or (2) because it was in the nature of a penal clause clogging the equity arising on failure to exercise a contractual right to redeem, or (3) because it was in the nature of a condition repugnant as well to the contractual as to the equitable right. It is true that in the case of *Santley* v. *Wilde* (1899, 2 Ch. 474) the attempt that was made to induce the Court in the exercise of its equitable jurisdiction to assist in the repudiation of a fair and reasonable bargain ought, according to the opinion of other Judges, to have been successful, but it is one thing to criticise a decision and quite another to take the responsibility of deciding it.

The defendants in the present case rely chiefly on three cases which came up to your Lordships' House, and to which I must shortly refer. In the first of those cases—*Noakes* v. *Rice*, 1902 A.C. 24—the collateral advantage in question was a covenant tying the mortgaged premises, which consisted of a leasehold public-house, to the mortgagee's brewery. There was a proviso for reconveyance of the public-house to the mortgagor upon payment on demand or without demand of all moneys thereby covenanted to be paid. There was therefore a contractual right to a reconveyance whenever the mortgagor thought fit to pay, The tie, however, was for the whole term of the lease, and was clearly inconsistent with and repugnant to this right. It was therefore bad. There is, I think, nothing at variance with anything I have suggested to your Lordships either in the decision itself or in the speeches of any of the noble Lords who advised the House, with the exception of the speech of Lord Davey.

It is with the greatest diffidence that I venture to criticise any opinion expressed by so great an authority, but I cannot wholly accept what Lord Davey lays down as to the equitable principle in relation to mortgages. It appears to me that he omits to notice that the doctrine as to clogs upon the equity of redemption is applicable to all mortgages, and not confined to mortgages to secure borrowed money, and founding himself upon considerations which apply, if they apply at all, only to the latter class of mortgage, defines the equity to redeem in such a way that in many cases it could never fit the facts at all. I can best illustrate this by supposing that in the case he was considering the mortgage had been given by way of security for the debt of a third party, the mortgagee agreeing not to enforce the debt for a specified period. The tie would still have constituted a clog, being inconsistent with the proviso for redemption, and consequently inconsistent with any equitable right to redeem, but a considerable part of Lord Davey's judgment would have been entirely inappropriate. Thus, after approving Lord Lindley's statement in *Santley* v. *Wilde* to the effect that a clog is something inconsistent with the security and in the nature of a repugnant condition, he proceeds as follows—"But I ask 'security' for what? I think it must be security for the principal, interest, and costs, and, I will add, for any advantage in the nature of increased interest or remuneration for the loan which the mortgagee has validly stipulated for during the continuance of the mortgage. There are two elements in the conception of a mortgage—first, security for money advanced; and secondly, remuneration for the use of money. When the mortgage is paid off the security is at an end, and as the mortgagee is no longer kept out of his money the remuneration to him for the use of his money is also at an end." Then, after criticising *Santley* v. *Wilde*, he continues—"In my opinion every yearly or other recurring payment stipulated for by the mortgagee should be held to be in the nature of interest, and no more payable after the principal is paid off than interest could be. I apprehend that a man could not stipulate for the continuance of payment of interest after the principal is paid, and I do not think he can stipulate for any other recurring payment such as a share of profits. Any stipulation to that effect would in my opinion be void, as a clog or fetter on the equity of redemption." It is evident that no part of the above can possibly apply to mortgages other than those entered into upon the occasion of a transaction of loan.

It appears to me that the noble Lord is reasserting in a modified form the doctrine which prevailed prior to the repeal of the usury laws, and was based on those laws. As long as it was impossible because of the usury laws for a mortgagee before making a loan to stipulate for any collateral advantage, the equity was an equity to redeem on payment of the principal of the loan with interest and costs, and any stipulation to the contrary might be considered a clog; a mortgagee may now stipulate for a collateral advantage, but Lord Davey assumes that the equity remains the same; only, if this be so, it follows that every collateral stipulation which cannot be considered in the nature of interest is still bad. In my opinion the equity cannot remain the same when the only reason for its existence is gone. Nor can I accept the proposition that upon the occasion of a loan the mortgagee cannot stipulate for any payment falling due after the principal is paid. Such a rule would seriously interfere with business transactions and would be a hardship on mortgagees and mortgagors alike. Take, for instance, a case like *Potter* v. *Edwards*, 26 L.J. 468, Ch., where in consideration of

£700 a mortgagee agrees to pay £1000 with interest on a fixed date, and the proviso for redemption is framed accordingly. This is good, but according to the proposition in question if the mortgagee had desired further time for the payment of the £300 bonus and the proviso for reconveyance had been upon payment of the £700 and interest on the fixed date and the £300 by instalments payable later, there would have been an illegal clog. I can see no objection to a bargain by which money is advanced for three years and the borrower pays by way of remuneration or interest for the use of money a further sum payable by instalments extending over five years. Why should there be any principle of law or equity precluding free contract in this respect?

I come now to the second of the three cases to which I have referred, the case of *Bradley* v. *Carritt* (1903 A.C. 253). Here there was a mortgage of shares in a company expressed to be by way of security for borrowed money payable on or before a fixed date with interest in the meantime. This involved an obligation to retransfer the shares if the money and interest were paid as agreed. On default there would be an equity to a reconveyance on payment of principal, interest, and costs. There was a clause enabling the mortgagee on default to take over the shares in satisfaction of the debt. This was inconsistent with and a clog on the equity to redeem, and therefore bad. There was also a provision that the mortgagee should always thereafter as shareholder use his best endeavours to secure that the mortgagee or his firm should have the sale of the company's teas, and in the event of such teas being sold otherwise than to the mortgagee or his firm the mortgagor was to pay the mortgagee a commission. It was as to this latter clause that the difficulty arose. Was it or was it not operative after redemption? The real question, in my opinion, was whether it was inconsistent with or repugnant to the contractual right of the mortgagee to have his property restored unfettered if he paid the money secured with interest as provided in the agreement, and the consequent equitable right to have the property so restored if he paid this money with interest and costs at any time. On this point there was room for difference of opinion, and accordingly we find Bigham, J., A. L. Smith, M.R., Stirling and Vaughan Williams, L.JJ., Lord Lindley, and Lord Shand taking the one view, and Lords Macnaghten, Davey, and Robertson taking another. There is really no difficulty in the decision itself. It is merely to the effect that the case was within the principles of *Noakes* v. *Rice*. Lords Macnaghten, Shand, and Davey all thought that if the stipulations in question were binding after redemption the mortgagor could not upon redemption get back his property intact. In other words, that the stipulation was repugnant both to the contractual right and the equity. But both Lord Macnaghten and Lord Davey also expressed opinions to the effect that all stipulations for collateral advantages, and not only those which were repugnant to the contractual or equitable right, must come to an end upon redemption. These expressions of opinion were not, I think, necessary to the decision, and, though of course of the greatest weight, are not, I think, binding on your Lordships. I have already given my reasons for not being able to accept them. It appears to me that if they be accepted it will be found that equity has involved itself in a Gordian knot which can only be cut by an Act of Parliament, and that unless and until the Legislature finds time to intervene your Lordships will be obliged in the name of equity to connive at, and indeed assist in, the violation of fair and reasonable bargains. There is, I think, nothing in the former decisions of this House which compels your Lordships to submit to this indignity.

The last case to which it is necessary to refer is *Samuel* v. *Jarrah Timber and Wood Paving Corporation, Limited* (1904 A.C. 323). The facts of this case were simple. There was a loan, and certain debenture stock was by the express terms of the agreement to be transferred, and was in fact transferred, to the mortgagee "as security" for the loan. This meant that on repayment of the loan with interest the stock was to be retransferred. The loan was repayable upon thirty days' notice on either side, and the mortgagee was to have an option to purchase the stock for twelve months. This option being inconsistent with both the contractual and equitable right of redemption was clearly invalid. To use Lord Macnaghten's language —"It is an established rule that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged and the conveyance absolute." As I have already said, I think the rule depends on the inconsistency or repugnancy involved in any such provision. If once you come to the conclusion that the parties intended that the property should be reconveyed on payment off of the moneys secured, any provision which would prevent this must be rejected as inconsistent with and repugnant to the true intention. But, on the other hand, if you once come to the conclusion that this was not the real intention of the parties, then the transaction is not one of mortgage at all.

After the most careful consideration of the authorities I think it is open to this House to hold, and I invite your Lordships to hold, that there is now no rule in equity which precludes a mortgagee, whether the mortgage be made upon the occasion of a loan or otherwise, from stipulating for any collateral advantage, provided such collateral advantage is not either (1) unfair and unconscionable, or (2) in the nature of a penalty clogging the equity of redemption, or (3) inconsistent with or repugnant to the contractual and equitable right to redeem.

In the present case it is clear from the evidence, if not from the agreement of the 24th August 1910 itself, that the nature of the transaction was as follows:—The defendant company wanted to borrow £10,000, and the plaintiffs desired to obtain an op-

tion of purchase over any sheepskins the defendants might have for sale during a period of five years. The plaintiffs agreed to lend the money in consideration of obtaining this option, and the defendant company agreed to give the option in consideration of obtaining the loan. The loan was to carry interest at 6 per cent. per annum, and was not to be called in by the plaintiffs for a specified period. The defendant company, however, might pay it off at any time. It was to be secured by a floating charge over the defendant company's undertaking. The option was to continue for five years whether the loan was paid off or otherwise, and if the plaintiffs did not exercise their option as to any of the defendant company's skins a commission on the sale of such skins was in certain events payable to the plaintiffs.

I doubt whether, even before the repeal of the usury laws, this perfectly fair and businesslike transaction would have been considered a mortgage within any equitable rule or maxim relating to mortgages. It never was intended by the parties that if the defendant company exercised their right to pay off the loan they should get rid of the option. The option was not in the nature of a penalty, nor was it nor could it ever become inconsistent with or repugnant to any other part of the real bargain between the parties. The same is true of the commission payable on the sale of skins as to which the option was not exercised. Under these circumstances it seems to me that the bargain must stand, and that the plaintiffs are entitled to the relief they claim.

Their Lordships sustained the appeal.

Counsel for the Appellants — Hon. F. Russell, K.C.—J. F. W. Galbraith. Agents —Alfred Double & Sons, Solicitors.

Counsel for the Respondents — Micklem, K.C.—A. L. Ellis. Agents—Rawle, Johnstone, & Company, Solicitors.

HOUSE OF LORDS.

Friday, October 24, 1913.

(Before the Lord Chancellor (Viscount Haldane), Earl of Halsbury, Lords Atkinson, Mersey, Parker, and Sumner.)

GREAT CENTRAL RAILWAY COMPANY *v.* MIDLAND RAILWAY COMPANY.

(APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Railway-Amalgamation-Running Powers —Railways Clauses Act 1863 (26 *and* 27 *Vict. cap.* 92), *secs.* 36-39, 41, 55.

In 1865 the G. Railway Company absorbed the L. Company. One of the rights taken over from the L. Company was running powers over a section of the M. Company's line from M. to S. In 1906 the G. Company absorbed the D. Company, which had a junction with the M. Company's line at S. The G. Company sought to combine the two rights and carry traffic from the D. line *via* S. junction to M. junction.

Held that section 38 of the Railways Clauses Act 1863 only conferred on the G. Company the rights the D. Company enjoyed at the time of the amalgamation and were not entitled to use the D. and M. lines in conjunction.

Midland Railway Company v. *Great Western Railway Company* (L.R., 8 Ch. 841) *distinguished.*

Appeal from an order of the Court of Appeal reversing a judgment of NEVILLE, J.

The *facts* are sufficiently stated in the judgment of the Lord Chancellor:—

LORD CHANCELLOR — In this case the appellants brought an action against the respondents for the purpose of obtaining a declaration that the appellants were entitled to exercise running powers for all their traffic on the Mansfield and Worksop line of the respondent company and any part thereof, and for that purpose to run off and on the said line by way of Shirebrook Junction, subject as regards certain traffic to the conditions of a particular agreement.

The Great Central Railway Company is a company which has been formed by the amalgamation of other lines with a part that was originally its own. It incorporated with itself the undertaking of the Manchester, Sheffield, and Lincolnshire Railway Company in 1897, and much later, in 1906, it incorporated with itself the undertaking of the Lancashire, Derbyshire, and East Coast Railway Company, which I will call for short the Derbyshire Company.

Mansfield Junction lies at one end of a stretch of line which belongs to the Midland Railway Company, and at the other end is the point of junction with the line of the old Manchester, Sheffield, and Lincolnshire Railway. Under an Act of 1865 the old Manchester, Sheffield, and Lincolnshire Railway Company had running powers, exclusive of local traffic, over the stretch of Midland line to which I have referred, and these powers passed in 1897 to the Great Central Company. The Derbyshire Company had formed a junction, subject to certain restrictions, at a point called Shirebrook upon the Midland line, and the question which now arises is whether the Great Central Company, having succeeded to the powers not only of the Derbyshire Company in respect of this junction, but of the Manchester, Sheffield, and Lincolnshire Company, are able to use the running powers of the old Manchester, Sheffield, and Lincolnshire Company over the whole of that stretch for the purpose of bringing on to the Midland line the traffic which they may collect from various quarters at Shirebrook Junction.

The whole question turns upon the construction of the Railways Clauses Act 1863, which contains the general clauses which are ordinarily incorporated in railway amalgamations; and the point which arises is whether the sections which that Act contains are sufficient to confine the appellant company, as representing the Derbyshire