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

Railway Company, to that extent and no more, of user and of running powers over the Midland section which was possessed by the Derbyshire Company themselves. It is plain that the Derbyshire Company had not these general running powers over the Midland section which the Manchester, Sheffield, and Lincolnshire possessed, and, on the other hand, at the time when the Great Central Railway Company took over the undertaking of the Manchester, Sheffield, and Lincolnshire Company, they had not got the powers of the Derbyshire Company which they took over in 1906.

The case went before Neville, J., on the claim of the appellants to obtain the declaration to which I have referred, and Neville, J., decided in their favour; he thought that the case was really governed by the case of *Midland Railway Company* v. *Great Western Railway Company* (L.R., 8 Ch. 841), in which a company that had got all the rights of another company, including a junction with full powers to that other company to get on to the Great Western line, and which also itself possessed running powers over the Great Western, was held to have full running powers over the part of the Great Western line which was in question. But obviously in that case the rights were very different from the rights here. In that case there were the fullest rights in existence. Farwell, L.J., in distinguishing that case, points out that what we have here is a question of a quite different kind, turning on the terms of an amalgamation. Objections were raised by the respondents to the amalgamation with the Derbyshire Company at the time when the negotiations for it took place, and these objections were got over by inserting the sections of the Act of 1863 under which the Great Central, the amalgamating company, got nothing more as against the Midland than the amalgamated company the Derbyshire had before the amalgamation. Then he goes on to point out that by sec. 38 of the Act of 1863 the undertaking, rights, powers, and so on of the Derbyshire Company became vested in the appellants and were to be held, used, exercised, and enjoyed by them in the same manner and to the same extent as was the case at the time of the amalgamation.

Now the point becomes a very simple one if you once come to the conclusion that the rights of user of the amalgamating company—that is to say, the Great Central—are not to be greater in respect of the powers as regards this junction than the rights which existed at the time when the Derbyshire Company themselves possessed those rights. We are not dealing here with any question of facilities. We are dealing with what is quite different, a question of running powers; we are dealing with a question of user in that sense only. I am unable to come to any other conclusion that that Farwell, L.J., and the Court of Appeal were right in construing the sections of the Act of 1863 as confining the Great Central Company to the exercise of such running powers—and of no more—as the Derbyshire Company possessed at the time of the amalgamation. If that is so, then, as the Derbyshire Company did not possess these rights, the claim on which the action is put forward was not well founded and the judgment of Neville, J., was consequently wrong. I agree entirely with the view taken by the Court of Appeal, and especially with the reasoning of Farwell, L.J., and I consequently move your Lordships that the appeal be dismissed, with costs.

LORD PARKER—I agree. It appears to me that the real distinction between this case and the Hereford case (*Midland Railway Company* v. *Great Western Railway Company*, L.R., 8 Ch. 841) is that in the Hereford case the new access had been acquired for the purposes of the company which had the general running powers, and therefore could naturally be used in connection with those running powers. In the present case, however, the new access has not in any sense been acquired for the purposes of the undertaking of the Great Central Company as it existed prior to the amalgamation; it has been acquired only for the purposes of the undertaking transferred upon the amalgamation; and therefore, having regard to sec. 38 of the Railways Clauses Act 1863, it appears to me that it cannot be used in connection with the running powers which formerly attached only to the Great Central Railway Company.

The EARL OF HALSBURY, and LORDS ATKINSON, MERSEY, and SUMNER expressed their concurrence.

Their Lordships dismissed the appeal.

Counsel for the Appellants—Sir A. Cripps, K.C.—Jenkins, K.C.—Cozens-Hardy, K.C.—Bischoff. Agent—D. H. Davies, Solicitor.

Counsel for the Respondents—Upjohn, K.C.—F. H. Schwann. Agents—Beale & Company, Solicitors.

HOUSE OF LORDS.

Tuesday, December 9, 1913.

(Before the Lord Chancellor (Viscount Haldane), Lords Kinnear, Dunedin, and Atkinson.)

WHITELEY *v.* DELANEY.

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

Right in Security—Mortgage—Priority—Competition between Mortgagees—Form of Conveyance—Intention of the Parties.

A. mortgaged property in Yorkshire to B. in order to secure a loan of £300. He subsequently granted a second mortgage to the respondent C, and both mortgages were recorded under the Yorkshire Registries Acts. In order to provide the money to pay off C, A's daughter D undertook to buy the property if she could find someone to advance £300 to pay off B, and she instructed E, a solicitor, to this effect. E, ignorant