Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of James Fairclough v. *The Swan Brewery Company, Limited, from the Supreme Court of the State of Western Australia; delivered the 17th May* 1912.

PRESENT AT THE HEARING:

LORD MACNAGHTEN.
LORD ATKINSON.
LORD SHAW.
LORD MERSEY.

[DELIVERED BY LORD MACNAGHTEN.]

James Fairclough, a publican, the Appellant in this case became the registered proprietor of a lease of the Federal Hotel, Katanning, for the residue of a term of twenty years from the 12th of June 1905.

By an instrument of mortgage dated the 27th of December 1907, the Appellant therein called "the mortgagor," in consideration of the sum of 500*l*. lent to him by the Respondent Company, and in consideration of all moneys which might thereafter become owing by the mortgagor to the Company for goods supplied, or for money lent or advanced, or on any other account whatever, did thereby for himself, his heirs, executors, administrators, and transferees, covenant with the Company as follows:—

"That the mortgagor will pay to the Company the "said principal sum of 500*l*., by 209 successive monthly "instalments as follows, that is to say, 208 instalments of "2*l*. 8*s*. each, and one final instalment of 16*s*., the first of

" such monthly instalments of 2*l*. 8*s*. to be paid on the 1st day
" of January next, and a subsequent instalment to be paid on
" the 1st day of every succeeding month thereafter until the
" whole of the said principal sum of 500*l*. shall be paid off,
" provided always that the mortgagor shall not be at liberty
" to pay off the said principal sum, except by the instalments,
" and at the times aforesaid, without the express consent in
" writing of the Company on each occasion first had and
" obtained."

Then followed a covenant for payment of interest on the amount from time to time remaining unpaid, at the rate of 7*l*. per cent. per annum on the first day of every calendar month, and other covenants including a covenant stipulating in effect that during the continuance of the security the Federal Hotel should be a tied house in favour of the Company. For better securing the payment in manner aforesaid of the said principal sum and interest, and all other moneys intended to be thereby secured, the mortgagor thereby mortgaged all his estate and interest in the Federal Hotel to the Company.

It will be observed that the lease is made to expire on the 12th of June 1925, and that the instrument of mortgage provides that without the consent in writing of the Company, the mortgage debt of 500*l*. is not to be wholly paid off until the 1st of May 1925, that is just six weeks before the actual expiration of the lease.

In December 1909 the Company were prevented by accidental circumstances from supplying the Appellant with beer in accordance with a covenant on their part contained in the mortgage deed. The Appellant thereupon assumed to treat the tie as at an end, and obtained beer from other quarters. The Company brought an action for damages and for an injunction. The Appellant, who apparently had already offered to redeem, counterclaimed for redemption. McMillan, J., gave judgment for the Company in the action, and assessed the damages at 8*l*. On the counter-

claim he gave judgment for the Appellant, holding that by law he was entitled to redeem. On appeal to the Full Court an order was made in the action in favour of the Company with a reference as to damages. The counter claim was dismissed with costs. Hence the present Appeal.

The arguments of counsel ranged over a very wide field. But the real point is a narrow one. It depends upon a doctrine of equity, which is not open to question.

"There is" as Kindersley, V.C., said in *Gossip* v. *Wright*, 32 L.J., Ch. 653, "no doubt "that the broad rule is this: that the Court will "not allow the right of redemption in any way "to be hampered or crippled in that which the "parties intended to be a security either by "any contemporaneous instrument with the deed "in question, or by anything which this Court "would regard as a simultaneous arrangement "or part of the same transaction." The rule in comparatively recent times was unsettled by certain decisions in the Court of Chancery in England which seem to have misled the learned Judges in the Full Court. But it is now firmly established by the House of Lords that the old rule still prevails and that equity will not permit any device or contrivance being part of the mortgage transaction or contemporaneous with it to prevent or impede redemption. The learned Counsel on behalf of the Respondents admitted as he was bound to admit that a mortgage cannot be made irredeemable. That is plainly forbidden. Is there any difference between forbidding redemption and permitting it, if the permission be a mere pretence? Here the provision for redemption is nugatory. The incumbrance on the lease the subject of the mortgage according to the letter of the bargain falls to be discharged before the lease terminates, but at a time when it is on the very point of expiring when redemption

can be of no advantage to the mortgagor even if he should be so fortunate as to get his deeds back before the actual termination of the lease. For all practical purposes this mortgage is irredeemable. It was obviously meant to be irredeemable. It was made irredeemable in and by the mortgage itself.

Their Lordships are therefore of opinion that the order of the Full Court should be discharged with costs, and the decision of McMillan, J., restored. Their Lordships will humbly advise His Majesty accordingly.

The Respondent Company will pay the costs of this Appeal.

In the Privy Council.

JAMES FAIRCLOUGH

v.

THE SWAN BREWERY COMPANY, LIMITED.

DELIVERED BY LORD MACNAGHTEN.

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