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

of the existence of C's mortgage, arranged for F lending the £300 on mortgage, paid off B, and obtained from him the title-deeds, and prepared three dispositions of the property—(*a*) B to A, (*b*) A to D, (*c*) D to F—in security. C sued F, D, and A to have it declared that in virtue of deed (*a*) his mortgage had priority over F's.

Held that F was equitable transferee of B's first mortgage, and entitled to priority over C.

Toulmin v. *Steere*, 3 Mer. 210, *discussed.*

The majority of the Court of Appeal (COZENS HARDY, M.R., and BUCKLEY, L.J., FLETCHER MOULTON, L.J. *dissenting*), holding themselves bound by *Toulmin* v. *Steere*, 3 Mer. 210, reversed the decision of PARKER, J., and held the appellants had allowed a first mortgage over certain property in Yorkshire to become extinct.

The *facts* summarised above are reviewed at length in their Lordships' judgment, as in those of Parker, J., and Fletcher Moulton, L.J.

Their Lordships took time to consider their judgment.

LORD CHANCELLOR—As the result of the consideration which I have given to this appeal I have come to the conclusion that it is unnecessary for the House to express its opinion on the question whether *Toulmin* v. *Steere* was rightly decided. The case must, I think, be disposed of on other grounds—grounds which were to some extent referred to in the judgments both of Parker, J., and Fletcher Moulton, L.J.

Stripped of what is irrelevant, the events out of which the dispute has arisen may be stated as follows:—On the 2nd February 1899 Samuel Ogden mortgaged the Cross Hotel at Haworth in Yorkshire to Edward Bromley Manks (whose executors are the respondents) to secure £1800 and interest. On the 20th May 1899 Ogden mortgaged other property at Halifax in the same county, called the Gibbet Street house, to Manks to secure £500 and interest. On the 4th April 1900 Ogden mortgaged his Lower Brow property at Haworth to Ackroyd to secure £300 and interest. It is to this mortgage that the question in the present appeal chiefly relates. On the 18th July 1900 Ogden charged the Cross Hotel in Manks' favour with a further sum of £120 and interest, and on the 28th June 1901 he charged the same property in favour of Manks with a still further sum of £380 and interest. On the 16th October 1901 Ogden, by way of collateral security to Manks for the two further advances of £120 and £380, further charged the Gibbet Street house, and also made a second mortgage of the Lower Brow property, subject to Ackroyd's mortgage to Manks, to secure these further advances. This second mortgage is the title on which the case of the respondents rests. All these securities were duly registered in the Yorkshire Registry.

In the course of these transactions Manks ascertained that there was a charge on the Cross Hotel in favour of a bank, ranking by virtue of registration next after his mortgage, for £1800, and taking precedence of the further advances of £120 and £380. He then verbally arranged with Ogden that while the latter was in the usual way to pay the interest as it accrued on these three sums, the amounts so paid should not be appropriated to payment of such interest, but should be appropriated in part discharge of the principal sums of £120 and £380 until they had been wiped out. The interest on the £1800 secured by the prior mortgage to Manks was meantime to remain in arrear and increase the amount for which Manks had priority over the bank.

The learned judge who tried the action found that the payments made by Ogden prior to the 19th August 1905 were made on this footing, and that the sums of £120 and £380 were by so much reduced. On the 19th August 1905 a new verbal agreement was come to by which it was arranged, not only that future payments should be taken on account of interest, but that the past payments should be reappropriated to interest instead of to capital account. The effect of the new agreement was that the Gibbet Street house and the Lower Brow property were recharged with the amount by which the sums of £120 and £380 had been reduced. But in the interval, on the 25th March 1905, Ogden had further charged the Lower Brow property in favour of Ackroyd with £172, 18s. 11d. and interest, and this further charge had been registered. These facts were found by Parker, J., and his findings were not challenged on this appeal.

In 1907 Ackroyd was pressing Ogden for repayment, and the latter, being unable to find the money, offered to sell his Lower Brow property to his daughter Mrs Whiteley, the appellant, for £450. Thereupon, about the 12th July 1907, Mrs Whiteley and her husband saw Walshaw, a solicitor, and told him that she wanted to find someone who would advance the £300 due to Ackroyd, and that with this assistance she would buy the land. They left matters in Walshaw's hands. The latter communicated with a client of his own called Farrar, who agreed to advance £300 on a first mortgage of the land, and handed this sum to Walshaw for the purpose. Walshaw carried through the transaction on behalf of all parties excepting Ackroyd, who had his own solicitor. In his evidence at the trial he was asked whether he paid the £300 to Ackroyd's solicitor some days before Ackroyd executed a reconveyance. He replied that he did, and that he then took up the deeds. "We paid off the £300, took up the deeds, and we were satisfied that we had got the title." "Because you had the deeds you thought you were safe?" "Yes."

I entertain no doubt that the effect of the payment under these circumstances was to make Ackroyd a trustee of the legal estate for Farrar as transferee in equity of the mortgage to the extent of the £300 advanced by him. Now, neither Walshaw nor any of the other parties to the transaction knew of Manks' equitable security as second mortgagee, and Ogden did not disclose it.

Consequently Walshaw framed the deeds which were required to carry out the sale, and to give Farrar a legal mortgage and the title he had bargained for in the belief that Ogden had a clear title to the equity of redemption. These deeds were drawn in a form which he would certainly not have adopted had he known of the second mortgage to Manks. They were three in number. By the first, dated the 16th August 1907, Akroyd, the legal mortgagee, in consideration of the principal and interest under his mortgage having been repaid to him, conveyed to Ogden the Lower Brow property in fee-simple. By the second deed, which was of the same date, Ogden, on his recital that he was secured in fee-simple in possession free from incumbrances, conveyed to Mrs Whiteley in consideration of £450 paid to him by her. By the third deed, which was dated the next day, Mrs Whiteley, on the recital that she was secured in fee-simple free from incumbrances, conveyed by way of mortgage to Farrar to secure £300. The three deeds were all registered in the Yorkshire Registry on the 28th August at the same time, and it is plain that they formed steps in a single transaction.

The intention of the parties as shown on the face of the deeds was that Farrar should have a first mortgage, and it appears to me that this was the intention throughout. From the evidence of Walshaw and the other witnesses it is clear that the former paid the £300 to Ackroyd's solicitor some three weeks prior to the execution of the new deeds, on the terms of getting the title-deeds, and so obtaining temporarily an equitable first mortgage for his client Farrar. But for the outstanding second mortgage in favour of Manks, of which Ogden, for whom also he was acting, had left him in ignorance, the course he took would have been proper. As the facts were the course adopted was a mistaken one. The deeds themselves were obviously, having regard to the recitals that the land was free from incumbrances, drafted in error. Moreover, by their terms, they purported to discharge the mortgage to Ackroyd and to affect the new mortgage to Farrar after the lapse of a day, a period which might have let in the second mortgage of Manks, which was registered, and which would therefore under normal circumstances have taken precedence of the mortgage to Farrar, which was later in date. Had Walshaw known of Manks' incumbrance he would, of course, have so framed the deeds as to keep alive the equitable transfer of Ackroyd's mortgage which Farrar had obtained at the earlier date when he paid over his £300 and took the deeds as security.

There are two inferences which I draw from the facts proved at the trial. The first is that the parties to the three deeds must be taken to have agreed on instructions to Walshaw to the effect that the transaction was to be carried out by him in such a way as to give Farrar a first and legal mortgage, and to give Mrs Whiteley the benefit of any charges she paid off. Farrar was to find £300 and she was to find £150. This, it appears, she did, partly by paying to Ackroyd through Walshaw £48, 5s. 6d., which was the amount remaining due on the latter's second security of the 25th March 1905, and partly by releasing her father from debts which he owed to her. The second inference I draw is that Walshaw was instructed to carry this agreement, and nothing short of it, into effect, and that he framed the deeds in a form which failed to accomplish it. The reason of this failure was a mistaken belief, common to himself and all the parties to the deeds excepting Ogden, that Ogden's Lower Brow property was subject to no incumbrances other than the two in favour of Ackroyd. Ogden had withheld from them all knowledge of his mortgage to Manks. If Walshaw had known of this mortgage it would have been his duty to insert into the deeds he framed provisions which would have preserved the priorities of Ackroyd for the benefit of Farrar and Mrs Whiteley respectively. I think, therefore, that Farrar and Mrs Whiteley would have been entitled to invoke the assistance of a court of equity in rectifying the deeds on the ground of common mistake. And apart from this I think that neither Ogden, whose misrepresentation had given rise to the difficulty, nor anyone claiming through him, could have insisted as against the others on a title arising from the mistaken form in which Walshaw had framed them.

So far as the transaction with Farrar is concerned, the case may be stated in another way. Ackroyd conveys to Ogden, who gets the legal fee-simple. But Ackroyd was trustee for Farrar to the extent of the £300 advanced by the latter, and Ogden knew this. Ogden must therefore be taken to have become trustee in his place. Ogden then conveys to Mrs Whiteley, who took the legal fee-simple in like manner subject to Farrar's charge, and she then makes what is in form a fresh legal mortgage for the amount of his charge to Farrar. Farrar having thus become entitled in equity to the priority of Ackroyd's mortgage, this priority could not be taken from him without his consent. Now it is certain that Ogden could not have said that as between himself and Farrar he had destroyed the latter's equitable title, and it is equally clear that no one claiming only through him, as Manks did, could be in a better position. Unless, then, the parties to the deeds in question are to be taken to have destroyed Farrar's equitable title with his assent, he must succeed as against Manks. Now it is clear that no one so intended unless Ogden did, and if he so intended Manks can derive no benefit from his misconduct. It is said that all the parties, including Farrar, left matters in the hands of Walshaw to carry out the transaction as he thought best, and that they must abide by what he has done. But, as I have already pointed out, I think it clear that these instructions were based upon a definite agreement under which Walshaw was to frame the deeds so that Farrar should have a first mortgage. Misled by Ogden, and believing, as all other parties believed, that no other security

given by Ogden stood in the way, Walshaw drew the deeds in a form which did not carry out what must be taken to have been the antecedent bargain. If so, Ogden certainly could not have insisted on their having effect in the form in which they were framed. He could not have taken advantage of his own wrong, nor could he have resisted a rectification which would have made the deed carry out the bargain of the parties. But Manks only claims through Ogden. His title is equitable, and is no greater than that of the latter, and it is, for the purposes of a question with Farrar, the title of a volunteer who has given no consideration for the new priority which he is claiming. That title therefore remains subject to Ackroyd's original prior mortgage, which equity will not treat as displaced by the act of Ogden.

This conclusion appears to me to be inevitable. Whether the question is approached on the footing that Manks could not be allowed in equity to take advantage of the wrong done by Ogden, through whom he claimed, or whether the question is approached in the light of the principle that a court of equity will not enforce instruments which have been fashioned under a common mistake, the parties to the proceedings for such enforcement being the parties who would be required by the Court to be before it if these proceedings had embraced a counter-claim for rectification, I think that the appellants, Farrar and Mrs Whiteley, are both entitled to succeed in this appeal on these grounds alone.

In the Courts below the discussion was chiefly directed to another question, on which Parker, J., decided in favour of the appellants, but Cozens-Hardy, M.R., and Buckley, L.J. (Fletcher Moulton, L.J., dissenting), overruled him. That question was whether the case was governed by the decision of Sir William Grant in *Toulmin* v. *Steere* (3 Mer. 210). Sir William Grant was a great master of equity, and his judgments are regarded with deep respect. But the judgment in *Toulmin* v. *Steere* has been the subject of much criticism, and the more I have examined it the more difficult have I found it to discover a principle consistently applied. The difficulty is not rendered less by the fact that less than six years previously Sir William Grant had himself, in *Forbes* v. *Moffat* (18 Ves. 384) stated the true principle with the lucidity of which he was a master. The decision is not an application of what was laid down in *Otter* v. *Lord Vaux* (2 K. & J. 650; 6 D. M. & G. 638), that a mortgagor purchasing the interest of his first mortgagee cannot derogate from his own bargain by setting up the mortgage so purchased against a second mortgagee. For in *Toulmin* v. *Steere* it was not the grantor of the second mortgage, but subsequent purchasers of the equity of redemption, whose title was interfered with, and it is far from apparent why the rule should have any application to such a case. Indeed, it is now quite plain that a purchaser from a mortgagor and the first mortgagee can always, if he chooses, keep the first mortgage alive, and so protect himself against subsequent incumbrances, whether he had notice of them or not. Such authorities as *Stevens* v. *Mid-Hants Railway Company* (L.R., 8 Ch. A. 1064), *Adams* v. *Angell* (5 Ch. Div. 634), and *Thorne* v. *Cann* (1895, A. C. 11) in this House illustrate the distinction between such cases and those where, as in *Otter* v. *Lord Vaux*, there is a direct relation of contract with the second mortgagee.

What the Master of the Rolls and Buckley, L.J., held in the Court of Appeal in the present case does not seem to me to have been inconsistent with any of these authorities. Parker, J., had found that the manner in which the two interests had become united in Mrs Whiteley made it difficult to distinguish the case from *Toulmin* v. *Steere*, but he thought that as the effect of the subsequent authorities was that the doctrine of *Toulmin* v. *Steere* was not to be extended, it ought not to govern the case before him. He was of opinion that Mrs Whiteley had no notice, constructive or otherwise, of Manks' mortgage. Whether this fact ought logically to form a good ground for a distinction he doubted, but it did constitute, in his view, a circumstance which, on the authorities that declared that *Toulmin* v. *Steere* was not to be extended, he was bound to take into account. Apart from *Toulmin* v. *Steere* he was of opinion that the form of the deeds was not necessarily inconsistent with an intention to keep the prior incumbrance alive, and for this he relied on the decision in *Burrell* v. *Lord Egremont* (7 Beav. 205), where a tenant for life, having paid off a charge, procured the inheritance to be released from it, under circumstances and in a form which appeared to exclude an actual intention to keep the charge alive, and it was yet held that no intention to merge it had been proved.

The Master of the Rolls did not, I think, dissent from the general statement of the law made by Parker, J. But he said that where the person who pays off a charge is not the tenant for life, but the owner in fee of the estate charged, the presumption is that he does not intend to keep the charge alive. He thought that in the present case there had been constructive notice, but he did not rely on constructive notice as making a difference, nor did he think that *Toulmin* v. *Steere* really turned on notice. What he held, and Buckley, L.J., agreed with him, was that *Toulmin* v. *Steere* was an authority for the proposition that in a case like the present one there was a presumption that the purchaser did not intend to keep the charge alive, and that as *Toulmin* v. *Steere* has never been expressly overruled, he ought to follow it, and hold that no intention to keep the charge alive had been established.

I think that in the case before us it is difficult, quite apart from *Toulmin* v. *Steere*, so far as the mere form of the deeds is concerned, to come to a different conclusion as to an intention to merge from that of the majority in the Court of Appeal. These deeds proceed on a plain recital that Ogden, and then Mrs Whiteley, were seized

in fee-simple free from incumbrances, and they seem to me to disclose an intention to merge. It is true that in *Burrell* v. *Lord Egremont* there was no expression of intention in the instruments which the Court had to construe which pointed to an intention to preserve the charge alive, and yet it was held that the benefit of the charge was preserved. But in the present case I think it tolerably plain that the intention of Walshaw was to unite the equity of redemption and the mortgage in a new unincumbered fee-simple. If so, *prima facie* there was a merger. I do not rely on *Toulmin* v. *Steere* for this conclusion, nor do I think it necessary or even proper to express an opinion as to whether any part of the doctrine of *Toulmin* v. *Steere* is law to-day. What I do rely on is the form of the deeds and the circumstances of this particular transaction. But these, for reasons which I have already given, are not, in my opinion, conclusive as against the appellants. I interpret the facts differently from the majority in the Court of Appeal. I think that, as I have already said, there was an agreement come to before Walshaw was instructed to draw the deeds, to the effect that Farrar was to be right through the transaction in the position of a first mortgagee, and that Walshaw was misled into the mistake of framing the deeds on a different footing because of Ogden's concealment of Manks' incumbrance. It is upon this ground that I rest my opinion on the appeal before the House.

I mention the Yorkshire Registry Acts merely for the purpose of saying that they do not assist the respondents. For sec. 15 of the Act of 1884, which gives priority according to date of registration, provides that nothing in the section is to operate to confer on any person claiming without valuable consideration under any person any further priority or protection than would belong to the person under whom he claims, and that any disposition of land or charge on land which if unregistered would be fraudulent and void, shall not, notwithstanding registration, be fraudulent and void in like manner. I think that it is plain that the registration of the conveyance of the 16th August 1907 to Ogden could give neither to him nor to Manks as claiming through him any advantage to be derived from the Registration Acts.

The only claim made by the respondents in their statement of claims is for a declaration of the priority of Manks' security of the 16th October 1901, and for a conveyance of the legal estate and consequential relief. I am of opinion that this claim so far as it has been controverted fails, and that Parker, J., was right in dismissing the action.

I move that the judgment of the Court of Appeal be reversed, and that of Parker, J., be restored. The respondents must pay the costs here and in the Court of Appeal.

I may add that Lord Kinnear has requested me to inform your Lordships that he concurs in this conclusion.

LORD DUNEDIN—In this case I think it is absolutely necessary to begin by formulating to oneself a clear view of the facts. Indeed, I think that the difference of judicial opinion which is shown in the judgments under review will be found really to flow from the different views which the learned Judges concerned have taken of the true facts of the case. I do not recapitulate these facts. They are set out at length in the judgments. I will merely state the conclusions I draw from them. I hold that Farrar only parted with his £300 to his agent Walshaw upon the terms that in return for his money he was to have a first mortgage over the Lower Brow Farm; that Walshaw in obedience to those instructions paid Farrar's money to Ackroyd, and took from Ackroyd on Farrar's behalf the title-deeds to the property which Ackroyd then held in his capacity of first and legal mortgagee.

That ended what may be called the first chapter of the transaction. The other things happened three weeks later.

I pause here to observe that my view of the facts coincides with that taken by Parker, J., who conducted the trial, and Fletcher Moulton, L.J., in the Court of Appeal. It does not coincide with that of the Master of the Rolls or with that of Buckley, L.J. The Master of the Rolls takes the view that the £300 was paid to Ackroyd by Ogden. Buckley, L.J., thought it was paid by Mrs Whiteley, and both consequently incline to the view that the taking over of the title-deeds by Walshaw from Ackroyd was only in order to prepare the necessary deeds, and not in order to assure security to Farrar. I believe it is this difference in the view of the facts which is at the root of the divergence of opinion.

Taking, then, the facts as I hold them to be, the position of the matter at this time was that Farrar was in equity in the place of Ackroyd, and could have compelled a transference of Ackroyd's mortgage.

Now Farrar left it to his agent Walshaw to carry out what he wished by appropriate conveyancing, and here it is that the complication begins. Walshaw was not only agent for Farrar, but he was also acting as solicitor—that is, as agent—for Ogden and for the Whiteleys. Indeed it was at the instance of Ogden and the Whiteleys—induced by the fact that Ackroyd was threatening to foreclose—that any alteration in the *status quo* was contemplated. The alteration contemplated was that Mrs Whiteley should acquire the property, and that Ackroyd should be got out of the way. But Mrs Whiteley had not money enough to get Ackroyd out of the way, and she commissioned Walshaw to find someone who would find money to effect that object. Walshaw accordingly set himself to find Farrar, to whom he proposed the granting of a loan on first mortgage. He found Farrar and paid off Ackroyd with Farrar's money and took the title-deeds. Three weeks after he had thus paid off Ackroyd he proceeded to carry out, as he thought, the instructions of all his clients in the way we know, and in a way which would have fulfilled the instructions of all of them had it not been for the existence, unknown to all except Ogden, of the second mortgage in favour of

Manks. But as the deeds were executed, if nothing but these could be looked at, the result was indubitably not to carry out the intentions of Farrar. As the deeds stood, the effect was that all that Farrar got was a mortgage which, Ackroyd's mortgage being gone, was inferior in preference to that of Manks.

Mr Lawrence, in the very succinct and able argument which he addressed to the House, urged that the deeds carried out the bargain made, and that if in the event Manks got a benefit which he could hardly have anticipated it was only because the bargain made by Farrar, Ogden, and the Whiteleys was carried out in terms, and that Manks got no more than he was entitled to, because his original mortgage though a second mortgage was always on the terms that it should be a first if the existing first from any cause was wiped out. Or, as he put it, the pervading idea of the whole arrangement was that Ackroyd's mortgage should disappear, and that Farrar should hold a mortgage flowing from Mrs Whiteley.

I think that the fallacy in this view consists in ignoring the independent position of Farrar. Farrar was no party to the troubles of Ogden, who was pressed by Ackroyd, or the endeavours of the daughter Mrs Whiteley to come to the rescue of her father. He was a pure investor to whom his solicitor proposed that he should lend £300 as a first mortgage over a sufficient subject. His only idea, and that of his solicitor for him, was that the £300 should be secured. To say that this idea was swallowed up by the pervading idea as above expressed is, I humbly think, to confound the method, or effectuating a certain object with the object itself.

It appears to me, therefore, that as soon as the mistake made was discovered, and so long as no new rights to third parties had arisen on the faith of what had been done, Farrar would have been entitled to have the mistake rectified. Who could have opposed? Not Ogden, for he could not have taken advantage from his own wrongful concealment. Not the Whiteleys, for *ex hypothesi* they thought that what was done was giving Farrar all he had stipulated for. Not Ackroyd, for he had no interest and could not be prejudiced either way. What, then, was it in the mouth of Manks to say? The transaction was *res inter alios acta* as far as he was concerned. He had given no consideration for this transaction. And, further, he is only here because he is appealing to an equitable right. So that his equitable right, based upon his original contract, must needs come to this—a right to prevent equity doing, as between other parties with whom he had no concern, what equity would otherwise insist on doing. But his contract right was against Ogden alone, and if, as in a question with Ogden, the equitable right of Farrar to have the deeds reformed would have prevailed, it seems clear that there can be no equity in Manks to prevent that being done.

Actual rectification of the deeds is not necessary. It is conceded that to refuse Manks the declaration he asks is sufficient. The result is that attained by the formal judgment of Parker, J.

This view approaches the case from rather another aspect than that which has loomed largely in much of the argument, and some of the judgments of the Court below, but I do not think it is a new view. Thus Moulton, L.J., says—(1912, 1 Ch. 753)—"It" (that is, the equitable interest of Farrar in Ackroyd's mortgage) "was in the hands of Farrar and never passed to Ogden" (by Ackroyd's reconveyance). "The consequence is that in spite of the absolute language of the reconveyance this is not a case in which the owner of the equity of redemption in fact acquired the interest of the first mortgagee by the payment off of the mortgage debt and a reconveyance of the estate. . . . Ogden conveyed all that he had got to his daughter, but he could not convey that which he did not possess—namely, the outstanding first charge to Farrar." That embodies, in my view, in other words, the arguments which I have sought to express.

This view absolves me from the duty of considering whether the much-canvassed case of *Toulmin* v. *Steere* was or was not rightly decided. I confess I avoid that task with gladness. Not only was the judgment that of a great judge, but it is many years old, and only the strongest reasons should make a court of last resort upset a judgment on a point of conveyancing which has remained as authority for so long a time. So that, however the case might be decided, if it occurred now for the first time I should be inclined to hold that, if the facts of the case are identical, *Toulmin* v. *Steere* should still be followed. It is clear, however, that there has been, to say the least of it, a great reluctance on the part of judges learned in equity to extend the principle of *Toulmin* v. *Steere* beyond the limits of its own facts.

All seem agreed that in debatable cases merger takes place or not according to intention. Indeed, this seems a necessary corollary to the interposition of equity, for otherwise why not leave the parties to their position at law. The difference of opinion seems to come to a question of *onus*. Where law would involve merger, and where equity can save that consequence, is the *onus* on those who seek to say that there is merger or on those who will have the contrary? Must you prove an intention to merge, or an intention to keep alive the security?

I think, taking the cases cited as a whole, that the general view comes to this. Where by appropriate conveyancing the charge could be preserved (this excludes all cases of which *Otter* v. *Lord Vaux* is a type), then it will be for the party alleging the charge to be dead to show an intention to that effect. What have been called the presumptions arising from the continued existence of the charge being to the benefit of the person who has it paid off, as, *e.g.*, in the case of payment by a limited owner, are just, I think, the ways of expressing the same rule. In the application of this rule to the facts of the present case all depends on whether the true payer of the charge

was Farrar, and here, as I have already said, I prefer the view as expressed by Parker, J., and Fletcher Moulton, L.J., to those that are opposed.

LORD ATKINSON concurred.

Their Lordships sustained the appeal.

Counsel for the Appellants—T. H. Carson, K.C.—Tomlin, K.C. Agents—Williamson, Hill, & Company, Solicitors.

Counsel for the Respondents—P. O. Lawrence, K.C. — R. Watson — H. A. Hind. Agents—Burn & Berridge, Solicitors.

HOUSE OF LORDS.

Tuesday, December 9, 1913.

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

PLUMB *v.* COBDEN FLOUR MILLS COMPANY.

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

Master and Servant— Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *sec.* 1 — "*Arising out of*" *the Workman's Employment.*

A workman employed to do certain work by hand, and finding it more convenient to use his employer's machinery for the purpose, did so unknown to his employers and was thereby injured.

Held that though he had acted within the scope of his employment and could not be said by his conduct to have brought on himself a new and added peril, he had failed to show that the accident arose "out of his employment."

An award of the County Court Judge of Denbighshire in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) found, on the facts (detailed by Lord Dunedin in his judgment), that it was with the object of better discharging his duty that the workman adopted the procedure which led to the accident, and that the accident therefore arose "out of and in the course of his employment." The Court of Appeal (COZENS-HARDY, M.R., BUCKLEY and HAMILTON, L.JJ.) reversed this judgment and held that the accident did not arise out of the employment. The workman, Plumb, appealed to the House of Lords.

Their Lordships' considered judgment was delivered by LORD DUNEDIN, with the concurrence of the LORD CHANCELLOR and LORDS KINNEAR and ATKINSON, as follows:—

LORD DUNEDIN—I have not the slightest doubt as to the soundness of the judgment appealed from. As, however, we had the benefit of a very able argument and a copious citation of authorities, it may be of use to formulate the conclusions at which I have arrived.

The facts of the case are simple. The appellant was a foreman worker in the employment of the respondents, and his duties on the day on which he was injured consisted in the task, assisted by other workmen, of stacking bundles of sacks in a room in the respondents' premises. The work was done by hand. In the room in which this was being done there ran along the ceiling a shaft which transmitted power to machines in other rooms, but there were no pulleys on the shaft in this room, and it was not used in connection with any machine in this room. The stack had arrived at the height of about 7 ft., and the bundles could no longer be thrown up from the bottom. The appellant, who was on the top of the stack, then improvised a method of getting up the sacks. He put a rope round the revolving shafting, attached one end to the bundle, and sufficient tension being put on the other end of the rope to ensure friction, the sack was drawn up as by a crane. A bundle of sacks was drawn too far and stuck between the shafting and the ceiling. The appellant, to free the bundle, cut the rope. The bundle fell, and falling on the bundle on which the appellant was standing caused him to lose his balance. In his effort to recover equilibrium one arm got entangled with the rope which was round the shafting: he was pulled over the shafting and severely injured.

The question for decision is, did the accident arise out of his employment? The Court of Appeal held that it did not, and I agree with them.

It is well, I think, in considering the cases, which are numerous, to keep steadily in mind that the question to be answered is always the question arising upon the very words of the statute. It is often useful in striving to test the facts of a particular case to express the test in various phrases. But such phrases are merely aids to solving the original question, and must not be allowed to dislodge the original words. Most of the erroneous arguments which are put before the Courts in this branch of the law will be found to depend on disregarding this salutary rule. A test embodied in a certain phrase is put forward, and only put forward, by a judge in considering the facts of the case before him. That phrase is seized on and treated as if it afforded a conclusive test for all circumstances, with the result that a certain conclusion is plausibly represented as resting upon authority, which would have little chance of being accepted if tried by the words of the statute itself.

Under this reservation I propose shortly to examine some of the tests which have been found useful in the various cases which have occurred where the point was whether or not the accident arose out of the employment.

The first and most useful is contained in the expression "scope or sphere of employment." The expression was used in an early case, the case of *Whitehead* v. *Reader*, 1901, 2 K.B. 48, by Collins, L.J., who pointed out that the question of whether a servant had violated an order was not conclusive of