Mortgages—Long Term Mortgages as Clogs on the Equity of Redemption—[England].—In 1931 the plaintiff mortgaged to the defendant, a friendly society, an estate consisting of some ninety separate properties, to secure a loan of £310,000. The plaintiff covenanted to repay the loan by eighty half-yearly installments of the principal and interest combined, and not to sell the equity of redemption, or to lease for more than three years any part of the properties, without the consent of the mortgagee, such consent not to be unreasonably withheld. About six years later, the plaintiff brought an action for a declaratory judgment that it was entitled to redeem at any time upon payment of the principal with interest to the date of redemption. *Held*, for the plaintiff. The restrictive provisions of the mortgage constituted a clog on the equity of redemption. *Knightsbridge Estates Trust, Ltd. v. Byrne.*[1]

The rule against clogging the equity of redemption is, perhaps, the classic example of equity's solicitude for the debtor.[2] Courts have accordingly invalidated provisions in a mortgage[3] eliminating the right to redemption entirely.[4] The prohibition was easily extended to mortgages limiting recourse to equity to a stipulated time after default,[5] barring the right to redeem after the death of the mortgagor[6] or on failure of the heirs male of his body,[7] giving the mortgagee an option to purchase on payment of an additional sum prior to maturity[8] or on default.[9] Courts have likewise set aside stipulations in the mortgage such as agreements to buy goods from the mortgagee during the term of the mortgage,[10] to employ the mortagee as a broker,[11] or to pay a higher rate of interest on failure to meet promptly the interest due.[12] Such stipulations,

[1] [1938] 1 Ch. 741. The rule against perpetuities was held, in the instant case, not applicable to mortgages. See Gray, The Rule against Perpetuities 460 (3d ed. 1915); 185 Law Times 393 (1938).

[2] See Pritchard v. Elton, 38 Conn. 434 (1871); Vernon v. Bethell, 2 Eden 110 (1762); Turner, The Equity of Redemption 175 *et seq.* (1931).

[3] Contracts made subsequent to the mortgage do not clog the equity of redemption. See Reeve v. Lisle, [1902] A. C. 461; Melbourne Banking Co. v. Brougham, 7 A.C. 307 (1882). But the court must be satisfied that it is an independent transaction. Batty v. Snook, 5 Mich. 231 (1858); Tennery v. Nicholas, 87 Ill. 464 (1877); *In re* Edwards' Estate, 11 Ir. Ch. R. 367 (1861).

[4] See for example, Peugh v. Davis, 96 U.S. 332 (1877); Beverly v. Davis, 79 Wash. 537, 140 Pac. 696 (1914); Batty v. Snook, 5 Mich. 231 (1858); Salt v. Marquess of Northampton, [1892] A. C. 1.

[5] Simon v. Schmidt, 41 Hun (N.Y.) 318 (1886); Hughes v. Harlam, 166 N.Y. 427, 60 N.E. 22 (1901).

[6] Johnston v. Gray, 16 Serg. and R. (Pa.) 361 (1827).

[7] Howard v. Harris, 1 Vern. 190 (1683).

[8] Samuel v. Jarrah Timber and Wood Paving Corp., Ltd., [1904] A.C. 323. See also Vernon v. Bethell, 2 Eden 110, 113 (1762).

[9] Wilson v. Fisher, 148 N.C. 535, 62 S.E. 622 (1908); Price v. Perrie, Freem. Ch. 257 (1702).

[10] Noakes & Co. v. Rice, [1902] A.C. 24. *Cf.* G. & C. Kreglinger v. New Patagonia Meat and Cold Storage Co., Ltd., [1914] A.C. 25.

[11] Bradley v. Carritt, [1903] A.C. 253.

[12] Holles v. Wyse, 2 Vern. 289 (1693); Strode v. Parker, 2 Vern. 316 (1694). For other types of collateral stipulations see James v. Kerr, 40 Ch. D. 449 (1889); Horwood v. Millar's Timber and Trading Co., Ltd., [1917] 1 K.B. 305. In general see 2 White & Tudor, Leading Cases in Equity 13–16 (9th ed. 1928); 1 Coote, Mortgages 18–26 (9th ed. 1927).

it should be noted, do not eliminate the right to redeem at maturity. Nevertheless, courts have held such stipulations invalid under the rule against clogging the equity, on the ground that such collateral advantages in addition to the interest on the loan constitute an inequitable bargain.[13]

In the instant case the rule is further extended to give the mortgagor, contrary to the terms of the mortgage, a right to redeem *prior* to maturity. While this result appears in striking contrast to the general rule against compelling a mortgagee to accept before maturity payment of the principal and interest to the date of redemption[14] or even of maturity,[15] the court's conclusion is supported by earlier English decisions. The rule therein announced is that long term mortgages, postponing the date of redemption to maturity, might be unreasonable in the light of other features of the mortgage.[16] In such a case the mortgagor is privileged to redeem at will on payment of the principal with interest to the date of redemption. Thus in *Cowdry v. Day*[17] the twenty-year postponment was held invalid where the mortgagee was the solicitor of the mortgagor;[18] and in *Morgan v. Jeffreys*[19] the postponement for a twenty-eight year period bound only the mortgagor, while the mortgagee was free to require repayment at any time. Again, in *Fairclough v. Swan Brewery*[20] a twenty-year mortgage

[13] See Jennings v. Ward, 2 Vern. 520 (1705). Repeal of the usury laws was seized upon as a justification for relaxing the rule against clogging the equity. See Turner, *op. cit. supra* note 2, at 178; Wyman, The Clog on the Equity of Redemption, 21 Harv. L. Rev. 459, 470 (1908). See also G. & C. Kreglinger v. New Patagonia Meat and Cold Storage Co., Ltd., [1914] A. C. 25; Biggs v. Hoddinott, [1898] 2 Ch. 307; Noakes v. Rice, [1902] A.C. 24.

Courts have upheld the validity of agreements which would normally be condemned as clogs where the security was risky, or a family agreement was involved. Potter v. Edwards, 26 L. J. Ch. 468 (1859); Bonham v. Newcomb, 1 Vern. 231 (1683); Davies v. Chamberlain, 26 T. L. R. 138 (1909).

[14] 2 Jones, Mortgages 813 (8th ed. 1928). Tillon v. Brittou, 9 N. J. L. 120 (1827); McHard v. Whetcroft, 3 Harris and McHenry (Md.) 85 (1791); Kingman v. Pierce, 17 Mass. 247 (1821); Pederson v. Fisher, 139 Wash. 28, 245 Pac. 30 (1926); Bernard v. Toplitz, 160 Mass. 162, 35 N.E. 673 (1893); Chicago and I. R. Co. v. Pyne, 30 Fed. 86 (C.C. N.Y. 1887); Abbe v. Goodwin, 7 Conn. 377 (1829); Bovill v. Endle, [1896] 1 Ch. 648.

See also Moore v. Cord, 14 Wis. 231 (1861); Saunders v. Frost, 22 Mass. 267 (1827); Doering v. Schneider, 74 Ind. App. 294, 128 N.E. 936 (1920); Trahant v. Perry, 253 Mass. 486, 149 N.E. 149 (1925); Ballard Hassett Co. v. City of Des Moines, 207 Iowa 1351, 224 N.W. 793 (1929); Harding v. Tingey, 34 L. J. Ch. 13 (1864); *In re* Metropolis and Counties Permanent Investment Bldg. Society, Gatfields Case, [1911] 1 Ch. 698.

[15] Moore v. Kime, 43 Neb. 517, 61 N.W. 736 (1895); Bowen v. Julius, 141 Ind. 310, 40 N.E. 700 (1895); Browne v. Cole, 14 Sim. 427 (1845); Pyross v. Fraser, 82 S.C. 498, 64 S.E. 407 (1909). See also cases in note 31 *supra*.

[16] See Eve, J., in Davis v. Symons, [1934] Ch. 442, 448. Time provisions, if reasonable in the light of other circumstances, will be upheld. Biggs v. Hoddinott, [1898] 2 Ch. 307. See also Teevan v. Smith 20 Ch. D. 724, 729 (1882); *In re* Hone's Estate, Ir. R. 8 Eq. 65 (1873); *In re* Fortescue's Estate, [1916] 1 Ir. R. 268.

[17] 1 Giff. 316 (1859).

[18] All terms of mortgages between solicitor and client are subject to a close scrutiny dictated by public policy. See 2 White and Tudor, Leading Cases in Equity 16–19 (9th ed. 1928).

[19] [1910] 1 Ch. 620.

[20] [1912] A. C. 565. The mortgagor also stipulated that he would purchase all his liquor from the mortgagee. The court did not rest its decision on this point.

was on a lease which was to expire only six weeks after the date of redemption, making redemption nugatory. Finally, in *Davis v. Symons*[21] the court set aside a reciprocal twenty-year provision because the mortgage contained a stipulation prohibiting the sale of the equity of redemption except to a responsible person, and because the mortgage was partly on two endowment insurance policies which matured before the redemption date of the mortgage; the proceeds of these policies were to be paid to the mortgagee, thus making the policies irredeemable in addition to giving the mortgagee a benefit prior to the date of redemption.[22]

It might be urged, however, that the instant case does not contain the features which were found harsh in the aforementioned cases. The mortgages there involved were held oppressive because the postponement of redemption to maturity made such mortgages in effect irredeemable or because the postponement was binding only upon the mortgagor and not the mortgagee. In the instant case neither of the two objectionable features was present.

But it must be remembered that the rule against clogging the equity, though originally only a means of protecting the debtor's interest in the mortgaged estate,[23] was transformed by the English courts into a technique for reforming a transaction which appeared harsh and unreasonable.[24] In the instant case, therefore, the court granted the relief requested upon its determination that the bargain appeared unfair. The mortgage limited the mortgagor's power to lease the premises or to sell the equity of redemption; and what is of far greater significance, the mortgagor had no power to sell any of the ninety properties covered by the one mortgage, even though half-yearly payments of principal and interest were to be made and in time the value of the security would far exceed the amount of the mortgage.

It is submitted, nevertheless, that long term mortgages should not be held redeemable at the mortgagor's pleasure merely because of the postponement of the date of redemption to maturity. Since the inequity of the bargain does not result from the mere postponement[25] but rather from the operation of other features in the mortgage over a long period, the remedy should be primarily addressed to such oppressive features of the bargain. This would enable a court, wherever feasible, to permit postponement of the right to redeem and to set aside those restrictions which give the mortgage its oppressive character. To illustrate, let it be assumed that a forty-year mortgage on a single piece of property contains certain collateral stipulations limiting the mortgagor's power to lease, and that such stipulations are unreasonable only because they are to be in force during the forty-year mortgage period. In such a case a court might cut off the collateral stipulations and leave the parties within the framework of a legally recognized transaction. Such a result would be in accord with the tendency not to extend the doctrine against clogging the equity of redemption;[26]

[21] [1934] Ch. 442.

[22] For an old case in which a provision postponing the right to redeem was set aside see Talbot v. Braddill, 1 Vern. 184 (1683), and 1 Vern. 393 (1686).

[23] See Turner, The Equity of Redemption (1931) (*passim*). [24] *Id.* at 175 *et seq.*

[25] See the strong dictum in Davis v. Symons, [1934] Ch. 442, 448. *Cf.* Teevan v. Smith, 20 Ch. D. 724, 729 (1882); Biggs v. Hoddinott, [1898] 2 Ch. 307.

[26] It has been said by Lord Mersey that the clog doctrine "seems 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." C. & G. Kreglinger v. New Patagonia Meat and Cold Storage Co., [1914] A.C. 25, 45.

and is strongly suggested by the more traditional cases involving collateral stipulations[27] as well as by the general rule which permits a mortgagee to refuse, prior to maturity a tender of the entire principal and interest even to the date of maturity.[28] Furthermore, the proposed result would obviate the difficulties to which the application of the rule gives rise.[29] In the first place, the prospective mortgagee must, at the risk of losing the benefits of a long term investment, make the initial determination that the contemplated transaction is not unfair.[30] Secondly, the mortgagee is left under the doctrine of the instant case in an unfavorable position. The mortgagor[31] may redeem at will while the mortgagee could not compel full payment on demand; and not even the possible analogy to the usury cases would warrant such a result.[32]

Taxation—Process—Validity of Constructive Service in Proceeding in Personam —[Illinois].—The Illinois General Assembly enacted a statute whereby the validity of the annual tax levy ordinances of all taxing bodies containing 500,000 or more inhabitants (except the State) shall be conclusively adjudicated before the taxes are extended. Each taxing body affected shall, within sixty days after passage of its annual appropriation ordinance, file a copy of its annual tax levy ordinance with the county clerk who in turn shall, within ten days, file in the proper county court, a petition for the confirmation of such levy, which petition shall contain a return day not less than twenty-five nor more than thirty days therefrom. Within five days after the petition is filed, the county clerk shall publish in a newspaper a notice addressed "to all taxpayers concerned" and to the taxing body, which shall include the docket number of the cause and the return day fixed, and advise all persons who may be affected that they may file objections to the levy. There shall be a hearing on the

[27] See notes 11–18 *supra.*

[28] See cases cited in note 15 *supra.* Perpetual rent charges, perpetual options, and irredeemable mortgage bonds have been upheld. Fleming v. Self, 3 DeGex, M. & G. 996, 1024 (1854); *In re* Crofton, 1 Ir. Eq. 204 (1839); Dewing, Financial Policy of Modern Corporations 94 *et seq.* (1926).

Doubts on the validity of irredeemable debentures on the ground that they violate the rule against clogging the equity appear in a number of English cases. Salt v. Marquess of Northampton, [1892] A.C. 1; Noakes v. Rice, [1902] A.C. 24; Reeve v. Lisle, [1902] A.C. 461; Samuel. v Jarrah Timber Co., [1904] A.C. 323. The doubts were resolved by sec. 14 of the Companies Act of 1907, re-enacted as sec. 74 of the Companies Act of 1929, 19 & 20 Geo. 5, c. 23 (1929).

[29] In this connection, the instant case would seem to point to the conclusion that henceforth, in England at least, when a long term mortgage is placed on a number of properties (and perhaps on land which is likely to be subdivided as well) the mortgage must be so framed that alienation is possible whenever the value of the property exceeds that of fair security for the loan.

[30] The complaint is made that the attorney of the mortgagee is faced with the double task of safeguarding not only the interests of his own client, but the interests of his adversary as well. 185 Law Times 393 (1938).

[31] It might be suggested that the clog doctrine may, in the long run, operate to prevent mortgagors from obtaining as good terms as they can.

[32] Even the usury laws grant the court the power to scale down the interest or revise the bargain in some other appropriate manner. 63 & 64 Vict. c. 51 (1900); 12 Halsbury, Statutes of England 219 (1930).