Lordships' bar that according to the true construction and effect of clause 8 of the respondent's contract the Borough Council had the right to re-enter upon the works if in the opinion of the engineer the respondent was not proceeding with sufficient expedition in the performance of the work. For this purpose it was said the engineer was not acting as the officer of the Borough Council, but was placed by the contract in the position of an arbitrator or referee, and his decision was made conclusive on the rate of progress. No imputation, it was rightly said, had been made upon Mr Ward's good faith, and therefore the re-entry must be held to have been rightfully made and no cause of action arose from it. Admitting this to be so, and assuming that the true effect of the incorporation of the conditions of M'Williams' contract so far as the same were then applicable was to give the right of re-entry under clause 8 of M'Williams' contract not to the appellant, but to the Borough Council, the answer to the argument appears to their Lordships to be that the jury have found (7) that the corporation prior to the seizure of the works improperly prevented the respondent from proceeding with the works in the manner authorised by his contract, and (17) that the corporation prevented the respondent from proceeding with the works with sufficient expedition. It was not suggested before their Lordships that these matters were not properly before the jury, or that the questions were not properly left to them, or that there was not evidence before them on which they could properly find as they did. Their Lordships do not think that the appellants are precluded by the express finding that the seizure was wrongful from raising any questions of law, but they think that the 7th and 17th findings are fatal to the appellants' argument. The corporation, of course, means the Borough Council, acting by their engineer Mr Ward. Their Lordships have already expressed their opinion that the Borough Council and Ward were made the appellants' agents for the purpose of superintending the execution of the contract by the respondent, and the acts done and orders given by the Borough Council or Ward, which the jury have found prevented the respondent from proceeding with the works with sufficient expedition, were therefore within the scope of the authority conferred by the appellants. Their Lordships hold that a party to a contract for execution of works cannot justify the exercise of a power of re-entry and seizure of the works in progress when the alleged default or delay of the contractor has been brought about by the acts or default of the party himself or his agent—*Roberts* v. *Bury Improvement Commissioners*, February 7, 1870, L.R. 5 C.P. 310. Their Lordships also agree with the learned Judges as to the proper measure of damages or (more accurately) as to the right of the respondent to treat the contract as at an end and sue for work and labour done instead of suing for damages for breach of the contract. Their Lordships will therefore humbly advise His Majesty that the judgment appealed from should be affirmed and the appeal dismissed. The appellants will pay the costs of the appeal.

Judgment appealed from affirmed.

Counsel for the Plaintiff and Respondent—Skerrett. Agents—Shaen, Roscoe, Massey, & Co.

Counsel for the Defendants and Appellants—Cripps, K.C.—Northcote. Agents—Mackrell, Maton, Godlee, & Quincey.

## HOUSE OF LORDS.

*Friday, July* 1.

(Before the Lord Chancellor (Halsbury), Lord Macnaghten, Lord James of Hereford, and Lord Lindley.)

### HOULDSWORTH AND ANOTHER *v.* THE YORKSHIRE WOOLCOMBERS' ASSOCIATION, LIMITED, AND ILLINGWORTH.

(On Appeal from the Court of Appeal in England.)

*Company—Companies Act* 1900 (63 *and* 64 *Vict. cap.* 48), *sec.* 14 (1) (*d*)—"*Floating Charge.*"

The Companies Act 1900, sec. 14 (1), enacts—"Every mortgage or charge created by a company after the commencement of this Act, and being . . . (*d*) a floating charge on the undertaking or property of the company, shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless filed with the registrar for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured."

A company, incorporated under the Companies Acts, on the narrative that its bank account had been overdrawn, that it would from time to time require further advances, and that its guarantors had requested to be relieved of their liability, assigned to a trustee for the guarantors, subject to redemption on discharge of the guarantors from all liability, "all and singular the book and other debts now owing to the 'company,' and also all and singular the book and other debts which may at any time during the continuance of this security become owing to the company (but not including uncalled capital of the company), and the full benefit of all the securities for the said present and future book and other debts." The trustee was empowered at any time to give notice of the assignment to the

debtors, to receive the debts, or appoint a receiver of them, or to exercise the statutory power of sale, but was not to be answerable for permitting the company to receive and deal with the debts as if there were no security. The deed provided that the trustee, on a written request by a majority of the guarantors, should give notice of the assignment to the company's debtors for the time being, but otherwise it was not to be incumbent on him to take any proceedings. The deed did not contain any express provision against taking possession. The security was not filed for registration in the manner required by the Companies Act 1900, sec. 14 (1) (*d*).

*Held* that the security was a "floating charge" within the meaning of the Companies Act 1900, sec. 14 (1) (*d*), and, not being registered as therein required, was void against creditors.

The Yorkshire Woolcombers' Association, Limited, incorporated under the Companies Acts, by a trust deed dated the 23rd April 1900, conveyed to trustees, upon trust to secure debenture stock about to be issued, certain property, and charged in favour of the trustees, by way of floating security, all its other property and assets, both present and future, but not including capital for the time being uncalled. The debenture stock was in due course issued.

The Association became indebted to a bank on its current account, and its overdraft was guaranteed by certain firms and persons. These parties having requested to be relieved of their liability, and the bank having refused further advances, an arrangement was come to whereby the guarantors increased their guarantees to the bank, and took from the Association a security granted to Illingworth as trustee on their behalf over the books and other debts then due or to become due to the Association. The material provisions of this security are set forth in the rubric (*supra*). The security was not filed with the registrar for registration in the manner required by the Companies Act 1890, sec. 4 (1) (*d*).

On November 24th 1902 Houldsworth and another, as trustees for the debentureholders, raised an action against the Association to enforce their security, and in it there was appointed a receiver of the property, assets, and undertaking of the Association subject to this trust. On the 21st December Illingworth, as trustee for the guarantors to the bank, appointed a receiver of all the book and other debts comprised in his security, and his receiver on the same day informed the debtor of the security and required from them payment of the debts. By agreement between the two receivers provision was made for the collection of the book and other debts, &c., now claimed by both, and the depositing of the money so collected in an account in their joint names.

On the 6th March Illingworth served a notice of motion in the action, whereby he asked an order for the money deposited in the receivers' joint names to be paid to him or his receiver, and for liberty to his receiver to collect what debts of the Association still remained outstanding.

The Judge (FARWELL, J.) dismissed the action, and on appeal his decision was affirmed by the Court of Appeal (VAUGHAN WILLIAMS, ROMER, and COZENS HARDY, L.JJ.)

Illingworth appealed.

At the conclusion of the appellants' argument their Lordships gave judgment.

LORD CHANCELLOR (HALSBURY)—It does not appear to me that this case is susceptible of much discussion, nor do I think it necessary to give an abstract definition of what a "floating security" is. It is enough to say that this instrument is one, and I think it is one for many reasons. In the first place, you have that which in a sense I suppose must be an element in the definition of a floating security—that it is something which is to "float," not to be put into immediate operation, but such that the company is to be allowed to carry on its business. It contemplates not only that it should carry with it the book debts which were then existing, but it contemplates also the possibility of those book debts being extinguished by a payment to the company, and that other book debts should come in and take the place of those that had disappeared. That seems to me to be an essential characteristic of what is properly called a floating security. I agree with Cozens Hardy, L.J., in thinking that the recitals are not without their importance. They show an intention on the part of both parties that the business of the company shall continue to be carried on in the ordinary way; that the book debts shall be at the command of the company for the purpose of being used by it. Of course, if there was an absolute assignment of them, which fixed the property in them, the company would have no right to touch them at all. The minute after the execution of such an assignment they would have no more interest in them, and would not be allowed to touch them, whereas as a matter of fact it seems to me that the whole purpose of this instrument is to enable the company to carry on its business in the ordinary way, to receive the book debts that were due to them, to incur new debts, and to carry on their business exactly as if this deed had not been executed at all. That is what is meant by a "floating security." It appears to me, notwithstanding the argument which we have heard, impossible to doubt that the bargain between the parties which is shown by this instrument is one which could only be carried out at all by its being a floating security such as I have indicated which must comprehend those incidents. I am not able to deduce more from the instrument itself than the Court of Appeal have deduced, and I entirely agree with the judgment pronounced by them, and it appears to me that this appeal ought to be dismissed.

LORD MACNAGHTEN—I am of the same opinion. I think that the judgment of Farwell, J., affirmed by the Court of Appeal, perfectly correct. With regard to the criticism which Williams, L.J., passed on some words of mine in *Government Stock Investment Co.* v. *Manila Railway Co.*, December 10, 1896, L.R. (1897), App. Cas. 81, I only wish to observe that what I said was intended as a description, not as a definition, of a floating security. I should have thought that there was not much difficulty in defining what a floating charge is in contrast to what is called a specific charge. A specific charge is, I think, one that, without more, fastens on ascertained and definite property, or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and, so to speak, floating with the property which it is intended to affect until some event occurs, or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp. I agree that this is a clear case, and that the appeal should be dismissed with costs.

LORD JAMES OF HEREFORD and LORD LINDLEY concurred.

Appeal dismissed.

Counsel for the Plaintiffs and Respondents—Upjohn, K.C.—Montgomery. Agent—George Frenam.

Counsel for the Appellant—Neville, K.C.—E. P. Hewitt. Agents—Leslie & Hardy.

## HOUSE OF LORDS.

*Friday, July* 15.

(Before the Lord Chancellor (Halsbury), Lords Macnaghten and Lindley.)

### MERCER *v.* LIVERPOOL, ST HELENS, AND SOUTH LANCASHIRE RAILWAY COMPANY.

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

*Railway—Compensation—Land Injuriously Affected — Claim for Compensation by Lessee who has Acquired his Holding Subsequent to the Notice to Treat Given to Owner.*

A railway company in virtue of its statutory powers served on a proprietor notice to treat for the purchase of a part of his lands and for compensation for damage by the execution of their works. Subsequent to the notice and the sending in of the particulars of his claim, the proprietor granted a building lease of a part of his lands adjoining the land proposed to be acquired by the railway company. The proprietor's claim was settled by the payment of a sum of money. *Held* that the sum of money paid to the proprietor must be held to cover damage done to the lessee's holding in the execution of the works, and that the lessee could not claim compensation therefor from the railway company.

Lord Gerard was the proprietor of land near St Helens. Under their statutory powers the Liverpool, St Helens, and South Lancashire Railway Company, on 23rd October 1891, served on him a notice to treat for the purchase of a part of his land, and for compensation for damage by the execution of their works. On the 12th January 1892 Lord Gerard served on the Railway Company particulars of his claim. In February he made a verbal agreement with one Gleave to grant a building lease to the latter of a part of his land for 999 years from January 1, 1892. The land to be let adjoined the land proposed to be acquired by the Railway Company, but no claim for compensation for damage to it had been included in the particulars of claim. Gleave obtained possession, received a formal lease dated 14th June 1892, built some houses, and subsequently assigned the lease to Mercer.

Lord Gerard's claim against the Railway Company was by agreement of 14th October 1892 settled, and by deed of 27th February 1894, in consideration of the sum of £24,209 paid to him, he conveyed to the Railway Company the lands included in that agreement, and some others. The lessee had no knowledge of the notice to treat, agreement, and conveyance.

During the year 1895 the Railway Company in the execution of their works injuriously affected, by interfering with the access, and in other ways, the land held by Mercer. For this damage, in an arbitration under the Lands Clauses Consolidation Act, Mercer obtained an award of compensation, which with the expenses of the arbitration amounted to £371, 10s.

Mercer brought an action to enforce the award. The Judge (LORD ALVERSTONE, C.J.) gave judgment for the plantiff, but on appeal this decision was reversed by the Court of Appeal (VAUGHAN WILLIAMS, STIRLING, and MATHEW, L.JJ.)

The plaintiff appealed.

At delivering judgement—

LORD CHANCELLOR—In this case I cannot entertain any doubt that the judgment of the Lords Justices of Appeal was right. The position of things which is here disclosed upon the facts is that at the time when the notice to treat was given Lord Gerard was the owner not only of the land intended to be taken under the powers of the Act but of other land which might or might not be injuriously affected, without any communication to the Railway Company of the possibility of his sub-letting the land, or rather letting the land for building purposes on a building speculation, and without any communication to the Railway Company that he had done so. The compensation was ascertained not by the ordinary course of an inquiry by an assessment jury but by a bargain between the parties. Of course, inasmuch as we have nothing at all before us as to what