owners of the ship are not bound unless the firm of brokers who gave the order had their authority to place it. In this case it is perfectly evident that the defenders had a mandate from the legal owners of the ship for the time being—that is, the mortgagees in possession. This was disclosed upon the face of the register, and it was on their behalf that they gave the order.

It is therefore very surprising that the defenders when they came to state defences did not take up the true position, but say that they ordered the goods as agents for the Grahamstown Shipping Company, who were the owners at the date of the proof, but were not the owners of the ship at the time when the order was placed. That was a very misleading statement, and was calculated, as Lord Guthrie has indicated, to induce the pursuer to go on with his action, because he felt that he was able to refute the only defence that had been put forward. I think we ought to penalise the conduct of the defenders in the way that Lord Guthrie has suggested—by refusing them their expenses before the Sheriff-Substitute. I think it would be going too far if we carried that refusal beyond the Sheriff-Substitute's Court, especially as the pursuer never seems to have really ascertained what his true legal position was, and came before the Sheriff and before us maintaining that upon the proof and documents he had established personal liability against the defenders.

LORD JUSTICE-CLERK—I agree with what your Lordships propose. I will say for myself that if I had been deciding this case alone I should have been a little more drastic in dealing with the defenders' expenses. I think this case is—shall I call it—a model of what ought not to be. I never have seen such a defence as that stated here. It is absolutely misleading. Your Lordships have dealt with it by proposing that expenses should not be allowed up to the date of the Sheriff-Substitute's interlocutor. While I concur in that, I repeat what I said at the beginning, that I would have taken a more drastic course had I been left to myself.

LORD ARDWALL was absent and LORD DUNDAS was sitting in the Extra Division.

The Court pronounced this interlocutor—

"... Dismiss the appeal and affirm the said interlocutors appealed against, except in so far as the finding for expenses in the said interlocutors is concerned, which are hereby recalled. . . . Find the defenders entitled to expenses in this and in the Inferior Court from 14th October 1910. . . ."

Counsel for Pursuer (Appellant)—Constable, K.C.—Lippe. Agents—Balfour & Manson, S.S.C.

Counsel for Defenders (Respondents)—Horne, K.C.—Aitchison. Agents—Whigham & MacLeod, S.S.C.

Saturday, November 18.

EXTRA DIVISION.

[Lord Skerrington, Ordinary.

BRITISH LINEN BANK *v.* CITY OF EDINBURGH.

Loan—Burgh—Statute—Municipal Borrowing—Redeemable Stock—Construction—Edinburgh Corporation Stock Act 1894 (*57 and 58 Vict. c. lvi*), *sec.* 5—*Edinburgh Improvement and Tramways Act* 1896 (*59 and 60 Vict. cap. ccxxiv*), *sec.* 83.

The Edinburgh Corporation Stock Act 1894 empowered the Corporation to create stock "redeemable at the option of the Corporation at par after the expiration of a period to be fixed by . . . resolution not exceeding sixty years from the first creation of the stock." The Edinburgh Improvement and Tramways Act 1896 provided for the issue of a new class of stock similarly redeemable "at one and the same period to be fixed by the Corporation, but not exceeding sixty years from the first issue of such stock." In pursuance of these powers the Corporation on 7th April 1897 passed a resolution for the creation of £750,000 two and a half per cent. stock "redeemable at par after the expiration of a period of thirty years from 15th May 1897," and issued a certificate providing that such stock should be redeemable at par after Whitsunday 1927. In an action of declarator at the instance of the British Linen Bank as holders of a certain amount of such stock against the Corporation, *held*, on a sound construction of the statutes, resolution, and certificate, that the Corporation were bound to redeem the stock immediately on the expiry of 15th May 1927 on the application of the holders thereof.

The Edinburgh Corporation Stock Act 1894 (57 and 58 Vict. cap. lvi) provides—"... Whereas it is expedient that the Corporation should be authorised to exercise their statutory borrowing powers for the time being by means of the creation and issue of Corporation stock as in this Act provided . . . Be it enacted . . . section 5 (1) Where the Corporation have for the time being any statutory borrowing power, then subject and according to the provisions of this Act the Corporation may from time to time by resolution exercise the power by creation of redeemable stock to be from time to time issued for such amount within the limit of the power at such price to bear such half-yearly or other dividends and to be so transferable . . . as the Corporation by the resolution for the first creation of Corporation stock direct: Provided that all Corporation stock at any time and from time to time so created shall be created on and subject to such terms and conditions as that the same shall form one and the same class of stock bearing one and the same rate of dividend, and shall become

redeemable as hereinafter provided after the expiration of one and the same period from the first creation of Corporation stock. (3) The resolution for the first creation of Corporation stock shall provide that such stock shall be redeemable at the option of the Corporation at par after the expiration of a period to be fixed by the resolution not exceeding sixty years from the first creation of the stock . . ."

The Edinburgh Improvement and Tramways Act 1896 (59 and 60 Vict. cap. ccxxiv) enacts:—Section 83—"The Corporation, in addition to the powers contained in the Edinburgh Corporation Stock Act 1894, may, and they are hereby authorised at any time to create and issue a new class of stock for all or any of the purposes for which the Corporation may create and issue stock to bear any rate of dividend which the Corporation may fix, and all stock of such class shall be redeemable at the option of the Corporation at one and the same period to be fixed by the Corporation, but not exceeding sixty years from the first issue of such stock."

The British Linen Bank as holders of £254,000 2½ per cent. redeemable stock, part of an issue of £750,000 created by a resolution passed by the Town Council of Edinburgh on 7th April 1897, in exercise of the statutory powers, brought an action against the Corporation for declarator that on a sound construction of the statutes a resolution passed in pursuance thereof and a prospectus the defenders were bound to redeem the stock immediately on the expiry of the 15th day of May 1927 on the application of the holders thereof. At the hearing in the Inner House the pursuers intimated that they did not found on the prospectus.

The resolution provided, *inter alia*—"*Third.*—That such stock shall be redeemable at par after the expiration of a period of thirty years from 15th May 1897."

The certificate of the stock provided, *inter alia*—"This is to certify that

the proprietor of pounds of Edinburgh Corporation two and a half per cent. redeemable stock, subject to the Acts of Parliament relating thereto. . . .

"*Note.*—Only £5 or multiples of £5 of this stock can be transferred. Redeemable at par after Whitsunday 1927 . . . Interest payable half-yearly on 15th May and 11th November."

The defenders pleaded, *inter alia*—"(2) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons, and the action should be dismissed. (3) In respect that the stockholders, under the terms of issue of said stock, have no right to demand repayment of their loans prior to 15th May 1957, the defenders are entitled to decree of absolvitor."

On 17th January 1911 the Lord Ordinary (SKERRINGTON) sustained the second plea-in-law for the defenders and dismissed the action.

Opinion.—"The pursuers are the holders of a large block of municipal stock which was allotted to them by the defenders the Corporation of the City of Edinburgh in the year 1897. The Corporation's resolution to create this stock is dated 7th April 1897, and bears to be under the authority and subject to the provisions of two private Acts of Parliament dated in 1894 and 1896 respectively. It purports to 'create stock to be called the Edinburgh Corporation 2½ per cent. redeemable stock, and to be issued to an amount which shall be sufficient for the following purposes, but not exceeding £750,000.' It also bears 'that such stock shall be redeemable at par after the expiration of a period of thirty years from 15th May 1897.' In the present action the pursuers ask for declarator that on a sound construction of the statutes and resolution above referred to, and also of a certain prospectus, the defenders are bound to redeem the said stock immediately on the expiry of the 15th day of May 1927. Though the conclusion is not so expressed, the pursuers mean that the defenders must redeem the stock at par. The prospectus referred to in the conclusion represented with perfect truth that the stock would 'be redeemable at par after 15th May 1927,' but that representation has no bearing upon the present dispute. The defenders have in the exercise of their Parliamentary powers created a peculiar species of property, and the only point in controversy is whether the property so created does or does not possess the quality which the pursuers attribute to it, viz., that it must be redeemed on 16th May 1927. It must be clearly understood that the present action relates exclusively to what is called the new or 2½ per cent. Edinburgh stock which was created and issued under the combined powers of the Acts of 1894 and 1896. It has nothing to do with the original or 3 per cent. stock which was issued under the powers of the 1894 Act alone. It will be necessary for me to express an opinion as to the meaning of the 1894 Act, but of course the rights of the 3 per cent. stockholders depend not merely on that Act but on statutory resolutions, the terms of which are not before the Court in the present action. It will also conduce to clearness if I state that counsel on both sides thought it unnecessary to debate the question whether the holders of either class of stock have a legal interest in the 'Loans Fund' established by the Act of 1894 for the purpose of providing for the payment of dividends and the redemption and extinction of all Corporation stock. Even if this question were answered affirmatively, it would not entitle the pursuers to the declarator for which they ask.

"Prior to the year 1894 the City of Edinburgh had obtained from Parliament and had partially exercised borrowing powers of various kinds, but none of its private Acts had authorised the creation and issue of municipal stock. The defenders might probably have taken advantage of the powers conferred upon local authorities by the Local Authorities Loans (Scotland) Acts 1891 and 1893 (54 and 55 Vict. cap. 34, and 56 Vict. cap. 8), and have issued redeem-

able stock in terms of these Acts. This course might, however, have involved disputes with the creditors under the then existing city debt, and the Corporation would further have been subject to the control of the Secretary for Scotland in the management of its finances. The defenders accordingly obtained a private Act, which is an adaptation of the public Act of 1891 to the special requirements of the city of Edinburgh, and which authorises the Corporation to exercise any unexhausted statutory borrowing powers by the creation and issue of redeemable stock. It is called the Edinburgh Corporation Stock Act 1894 (57 and 58 Vict. cap. lvi). The draftsman of the private Act had the public Act of 1891 before him. Section 5, which deals with the 'creation of stock' is practically the same in the two statutes, except that in the Edinburgh Act the reference to the Secretary for Scotland and all words expressly imposing an obligation on the Corporation to redeem the stock have been omitted. Nothing can be more significant than the contrast between section 5 (1) and (4) of the public Act and the corresponding clauses of the Edinburgh Act. This observation is not of course conclusive as to the construction of the Edinburgh Act, because the statute read as a whole may by necessary implication impose such an obligation on the Corporation. After carefully reading the statute, however, I have come to the conclusion that it is impossible to hold that the Corporation was impliedly bound by the Act of 1894 to redeem all stock created under the powers of that statute, though it may be that it was entitled in the statutory resolution for the creation of such stock to fix a date at which the option of redemption would be exercised.

"Section 5 (1) of the Act 1894 contains a proviso requiring that all Corporation stock from time to time created under the powers of that section 'shall form one and the same class of stock bearing one and the same rate of dividend, and shall become redeemable as hereinafter provided after the expiration of one and the same period from the first creation of Corporation stock.' Various issues of stock were made under the powers of this section, all of which bore the same rate of dividend, viz., 3 per cent., and were redeemable at the same date, viz., 16th May 1924. It seems to have occurred to the defenders that they could borrow money on more favourable terms, and accordingly a single section was introduced into the Edinburgh Improvement and Tramways Act 1896 (59 and 60 Vict. cap. ccxxiv) authorising the issue of a new class of stock, being that with which alone the present action is concerned. Section 83 of the Act of 1896 is as follows—'. . . [*quotes, v. sup.*] . . .' It is remarkable that the 1896 Act does not enact that the whole provisions of the 1894 Act with reference to the original stock shall apply, *mutatis mutandis*, to the new stock. Unless some such enactment is implied, section 83 of the later Act is unworkable. It appears from the resolution already quoted that the defenders assumed that the provisions of the 1894 Act applied to the new stock, and I think that they were right. I read section 83 of the 1896 Act as an addition to and an amendment of section 5 (1) of the 1894 Act. The result is that from 1896 onwards the defenders had power to create and issue two different kinds of stock, and that the provisions of the earlier Act apply equally to the original stock and to the new stock. Whether that is or is not the right way to get over the difficulty, I agree with the pursuers' counsel (the Dean of Faculty) in thinking that so far as the present controversy is concerned the rights of his clients fall to be determined primarily on a construction of the resolution quoted at the beginning of this opinion and of section 83 of the 1896 Act, the language of which is somewhat more favourable to his case than that of section 5 of the 1894 Act. As regards section 83, he argued that the new stock was stamped by Parliament as a redeemable stock, and that it was absurd to suppose that the Corporation had an option to convert it into a perpetual stock by simply doing nothing. He argued that the words 'at the option of the Corporation' as used in the section did not qualify the antecedent 'redeemable' but referred to what came afterwards, and were intended to make it clear that the Corporation should be entitled to fix the date of redemption at any date which they chose to select within sixty years from the first issue of the stock. He also maintained that the word 'period' as used in the section meant a specific date to be fixed by the Corporation. It followed that according to the intention of Parliament the stock must be redeemed within sixty years at the outside, and in the present case at the expiry of thirty years, being the date fixed by the Corporation itself. It seems to me that the Dean of Faculty's reading of the section reduces the words 'at the option of the Corporation' to mere surplusage. Even, however, if his reading of section 83 is accepted, the section and the relative resolution come to no more than that the stock 'shall be redeemable' at a particular date. The word 'redeemable' is a familiar one in our law, and it imports no more than that the creator of a right has a 'power or faculty' to re-acquire it on certain terms—Ersk., ii. 8. 2. So too it has been decided in England on the construction of a contract between a limited company and its debenture-holders that *prima facie* the word 'redeemable' means nothing more than that the debentures are 'liable to redemption.' Of course there is nothing to prevent a person who has reserved a power of redemption from contracting to exercise that power at a particular time and in a particular manner, and such bargains were resorted to at one time in the hope of evading the Usury Acts. Again, the Local Authorities Loans Act 1891 affords an excellent example of a statutory power to redeem 'coupled with a duty.' I use the phraseology of the interpretation clause of the 1891 Act which is followed in the

corresponding clause of the Edinburgh Act of 1894. Anyone who alleges that a redeemable stock must be redeemed is bound in my opinion to show the existence of the obligation upon which he founds, and this the pursuers have failed to do. Parliament might quite well have followed the same policy in the Edinburgh Act as it adopted in the Local Authorities Loans Acts, and have made all stocks issued by the Corporation compulsorily redeemable within a certain period. But I see nothing absurd or improbable in the scheme which was actually adopted, viz., that the whole question should be left to the discretion of the Corporation. I accordingly sustain the defenders' second plea-in-law and dismiss the action."

The pursuers reclaimed, and argued—On a sound construction of the Edinburgh Corporation Stock Act 1894 (57 and 58 Vict. cap. lvi), sec. 5, and the Edinburgh Improvement and Tramways Act 1896 (59 and 60 Vict. cap. ccxxiv), the resolution following thereon and the certificate, the words "shall be redeemable," meant that the defenders were bound to redeem the stock at Whitsunday 1927 on the application of the holders. To interpret them as a mere faculty of redemption or option to redeem was inconsistent with the language of the statutes and more especially with the limitation provided by sixty years. It would, further, have the effect of making the loan perpetual, and this was contrary to the general practice in all local legislation. When the Legislature sanctioned borrowings they invariably set a term for repayment which corresponded with the period at which the benefit arising from the loan would be exhausted, in this case estimated at sixty years. Redeemable stock meant stock which the person who issued it was bound to redeem at the date when it was said to be redeemable. The affix "able" was of Latin origin and signified originally a power or faculty, but usage had converted this primary meaning into that of obligation or liability, *e.g.*, the word "repayable" meant an obligation to repay—*in re Tewkesbury Gas Company*, [1911] 2 Ch. 279. In the case *in re Chicago and North-west Granaries Company, Limited*, [1898] 1 Ch. 263, the circumstances were different, and the context showed that a different meaning was to be attached to the word. The word "after" in the resolution was equivalent to "at," and the words "at the option of" simply referred to the faculty which the defenders had under the statutes to advance the period at which they would be bound in any event to redeem. The private Acts were a complete code for the case, and it was incompetent to refer to the general Act founded on by the defenders, but in any event that Act did not support the defenders' contention.

Argued for the defenders—On a sound construction of the statutes, resolution, and certificate, there was no right conferred on the defenders to require repayment at any time. It was incorrect to say that the policy of the Legislature had been to sanction no borrowing by public bodies without a period for repayment. There were really three periods in the history of such borrowings, viz., (1) where a definite term for repayment is prescribed; (2) where borrowings for different purposes are consolidated into one stock and the borrower is given the option of redeeming within a certain period, at the expiry of which the loan must be repaid; (3) when the issue of the stock is sanctioned without any obligation to redeem—Report of the Select Committee on the application of Sinking Funds, June 16, 1909 (No. 193 House of Commons Papers for 1909). The position of the pursuers was the same as stockholders in a company. The reference to option in both sections of the private Acts, together with the fact that the ordinary meaning of "redeemable" signified a faculty, confirmed this view. There was an obvious distinction in the word "repayable," which signified an obligation not only in financial speech but in common parlance. *In re Chicago and North-West Granaries Company, Limited, cit. sup.* was in point. A comparison of the sections in the private Acts with the corresponding clauses in section 5 of the Local Authorities Loans (Scotland) Act 1891 (54 and 55 Vict. cap. 34) showed that while the former were modelled on the latter, the latter contained words imposing an obligation to redeem which were absent in the former. The proper construction of the statutes was that the stock became redeemable at the option of the Corporation at Whitsunday 1927, and if not redeemed then became irredeemable for all time thereafter, or alternatively that this stock became redeemable at the option of the Corporation and remained redeemable at its option for all time thereafter, the sixty years being regarded not as a limit to the exercise of the option but as a period within which it must begin.

At advising—

LORD KINNEAR—This is an action by the British Linen Bank against the Corporation of Edinburgh for a declarator that on a sound construction of certain statutes and a resolution under which the defenders in 1897 created and issued £750,000 two and a-half per cent. redeemable stock, the defenders are bound to redeem the said stock immediately on the expiry of the 15th day of May 1927 on the application of the holders thereof. The defenders plead in answer in the first place that the action is premature and incompetent, and should be dismissed. But that plea, which I suppose was founded upon the notion that we ought not to declare at present a right which will only emerge in 1927, is no longer insisted in; and counsel for both parties stated at the bar that it is in the interests of both that the question between them should now be decided. Accordingly we must entertain the action as being properly brought.

The only other specific defence is that under the terms of the issue of the stock the stockholders have no right to demand

repayment of the loans prior to 15th May 1957. Reading that plea as it stands I should have thought it implied—I do not know whether it was meant to imply—that on the arrival of 15th May 1957 the stockholders would have a right to demand payment which it is denied they have at present; but the defenders' counsel and the Lord Ordinary have gone further, because according to the argument maintained to us, and according to the judgment of the Lord Ordinary, the view of both is that the right of the Corporation is to redeem or not redeem according to their own judgment and discretion. The stockholders, who have advanced money upon the terms contained in the Acts of Parliament and the documents regulating the issue of the stock, are, according to that view, never to be entitled to demand repayment of the money which they have advanced.

The question depends upon the terms of the certificate which has been issued to the pursuers, read with reference to the statutes which authorised the creation of the stock. The certificate sets out that the person named is proprietor of so much of 2½ per cent. redeemable stock subject to the Acts of Parliament relating thereto; and there is a note that the stock is redeemable at par after Whitsunday 1927, and that interest is payable half-yearly on the 15th May and 11th November. If one were to take this document by itself, *prima facie* it would appear to me to mean that the stock—whatever "stock" may mean—is to be redeemed at par at or after Whitsunday 1927, and that until then it is to bear interest at 2½ per cent. payable half-yearly on 15th of May and 11th of November.

But then the argument is that that is not the true nature of the Corporation's undertaking. The first argument which was maintained by the defenders' counsel I must confess does not much impress my mind. It was maintained that taking the word "redeemable" by itself it means only that the Corporation has a power to redeem, but is under no obligation to exercise that power. I must say I think very little importance is to be attached in questions of this kind to etymological considerations. It is a most fallacious way of construing an Act of Parliament or any legal instrument to take a single word by itself and pull it to pieces in order to get at what is supposed to be its original or primary meaning, because words in common use acquire secondary meanings and carry a variety of different implications according to the connection in which they are used. We must read the whole clause and interpret the language used with reference to the context and the subject-matter and the avowed object of the statute.

I think that is very clearly brought out by the two authorities which were cited by the defenders' counsel in support of their contention as to the meaning of the word "redeemable." The opinion of Mr Justice North, to which they referred as to the meaning of the word in a particular prospectus which he was construing, is not founded upon the view that the word has one fixed and definite signification which is always to be attached to it wherever it occurs, but it is founded upon an exact consideration of the actual document with which he was dealing, and it was upon a reading of the whole document that he came to his conclusion in the particular case.

The other authority is Erskine, ii, 8, 2, referred to by the Lord Ordinary in the passage of his opinion in which he says—"The word 'redeemable' imports no more than that the creator of a right has 'a power or faculty' to reacquire it on certain terms." Mr Erskine in the passage referred to begins by stating that a redeemable right is defined by Mackenzie as "that which returns to the disponer or granter on payment of the sum for which it was granted." But then he goes on to point out that there may be cases in which the granter has a right to redeem that which he has granted without payment, and he says that although that is not in accordance with the strict grammatical meaning of the word, since no price is to be paid for getting back the subject, still, according to the ordinary familiar reading, it is for all purposes a redeemable right. He then continues (the passage referred to by the Lord Ordinary)—"Under the appellation, therefore, of redeemable rights, all those may be included in which a power or faculty is in a certain event, or within a certain period of time, or without any restriction in point of time, competent to the debtor or the granter of the right."

Now in his explanation of that doctrine Mr Erskine is, I think, proceeding according to ordinary usage and common sense. The redeemable right must always be one which the granter has power to redeem, but the power may or may not be coupled with the duty or obligation of repayment according to the nature of the right itself and the conditions under which it is created. Therefore it appears to me, without any further consideration of the etymological signification of the word, that we must go to the Acts of Parliament in order to see what the right is which the Corporation is authorised to create, and what are the mutual rights and liabilities of the parties to the transaction.

There are two statutes, the Act of 1894 and the Act of 1896, and the particular stock with which we are now concerned, was created and issued under the second of these Acts. The Act of 1896, by its 83rd section, authorises the Corporation to issue a new class of stock; but then I think it is common ground, and the Lord Ordinary has so held, that this specific provision in the Act of 1896 cannot be taken by itself, but that in order to ascertain its true meaning and effect we must refer back to the Act of 1894, which first gave the Edinburgh Corporation the power of creating and issuing stock. I think that is quite obvious, because if we look at the 83rd section by itself it is practically unworkable. If we could not go back to see what

was meant by "stock" in the Act of 1894, I do not think anybody would be able to make out what was meant by the 83rd section. The stock issued by the Corporation does not define itself. It is not a term that in the connection in which it is used in these Acts is very easy to understand, and indeed I should not have been able to understand it had there not been the provision in the Act of 1894, and to a certain extent a provision in another Act —a general statute—which is not before us. The word is more familiarly used in connection with joint-stock companies. What was intended was to create an interest in the funds of the Corporation which could be transferred from one name to another and could stand in any name; and so far there is an analogy between the stock of public joint-stock companies and this interest which is to be created under the statutes. But in other respects there is no resemblance between the two rights. The stock in a public company means merely the capital of a commercial undertaking, and a stockholder is simply a shareholder—a person having right to a share in the capital; whereas the Corporation as a municipal corporation is not a trading company and has no capital, and the persons who are called stockholders are in no sense shareholders in any undertaking whatever.

But then I think when we come to the Act of 1894 the whole scheme of the statute and the special provision which we have to construe bring out quite clearly what it was that the statute intended to authorise. I may say, for the purpose of clearness, that I think the question as to the construction of this statute between the two parties is one which is capable of being very simply stated. The pursuers say that the transaction between them was a loan of money by them and others to the Corporation, which was therefore repayable just because it was a loan; and that the legal interest in the fund is the security for repayment of the loan, with interest at 2½ per cent. charged upon the revenue of the Corporation. The defenders on the other hand say that the transaction was a sale of a special kind of property in the shape of a perpetual annuity for payment of a sum of money down, which therefore may never be called up, and which they are never bound to repay. That is really the controversy between the parties on the construction of this Act.

Now I must say I cannot have any doubt that the pursuers are right, and that the transaction between the parties is one of loan. I think that is made perfectly clear by the explicit provision of the Act of 1894. That Act begins by a preamble, which we are quite entitled to look at for the purpose of throwing light on the enacting clauses by ascertaining the avowed purpose for which they were passed. The preamble, so far as it refers to the creation of stock, proceeds—"Whereas it is expedient that the Corporation should be authorised to exercise their statutory borrowing powers for the time being by means of the creation and issue of Corporation stock"; and then the statute goes on to say what they are to do in order to exercise the power of borrowing. In the 5th section of the statute, which is the material one, it is enacted that where the Corporation have for the time being any statutory borrowing power, then the Corporation may from time to time by resolution exercise the power by creation of redeemable stock to be from time to time issued for such amount, within the limit of the power, to bear such half-yearly or other dividends and to be so transferable as the Corporation may direct. They are to issue what is called redeemable stock for the purpose of carrying into effect their power of borrowing. Then the section goes on to provide that this is to be done by resolution, and that the resolution for the first creation of Corporation stock shall provide that such stock shall be redeemable at the option of the Corporation at par after the expiration of a period to be fixed by the resolution not exceeding sixty years from the first creation of the stock; and each resolution for creation of stock shall specify that the stock thereby created is redeemable. This condition is imperative. There is no power given to the Corporation to issue an irredeemable stock, or, in other words, to create a perpetual charge upon the town's revenues. Now in accordance with that section the Corporation did pass a resolution for creation of the stock now in question, in which they set forth, as it was their duty to do, that it was redeemable. Then there follow certain clauses which I do not think so material, but they all go to confirm the view which I take of the two sections I have read. In the first place there is clause 6, which says that the borrowing power is to be exercisable for the actual sum raisable by the Corporation; and then clause 7 enacts (1) that the Corporation stock shall be charged indifferently on the revenues of the Corporation from time to time arising from lands and heritages, and from the City undertakings, and on all funds, rates, and assessments leviable under the City Acts and this Act; and (2) that the dividend for the time being payable on the stock shall rank equally with the interest on all other securities granted by the Corporation.

Now the plain meaning of this appears to me to be beyond question. There is a power to borrow, which means that the Corporation is to obtain money on loan; and if it is not directly provided that the money so borrowed shall be repaid, that is because the obligation to repay follows as a necessary consequence from the right to borrow. A loan implies in law an obligation to repay the money lent when the subject of the loan is money. Nothing more is required to create an obligation to repay than the fact that the loan was made, because that carries with it an obligation to repay. If there is an express obligation to repay at a definite time, then the lender is entitled to call up his money at that time. If there is no definite time, then the money is repayable on demand or on

reasonable notice. But always and in every case if there is a loan at all it is repayable; and the statutes authorise nothing here except a loan, because the power to borrow is just a power to obtain money on loan, and if this consideration were the only one to be taken into account, I confess I should have no doubt that this money is repayable some time. But then it is repayable with interest. Some confusion may be introduced into the interpretation of the statutes by the use of the term "dividend upon stock," but that really means nothing more than interest upon money lent.

If the loan is repayable some time, the question is whether the statute provides for a time of repayment or not. I think it does by the 3rd sub-section of the 5th section, which I have already adverted to. That sub-section enacts that such stock shall be redeemable at the option of the Corporation at par after the expiration of a period to be fixed by the resolution for the first creation of stock not exceeding sixty years from such creation. If we drop out for a moment the words "at the option of the Corporation," which alone create any difficulty in the construction of this sub-section, it is to my mind clear what is intended. The Corporation is to borrow money. It is to give the lender a charge upon its revenues which is to be called stock, and this stock is to be redeemable at par after the expiration of a period which does not exceed sixty years from the first creation of the stock. That appears to me to bear only one meaning. The statute says that the right which the Corporation is to give must be redeemable, and it is to be redeemable at any period to be fixed by the Corporation itself which does not exceed sixty years. During the sixty years therefore the Corporation may, if it think fit, leave the charge upon its revenues standing; but they are only to do that for a period which does not exceed sixty years, and therefore when that period has expired they are bound to relieve their funds of that charge.

It was argued that these words "not exceeding sixty years" would be satisfied by a resolution for repayment of the stock at any time after the passing of sixty years. That is to say, there might be redemption as soon as sixty years had passed, or there might be no redemption until centuries after the sixty years, because the most distant date that can be imagined must be later than the fixed period. I do not think that is a reading which can possibly be put upon the provision of a statute which is intended to regulate a business transaction of a very important kind. The plain meaning of it seems to me to be that so long as the period allowed by the statute for the charge upon the revenues being unredeemed lasts the Corporation is not bound to redeem, but at the moment that period is exhausted then the Corporation is bound to redeem.

The only difficulty to my mind is created by the introduction of the words "at the option of the Corporation," but I think that difficulty arises not from any ambiguity in the words themselves but from their position. I cannot read the words as meaning that the stock is to be redeemable or not as the Corporation chooses, because I think that would be to subvert the whole series of direct and positive enactments as to the character of the right that is to be created by language intended primarily and obviously to state the specific manner in which the right created is to be carried out. The right given to the Corporation is a right to burden the rates—that is to say, to assess and levy rates for the purpose of the loan among other purposes—and but for the statute of course the Corporation would have no power to levy these rates; and therefore when the statute says that they may levy rates it does not mean that they may levy rates in perpetuity. The sole purpose as expressed in the word "redeemable" seems to me to be this, that the Corporation may create a charge upon the rates, but it is not to be a perpetual charge. It is to be a charge redeemable under certain conditions.

If that is the plain meaning of the direct provisions of the statute it would be contrary to all reasonable rules of construction to say that all that is to be subverted by the introduction of the term "option," unless it be clear upon the construction of the clauses that the statute intended first of all to say that the stock shall be redeemable and you shall not create a perpetual burden upon the revenues of the Corporation, and then afterwards to say that it shall not be redeemable and you may create a perpetual burden on the revenues of the Corporation if you like. Therefore we must read this clause in such a way as will enable the "option" to be referred to something else than the redeemable or irredeemable character of the stock itself. The clause is somewhat clumsily constructed, but what it really means, I think, is this, that inasmuch as the Corporation is required to redeem the stock at some time, but not necessarily until after the lapse of sixty years, they may leave it standing for sixty years and then must redeem it, but may redeem it at any such time within the sixty years as they may choose to fix. Its character during the sixty years is to depend on the option of the Corporation. They may redeem or not within the sixty years; after the sixty years they must redeem. That appears to me to be the true meaning of the clause. I think it is preferable to a construction which would be entirely repugnant to everything else which the statute provides.

If that be the true reading of the Act, it follows, in my opinion, that the capital may be called up at such period as the Corporation may be required to redeem, because what lies at the root of the whole question is that it is a loan. The Corporation has borrowed money, and therefore it necessarily follows that the money has to be repaid. In any other kind of document it may be that the more obvious way

of expressing the duty of repayment would not have been to give the debtor power or obligation to redeem, but to provide directly that the money should become due and payable at a certain date; but the explanation of the departure from this very natural form in this Act of Parliament is quite obvious, because the Act is passed to give a power to the Corporation, which they would not otherwise have, to create this charge upon the property of the Corporation. It is quite immaterial whether the one form of language or the other is used for the purpose of determining the period of the loan, because the payment of a secured debt and the redemption of the security are not two different things, but two sides of one and the same transaction. It follows, I think, that the lender is entitled to call for payment at the time at which the stocks become redeemable simply because there is no other known method of redeeming the charge upon the Corporation funds except by paying back the loan for which their funds are impledged, and also because there is no other date of payment stipulated, and the borrowers would have no answer to a demand for immediate payment if it were not a perfectly sufficient answer that the stock is not to be redeemable before a certain date.

Now if that is the true construction of the Act of 1894, I do not think the Act of 1896, which is the one with which we are immediately concerned, creates any difficulty. The only clause we need to consider is the 83rd; and the difference between the 83rd clause of this Act and the third subsection of the 5th clause of the former Act is certainly immaterial. The Lord Ordinary says it is more favourable to the pursuers than to the defenders. That may or may not be; the clause provides that the Corporation may "create and issue a new class of stock for all or any of the purposes for which the Corporation may create and issue stock, to bear any rate of dividend which the Corporation may fix; and all stock of such class shall be redeemable at the option of the Corporation at one and the same period to be fixed by the Corporation, but not exceeding sixty years from the first issue of such stock." Now the main difference in phraseology is that instead of saying it is to be redeemable "after" a period, it says it is to be redeemable "at" a period not exceeding sixty years. I think there is no difference between "at" and "after" in the view I take of the first statute. As in the first statute, so in this the Corporation is given an option; the stock is to be redeemable at the option of the Corporation at a period to be fixed by the Corporation, but not exceeding sixty years.

The only natural reading of these words seems to me to be that it is to be redeemable, but the period at which it is to be redeemable is to be fixed at the option of the Corporation, provided it be not fixed later than sixty years after creation. The clause gives an option to the Corporation. They have, however, in my opinion, exercised that option by the terms of the resolution and the certificate they have issued to the pursuers, because their certificate says that redemption is to be at par after Whitsunday 1927, a determination which is quite within their option. Therefore I take it that the Corporation has issued to the pursuers what is called stock—although I doubt whether the phrase is at all right—but stock redeemable at par at Whitsunday 1927.

I am unable to put any other construction upon the language of the statute, and I am therefore unable to agree with the Lord Ordinary's judgment, which accordingly falls to be recalled, and decree granted to the pursuers.

LORD DUNDAS—I am of the same opinion. I have considered this important and interesting case as well as I can, and have come to the conclusion that the interlocutor reclaimed against ought to be recalled and decree pronounced in the pursuers' favour. The matter really comes to resolve itself into a short point of construction of section 83 of the defenders' Act of 1896 (read, so far as necessary, in the light of their earlier Act of 1894), their resolution of 7th April, and the form of certificate issued by them for the stock in question. The stock is throughout characterised as "redeemable;" and the gist of the matter, as I construe it, is that the Corporation may, at their option, fix by resolution the period of redemption, subject to the provision that the stock must be redeemed within sixty years from its first creation. I think the Corporation did in fact exercise the option conferred upon them when they fixed, by their resolution, the period of redemption of the stock at par "after" 15th May 1927. Looking to the terms of section 83, I read "after" as equivalent to "at," and this again is, I suppose, fairly rendered by the words in the pursuers' summons, "immediately on the expiry of the 15th day of May 1927." The construction indicated seems to me to give due effect to every material word which we have to construe. It gives, on the one hand, a reasonable meaning to the words "at their option," upon which the defenders so strongly rely, and avoids, on the other hand, the result that the Corporation are entitled, by simply doing nothing, to make "reedemable" stock perpetual; and it seems also to afford an answer to the Lord Ordinary's view that "anyone who alleges that a redeemable stock must be redeemed is bound . . . to show the existence of the obligation upon which he founds," for the obligation on the Corporation is, *ex hypothesi*, to redeem the stock at the period which they themselves have fixed by resolution. I do not desire to elaborate the matter further, but am content simply to express my entire concurrence with the reasons for the proposed judgment which have been so fully stated by your Lordship in the chair.

LORD MACKENZIE—The British Linen Bank are holders of £254,000 Edinburgh Corporation 2½ per cent. stock issued under

the authority of the Edinburgh Corporation Stock Act 1894 and the Edinburgh Improvement and Tramways Act 1896. They bring this action to have it declared that the Corporation are bound to redeem the stock immediately on the expiry of the 15th day of May 1927 on the application of the holders. The position taken up by the defenders is that they are not under obligation to redeem the stock at any time, and this is the view given effect to by the Lord Ordinary. The form of the certificate for the stock is in these terms—"This is to certify that the proprietor of pounds of Edinburgh Corporation two and a-half per cent. redeemable stock, subject to the Acts of Parliament relating thereto."

A note is appended which contains the following—"Redeemable at par after Whitsunday 1927."

The statutes referred to in the certificate are the above-mentioned Acts of 1894 and 1896. The sections which require construction are section 5 (1) and (3) of the 1894 Act and section 83 of the 1896 Act. The stock in question was created under the authority of section 83 of the 1896 Act, but it is necessary to read along with this the provisions of the 1894 Act in order to discover not only the procedure to be adopted in exercising the powers conferred by the 83rd section of the Act of 1896, but also the conditions upon which these powers can be put in force. The object of the later Act was to enable the Corporation to borrow money at 2½ per cent. For the money obtained under the 1894 Act the rate of interest was 3 per cent.

Turning to the Act of 1894, the first point to be observed with regard to sec. 5 (1) is that the procedure is conditional upon the Corporation having for the time being a statutory borrowing power. This is also necessary as regards section 83 of the 1896 Act. If the Corporation has such statutory power, it may proceed to exercise it by the creation of "redeemable stock." The fact that it is a power to borrow which is to be exercised makes it unlikely that the creation of perpetual annuities was in the contemplation of the Legislature. On this point reference may be made to the case of *The Southern Brazilian Rio Grande Do Sul Railway*, 1905, 2 Ch. 78. Borrowing implies repayment at some time and under some circumstances. The succeeding sections of the 1894 Act expressly deal with the formation of a "loans fund" for the redemption of Corporation stock. The fact that the power is to create "redeemable stock" negatives the idea that the stock should under any circumstances be irredeemable. The concluding words of sec. 5 (1) are that the stock "shall," not "may," become redeemable as after provided. This provision for redemption is contained in sec. 5 (3), which enacts—"The resolution for the first creation of Corporation stock shall provide that such stock shall be redeemable at the option of the Corporation at par after the expiration of a period to be fixed by the resolution not exceeding sixty years from the first creation of the stock, and shall declare whether the stock shall be transferable in books or by deed"; and (4) provides that each resolution for creation of stock shall specify that the stock thereby created is redeemable. The corresponding provision in the 1896 Act is at the close of section 83—"All stock of such class shall be redeemable, at the option of the Corporation, at one and the same period to be fixed by the Corporation, but not exceeding sixty years from the first issue of such stock." The limitation in point of time to sixty years points strongly to the conclusion that it was not intended that the Corporation should have power indefinitely to delay redemption. The words "at the option of" are founded on as indicating that the Corporation is to have an absolute discretion. In my opinion, these words refer to the period which the Corporation may fix for redemption within the sixty years. The second schedule of the Act of 1894 contains (as provided by section 51) a form of resolution which may be used on the creation of stock. One clause of the resolution runs "That such stock shall be redeemable as follows (state terms)." The resolution as to the creation of the stock in question is dated 7th April 1897, and provides—"*Third.* That such stock shall be redeemable at par after the expiration of a period of thirty years from 15th May 1897." Although the word "after" is here used, it must mean "at," because this is the expression in the Act of 1896. When the Corporation passed this resolution, they exercised the option conferred upon them by section 83. The terms of the certificate must be construed with reference to the statute and resolution. When, therefore, a certificate was issued which said as regards this stock "Redeemable at par after Whitsunday 1927," this must be construed with reference to the statute and resolution as meaning that the stock shall be redeemable at par at Whitsunday 1927. It is not stated in the pleadings what the actual price of issue was. The decision must depend on the effect of the statutes, resolution, and certificate.

It was maintained for the Corporation that there is no obligation, expressed or implied, upon them to redeem the stock in question; that the expression "redeemable" naturally means "liable to be redeemed," not "shall be redeemed"; that the use of the phrase "at the option of" shows (if there were any doubt) what was meant by "redeemable"; that they were entitled, in their option, to fix any period within the sixty years mentioned in section 83, after which they were entitled to begin to redeem (according to this the use of the word "redeemable" was a note of warning to those tendering for the stock). The result of this argument, which has been given effect to by the Lord Ordinary, is that the matter of redemption is left entirely to the discretion of the Corporation within the period of sixty years. After the sixty years has expired the option ceases, and the stock becomes irredeemable. In order to meet this difficulty

the position taken up by the defenders on record is, as stated in their third plea-in-law, this—"In respect that the stockholders, under the terms of issue of said stock, have no right to demand repayment of their loans prior to 15th May 1957, the defenders are entitled to decree of absolvitor." This contention, however, or admission, is not, so far as can be discovered, based on any statutory provision, and was not made the foundation of the defenders' argument.

An obligation on the Corporation to repay within sixty years, coupled with a faculty of redemption sooner, would have been in accordance with the policy of Parliament, which is shown by the Local Authorities Loans (Scotland) Act 1891 (54 and 55 Vict. cap. 34), secs. 5 (1) and (4), as amended by the Act 56 Vict., cap. 8, sec. 2. It is no doubt evident that the draftsman of the Local Acts of 1894 and 1896 must have had the Acts of 1891 and 1893 before him. He, however, altered the phraseology, and the question is what has been effected by the language used.

"Redeemable" no doubt naturally means "liable to redemption"—*in re Chicago and North-Western Granaries Company, Limited*, [1898] 1 Ch. 263. It requires, however, to be construed with reference to the context, and if this indicates that it is used in the sense of "repayable" this may be its true meaning in the section. According to the defenders' argument the words "at the option of" add nothing to the meaning of the word "redeemable." That, according to their argument, imports a faculty of redemption and nothing more. The provision therefore in this view would have been complete if it had run—"The stock shall be redeemable after the expiration of a period to be fixed by the resolution not exceeding sixty years from the first creation of the stock." If, however, the expression "at the option of" is referred to the selection of a period short of the maximum of sixty years a definite meaning is assigned to it. The meaning of the clause is therefore this, the stock shall be redeemable, *i.e.*, shall be in fact redeemed, sixty years from its first creation, with an option to the Corporation to fix by resolution an earlier period. It was necessary for the period to be fixed by the resolution, because it was essential that persons about to tender should know the terms upon which their money is to be lent. If, as was contended for by the Corporation, the period for redemption was notified in order to warn intending offerers, the words "not exceeding sixty years" seem very inappropriate. They suggest that the Corporation could not defer the discharge of a duty for a longer period. The argument for the Corporation involves that the stock shall not be "liable to redemption" at any period after sixty years. This in my opinion would stultify the provision altogether.

It follows from what is above stated that the pursuers are entitled, in my opinion, to the decree they ask. I therefore concur with your Lordships.

The Court pronounced this interlocutor—

"Sustain the reclaiming note and recal the . . . interlocutor, and find and declare that on a sound construction of the statutes, resolution, and form of certificate mentioned on record and in the joint appendix for the parties, under which the defenders in 1897 created and issued £750,000 2½ per cent. Edinburgh Corporation redeemable stock, the defenders are bound to redeem the said stock immediately on the expiry of the 15th day of May 1927 on the application of the holders thereof, and are not entitled to postpone the right of the holders of the said stock to have the same redeemed by the defenders for any further period after said 15th day of May 1927, and decern. . . ."

Counsel for Pursuers and Appellants—Fleming, K.C.—Macmillan. Agents—Mackenzie & Kermack, W.S.

Counsel for Defenders and Respondents—Cooper, K.C.—Constable, K.C.—Hon. W. Watson. Agent—Sir Thomas Hunter, W.S.

Tuesday, November 21.

SECOND DIVISION.

[Sheriff Court at Glasgow

M'EWEN AND OTHERS *v.* STEEDMAN & M'ALISTER.

Nuisance—Gas Engine—Vibration—Damage to Property—Discomfort and Annoyance to Tenants—Interdict.

Three *pro indiviso* proprietors of a tenement of dwelling-houses in an engineering district, one of whom was an occupant, *held* entitled to interdict against a gas engine, the vibration from which caused injury to the structure of the building and material discomfort and annoyance to the tenants.

Opinion (*per* Lords Dundas and Salvesen) that a proprietor, although he may not be in occupation of his property, has a title to interdict in respect of discomfort or annoyance caused to his tenants by the operations of a third party which lower, or are reasonably calculated to lower, the letting value of his property.

Mrs Mary Gibb or M'Ewen, wife of Charles M'Ewen, with her husband's consent and concurrence, and James Gibb and William Gibb, *pro indiviso* proprietors of a tenement at 103 Cathcart Street, Kingston, Glasgow, *pursuers*, brought an action in the Sheriff Court at Glasgow against Steedman & M'Alister, cork manufacturers, 35 Ardgowan Street, Glasgow, *defenders*, in which they craved the Court, "to interdict the defenders, their servants, and all others acting under their authority, from working the gas engine in the premises occupied by the defenders at 35