[HOUSE OF LORDS.]

H. L. (Sc.) 1886 June 29.

LORD ELPHINSTONE . . . . . APPELLANT;

AND

THE MONKLAND IRON AND COAL COMPANY, LIMITED, AND LIQUIDATORS . . . . . RESPONDENTS.

Landlord and Tenant—Assent of Landlord to assign Lease.

When a lease is not assignable without the landlord's assent, the fact that the landlord did not object to the assignees taking possession cannot, irrespective of all other circumstances, be held sufficient to imply his recognition of the assignees.

Penalties, penal and liquidated.

When one lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage, the presumption is that the parties intended the sum to be penal and subject to modification; but where the payments stipulated are made proportionate to the extent to which the contractors may fail to implement their obligations, and they are to bear interest from the date of the failure, payments so adjusted with reference to the actual damage are liquidated damages.

Lessees, who had been granted the privilege of placing slag from blast furnaces on land let to them, covenanted (inter alia) to pay the lessor £100 per imperial acre for all land not restored at a particular date:—

Held, reversing the decision of the Court below, that the sum, although described in one part of the agreement, as "the penalty therein stipulated" was not a penalty; but estimated or stipulated damages.

Unassignable Lease—Contingent Damage—Company—Winding-up—Creditor in Liquidation entitled to interdict Dispersion of Assets.

When a limited company is voluntarily wound up a lessor who has granted a lease to the company not assignable without his consent, may obtain an interdict against the liquidator of the company dividing the surplus among the shareholders until some provision to meet his future contingent claims against the company is made.

APPEAL from the Second Division of the Court of Session, Scotland. The facts and material arguments are fully given in Lord Watson's opinion.

On appeal,

May 17, 18, 20, 21. *The Solicitor-General for Scotland* (*Asher*, Q.C.), and *Dundas*, were heard for the appellant (1).

The Lord Advocate (*Balfour*, Q.C.), and *Ure*, were heard for the respondents.

LORD WATSON:—

The respondent company was incorporated in 1872 for the purpose of acquiring the business and works of the Monkland Iron and Steel Company. The assets of the older company included (1) a lease, dated the 8th of March, 1836, for sixty years from Martinmas, 1834, of coal, ironstone, and fire-clay, and other subjects forming part of the estate of Monkland, now belonging to the appellant; (2) a minute of agreement between the appellant's predecessors and the company with regard to certain wayleaves over the Monkland estate, dated the 25th and 27th of April, 1853; (3) a tack to the company of the mill lands of Monkland, for the unexpired term of the mineral lease, dated the 10th and 19th of December, 1855; (4) an agreement between the appellant, the company, and certain trustees for behalf of the creditors of the company, dated the 18th and 21st of November, 1862; and (5) a minute of agreement, dated the 4th, 9th, and 14th of November, 1870, whereby the appellant let to the company, with concurrence of the trustees foresaid, the farms and lands of Petersburn, Peep-o'-day, and others for the period of nineteen years from and after Martinmas, 1870, at a cumulo rent of £640. The Monkland Iron and Steel Company in March, 1875, assigned their whole rights and liabilities under these five deeds of lease and agreement to the respondent company. A sixth minute of agreement was entered into between the appellant and the respondent company dated the 1st of August and 13th of December, 1877, with respect to the deposit of mineral refuse upon the appellant's lands of Monkland and other matters, to which it will be necessary to advert more particularly hereafter.

(1) For cases on the question of penalty or liquidated damages, see Lord Mansfield in *Lowe* v. *Peers* (1768), 2 Burr. at p. 2229; and *post*, p. 348.

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The affairs of the respondent company became embarrassed; and, at an extraordinary meeting held on the 30th of May, 1881, it was resolved that the company should be wound up voluntarily, and the respondents, William Mackinnon and Nathaniel Spens, were appointed liquidators. On the 9th of August, 1881, the liquidators sold, by public roup, the whole property and assets of the company, heritable and moveable, including the company's right and interest in the leases and agreements to which I have already referred, to a gentleman, who subsequently declared that he made the purchase on behalf of a new company, then in course of formation, which was incorporated and registered in September, 1881, as the Monkland Iron Company, Limited. In December, 1881, the respondents executed two formal assignations transferring and making over their whole rights and interests, as tenants or otherwise, and their whole obligations and liabilities, under the six deeds of lease and agreement already specified, to the new company.

On the 1st of July, 1881, the appellant lodged a claim in the liquidation, in which he insisted upon the liability of the respondent company to fulfil all the obligations and liabilities already incurred, or to become prestable to him under these six deeds. The liquidators gave no deliverance upon the claim, but proceeded to pay the creditors of the company; and after settling all claims of debt (other than the appellant's) a considerable sum remained in their hands at the time when this action was raised, on the 29th of October, 1883. Between September, 1881, and October, 1883, there was a good deal of correspondence between the appellant's agents on the one hand, and the respondents and the new company on the other, as to the terms upon which the appellant should recognise the new company as having right by assignation to the leases and agreements in question. These negotiations terminated with an assertion on the part of the respondents and the new company that the respondents had absolute power to assign, and that the appellant had not the option to give or withhold recognition of the new company as tenants in lieu and stead of the respondent company; and the present action was brought in consequence of an intimation made by the liquidators on the 4th of October, 1883, to the effect that,

if no proceedings were taken to interpel them before the 31st of that month, they would distribute the surplus assets among the shareholders of the company.

The leading conclusions of the appellant's summons are for declarator that the respondent company are still liable to fulfil the whole obligations and liabilities attaching to them under the contracts assigned to the new company, and that the liquidators are bound to set aside the whole or so much of the surplus assets as may be required to meet such obligations and liabilities as they become due and prestable. These conclusions are founded upon the allegation that the respondents had no power to assign so as to make the new company the appellant's debtors in these obligations and liabilities without his consent. The Lord Ordinary (Lee), on the 22nd of March, 1884, gave the appellant decree in terms of the declaratory conclusions. The case was then carried by reclaiming note to the Second Division of the Court, who, on the 30th of October, 1884, allowed the parties a proof before answer of their respective averments. The learned judges, at the same time, decided that four of the contracts specified in the summons, viz., the mineral lease of March, 1836, the minute of April, 1853, the mill lands tack of December, 1855, and the agreement of November, 1862, were in terms assignable, and had been lawfully assigned by the respondents. Against that decision, which was given effect to in the subsequent interlocutor of the 27th of May, 1885, no appeal has been taken. The proof allowed was led on the 2nd of December, 1884, before one of the judges of the Division. The case, which was then confined to the agricultural lease of November, 1870, and the minute of August and November, 1877, was again heard along with the proof; and by interlocutor of the 27th of May, 1885, their Lordships recalled the interlocutor of the Lord Ordinary and dismissed the action.

Lord Young, in whose opinion the other judges concurred, was inclined to think that the appellant had accepted the new company as assignees of the contracts embodied in the lease of 1870 and agreement of 1877, and that he could not therefore take action against the respondents. But, inasmuch as he was of opinion that no present debt or liability to the appellant under

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either of these contracts had been averred or proved, his Lordship preferred to abstain from deciding the point, and to leave the appellant to prefer his claims in the liquidation. His Lordship also expressed the opinion that the circumstances of the case did not justify the appellant in resorting to an extraordinary remedy for his security.

Lord Watson.

I cannot assent to the propriety of the course taken by the learned judges in dismissing the action, and leaving the appellant to renew his claims in the liquidation. The appellant had preferred a claim in the liquidation more than two years before the action was instituted. He had, during the interval, made repeated endeavours to get the liquidators to dispose of the claim, which they declined to do, and ultimately recommended him to take judicial proceedings. It was, in my opinion, inexpedient to send back the appellant, with his claim, to the liquidators, four years after it had been submitted to them. If they had again declined to entertain it, or if they had adjudicated upon it, in accordance with the pleas they now maintain, the appellant would have been under the necessity of raising a fresh action, with conclusions substantially the same with those he now insists in, for the purpose of enforcing what he conceives to be his legal rights. When a limited company is in course of being wound up voluntarily, I do not think a creditor, who is asserting future or even contingent claims against the company, can justly be said to resort to an extraordinary remedy when he seeks to have the liquidators judicially interpelled from dividing the surplus assets among the shareholders without making any provision to meet his claims when they shall arise. I am consequently of opinion that your Lordships ought now to dispose of the case upon its merits.

According to the law of Scotland, the assignation of his lease by a tenant, who has power to assign, has the effect of making the assignee sole tenant from the time he attains possession of the subject of the lease, and of discharging the cedent from future liability to the landlord. When the tenant has no power to assign, the unqualified acceptance of the assignee by the landlord, whether express or implied, has the same effect.

The agricultural lease of November, 1870, the first of the two contracts with which we have to deal, is conceived in favour of

the respondent company as lessees, "but excluding assignees and sub-tenants legal and conventional," these being words which plainly import that the lessees are to have no right either to assign or sub-let without the consent of the lessor. The respondents did not plead that the lease is, suâ naturâ, assignable, but they maintained that the appellant accepted their assignees. It was argued for them, on the authority of *Dobie* v. *Marquis of Lothian* (1) and *Duke of Portland* v. *Baird & Co.* (2), that the fact of the landlord not objecting to the assignees taking possession must, irrespective of all other circumstances, be held sufficient to imply his recognition of the assignees. The point did not arise for decision in either of these cases, and the dicta of the learned judges, when fairly considered, do not appear to me to give the least countenance to the respondents' contention. That a landlord has, by implication, consented to receive an assignee, or has so acted as to bar himself from alleging that he has not consented, must, in my opinion, be matter of inference from the whole circumstances of the case. I can easily conceive that the fact of the landlord having, in the full knowledge of the cedent's actings, refrained from making any objection to the assignee entering into possession, might, in the absence of other evidence, be conclusive; but that is not the kind of case submitted for our decision.

The evidence bearing upon this point is somewhat voluminous, but I have had no difficulty in coming to the conclusion that the appellant has not agreed to receive the new company as his assignees under the lease of 1870, and has done nothing to bar him from pleading the absence of his consent. The respondents appear to me to have been distinctly informed, and to have been, throughout the negotiations which preceded this action, perfectly aware, that the appellant declined to accept the new company as his tenants, except upon the condition, inter alia, that they were to remain liable for the whole prestations stipulated in the lease. It was unquestionably within the right of the appellant to attach that or any other lawful condition to his consent. Of course, the respondents were not bound to submit to such a condition;

(1) 2 Court Sess. Cas. 3rd Series, p. 788.

(2) 4 Court Sess. Cas. 3rd Series, p. 10.

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but they knew, or at least ought to have known, that, if they did not submit to it, they had no power to grant an effectual assignation. His claim, lodged with the liquidators on the 1st of July, 1881, which was all along insisted on by the appellant, was substantially the same claim which is preferred by him in this action. In the negotiations which took place between September, 1881 and October, 1883, the terms of which appear from the correspondence printed in the appendix, the appellant insisted on the respondent company remaining bound to him as a condition of his assenting to receive their assignees, and the negotiations seem to have been mainly protracted by attempts to adjust certain other conditions, also insisted in by the appellant, with reference to the carriage of the new company's traffic by lines on which wayleaves were payable to him. It is, moreover, a significant fact that in the course of the correspondence neither the respondents nor the new company ever suggested that the appellant had, in point of fact, accepted the latter company as his tenants. What they did assert was, that the lease was assignable by the respondents without his consent, an assertion which the appellant persistently disputed. In these circumstances it appears to me that the mere fact that rents were paid to the appellant by the new company is of no consequence. The receipts given for these payments contain no reference to the new company, and no entries or expressions from which his recognition of that company can be reasonably inferred.

The minute of agreement of 1877 stands in a different position from the lease of 1870 in this respect, that it does not contain an express exclusion of assignees. The respondents maintain that the contract of 1877 is in its own nature assignable, to the effect of relieving them from its obligations, so far as these became or may become prestable after the date of the assignation. They also maintain that, if they had not the power to assign, the appellant has nevertheless accepted the new company as his debtors in these obligations, and discharged them of all future liability. That argument rests upon the same evidence of implied consent which was relied on in the case of the lease of 1870, and must, in my opinion, be rejected for the reasons which I have already indicated.

The respondents maintain that the agreement of 1877 has reference to and is ancillary to the mineral lease of 1836, and other contracts which have been found to be validly assigned, and, consequently, that it is of the same quality as regards its assignability. I think that proposition would be well founded in law if the respondents were able to shew that the agreement of 1877 merely added certain terms to these contracts, or effected some modification of the stipulations which they contain. The appellant, on the other hand, maintains that the minute of 1877 consists of a variety of stipulations which are either independent of the subject-matter of these contracts, or are such as (being connected with them) became prestable before they were assigned to the new company.

The minute of 1877 contains in all thirteen articles of contract, some of which must be separately considered, inasmuch as they refer to different matters. The first to the eleventh articles, both inclusive, appear to me to relate to the same subject-matter, viz., the deposit of slag from their blast furnaces by the respondent company upon certain specified portions of the land let to them under the agricultural lease of 1870. The first, second, and third articles define the extent of the privilege; the fourth and fifth prescribe the compensation in money which the company is to pay for the exercise of the privilege; and articles 6 to 11 relate to the mode of making the deposit, and to certain relative works necessary for maintaining accesses, protecting open watercourses, and so forth. It is a point in favour of the respondents' argument that the privilege, although it affects the land let to them by the lease of 1870, is not a privilege useful or available to an agricultural tenant, and that it does not terminate at Martinmas, 1889, the ish of that lease, but is to endure "till the term of Martinmas, 1894, or such earlier date as shall be the termination of the lease of Monkland minerals, under which the second parties are now the tenants of the first party." But it is admitted that none of the slag to which the privilege relates is produced upon land let by the appellant to the company, and it is shewn by the receipts in process, and not disputed, that a very small percentage of the slag actually deposited in pursuance of the privilege was the product of minerals raised from the Monkland estate. It

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does not appear, and was not alleged by the respondents, that the mineral lease, or any other of the contracts libelled, gave them the right to erect blast furnaces, and carry on the manufacture of pig iron, upon the appellant's property, so that, in reality, the privilege was only available to those in right, for the time being, of the respondents' Calderbank works, with which the appellant had no connection whatever. In these circumstances, although the question does not appear to me to be free from difficulty, I am of opinion that these eleven articles are not, in any proper sense, ancillary to the contracts which the respondents had power to assign, and that the respondents, whether it be or be not in their power to communicate the privilege to the new company, cannot assign it to the effect of relieving themselves of the liabilities which they have undertaken to the appellant.

I do not think it necessary to determine whether the contract embodied in the 12th article of the minute was assignable by the respondents, because I am of opinion that the whole obligations therein undertaken by them had become due and prestable, before the new company came into existence. That article professedly modifies certain liabilities of the respondent company, arising under the previous agreement of November, 1862 (which the Court below have held to be well assigned), in reference to the levelling and soiling over of two deposits known as the Peep-o'-day and Brownsburn slag hills. By the 7th article of the agreement of 1862, the mineral tenants became bound to level and soil the surface of the Peep-o'-day deposit, which was then an old slag hill, on or before the 1st of January, 1868. The 8th article empowered them to lay slag from their works at Calderbank upon part of the lands of Brownsburn. By article 11 they undertake to level and soil over the deposit, within twenty years from the 1st of January, 1863, provided the mineral lease should endure for that period, and in the event of its sooner coming to a termination, then within six months thereafter. By the same article it was agreed, that in the event of their failure to complete the levelling and soiling over of the Brownsburn deposit within the time specified, they should pay to the appellant "to enable him to complete the same, a sum of money at the rate of £100 per imperial acre for all land covered with slag, and not

levelled and soiled within the foresaid period, which sum shall be in lieu and full of the second parties obligation under article eighth." The 12th article of the agreement of 1877 extended the time for completing the operation of levelling and soiling the Peep-o'-day deposit, and as regards the Brownsburn deposit limited the time to Whitsunday, 1879. In the case of Peep-o'-day, it provides that, failing performance, the respondent company shall pay to the appellant "at the rate of £100 per imperial acre for all ground not so restored, together with legal interest thereon, from and after the date when the operations should have been completed until paid." In the case of the Brownsburn deposit, which at that time covered the whole area included in the agreement of 1862, it provides that failing completion of soiling over at the term of Whitsunday, 1879, the penalty stipulated in the 11th article of that agreement shall be due and payable. The period fixed for completion of these operations was subsequently extended, in reference to both slag hills, to Whitsunday, 1881.

At the 15th of May, 1881, these slag hills were, to a large extent, neither levelled nor covered with soil; and it does not appear to me to admit of doubt that the money payments, stipulated in article 12 of the agreement of 1877, became, at that date, instantly due to the appellant. But, in the course of the negotiations to which I have already alluded, the agents of the appellant, by letter dated the 11th of November, 1882, agreed that he would not press the respondents for payment, on condition of the new company proceeding to carry on the work of levelling and soiling continuously and satisfactorily, and completing it by Martinmas, 1884, at the latest; and on the further condition that if the new company should fail to do so, all the obligations undertaken by the respondents with reference to pecuniary compensation "shall come into force in the same way as if the term of Martinmas, 1884, had been substituted for Whitsunday, 1881, in the agreements." The new company apparently did something in the way of soiling and levelling; but they admittedly failed to complete the work by Martinmas, 1884. It was pleaded at your Lordships' bar that the appellant thereby accepted the new company as his sole debtors in these obligations. The

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plea, in my opinion, involves no question of power to assign to the new company. The respondents must prove that the appellant consented to the delegation of his overdue debt to the new company; and the terms of the correspondence afford distinct evidence that he did not.

Whilst the present action depended before the Lord Ordinary the term of Martinmas, 1884, had not yet arrived; and the appellant was not in a position to ask decree for the sums due to him under article 12, although the summons contains an appropriate conclusion, and the grounds of the claim (£1,630) are set forth in the condescendence. The proof allowed by the Inner House interlocutor of the 30th of October, 1884, was of the whole averments of parties; and on the 2nd of December the appellant and the respondents both adduced evidence as to the extent of those portions of the slag hills which had not been levelled and soiled, in terms of the agreements, at Martinmas, 1884. The appellant asked the Second Division to give him decree for £1630, or such other sum as their Lordships might fix, and he preferred the same claim on the hearing of this appeal. The Second Division refused to give him decree, on the ground, as explained by Lord Young, that no debt under the agreement had been averred or proved in this action. I should have thought the learned judges were right in so refusing had I been able to concur in their opinion, which is thus expressed by Lord Young:—"The agreement to pay £100 per acre for ground unrestored at a particular date is clearly a penalty under which no more than the actual damage can be recovered." Upon that construction of the agreement the evidence does not afford data for assessing the amount due to the Appellant. But the payments stipulated in the 12th article are, in my opinion, liquidated damages, and not penalties. When a single slump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage, the presumption is that the parties intended the sum to be penal, and subject to modification. The payments stipulated in article 12 are not of that character; they are made proportionate to the extent to which the respondent company may fail to implement their obliga-

tions, and they are to bear interest from the date of the failure. I can find neither principle nor authority for holding that payments so adjusted by the contracting parties with reference to the actual amount of damage ought to be regarded as penalties. I have examined the evidence on both sides with respect to the condition of the Peep-o'-day and Brownsburn slag hills as at Martinmas, 1884. The testimony given by Mr. Ferrie and Mr. Thomson, on behalf of the respondents, does not appear to me to impeach the accuracy of the measurements made by Mr. Macrae and Mr. McCreath, the appellant's witnesses; and I think your Lordships may, without doing injustice to either party, fix the sum due by the respondents to the appellant, under the 12th article of the agreement of 1877, at £1600.

The 13th article of the minute of 1877 merely alters the consideration prestable by the respondent company in respect of a privilege of wayleave over the appellant's lands of Broadlees. The respondent company assert that the privilege was conferred upon them as tenants, by their mineral leases; and, seeing that the appellant did not allege, and has not proved, anything to the contrary, I think it must be assumed that article 13 is simply a modification of one of the terms of the contract under which they worked the Monkland minerals, and that they had the right to assign it to the new company.

I am accordingly of opinion that the interlocutors of the Second Division appealed from ought to be reversed, except in so far as they recall the Lord Ordinary's interlocutor of the 22nd of March, 1884; that the appellant should have decree for payment of £1600, with interest from Martinmas, 1884, and of declarator that the respondents are bound to fulfil all the liabilities undertaken to him by the respondent company under the lease of 1870 and the agreement of 1877, with the exception of the 13th article of that agreement; and that the respondents William Mackinnon and Nathaniel Spens are bound to set aside the surplus assets of the company, or so much thereof as may be necessary, in order to make due provision for these liabilities. I think the appellant ought to have the costs of this appeal and also the expenses incurred by him in the Court below, from the date of the interlocutor of the Second Division allowing a proof, and that the

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parties ought to bear their own expenses down to and including that date.

LORD HERSCHELL, L.C.:—

I have had the advantage of reading the opinion of my noble and learned friend who has just addressed the House, and I concur entirely in the conclusions at which he has arrived, and the reasoning upon which those conclusions are founded. The case turns for the most part, in my opinion, upon the view to be taken of the facts, and I do not think it necessary to repeat the exhaustive examination of them which is to be found in the opinion just expressed. I shall content myself with adding a few observations upon the points of law which were discussed in the arguments before your Lordships.

I cannot think that the learned judges in the Court below were right in dismissing the action. If any liability to the appellant existed on the part of the respondent company, he was entitled to have provision made for it by the liquidators before the assets of the company were distributed among the shareholders. And I think he was entitled to have it determined in this action whether any such liability did or did not exist.

He had already made application to the liquidators to deal with his claim. This they declined to do, and they in effect invited him to take judicial proceedings in order to obtain an adjudication upon it. The present action was accordingly brought. And I am of opinion that it was not only competent for the Court to determine in this action the rights of the parties, but that they were bound to do so.

There are only two other points upon which I think it necessary to add anything.

It was contended that even if the agricultural lease was not as of right assignable, the appellant had, by permitting possession to be taken by the assignees without objection on his part, accepted the assignees as his obligors. I do not think this contention is sound. Whether assignees have been accepted by the landlord in the place of the assignors must, as it seems to me, be determined as a question of fact upon a review of all the circumstances. The fact that possession has been given to the assignees

with the knowledge of the landlord and without objection on his part is no doubt an important element, but it is not the only element to be taken into consideration. In certain circumstances it might be conclusive. But where the facts shew beyond question that the landlord did not intend to accept the assignees in lieu of their assignors, and so far from leading them to the belief that he did so intend, intimated the contrary intention, I cannot think that the mere absence of objection to the possession of the assignees is conclusive that the landlord has accepted them and discharged the assignors. In support of the respondents' contention the cases of *Dobie* v. *Marquis of Lothian* (1) and *Duke of Portland* v. *Baird* (2) were referred to. But no such point arose for decision in either of those cases. And I do not think the dicta of the learned judges, which must be read in relation to the matters then before them, can have been intended to bear the construction insisted on by the respondents' counsel at your Lordships' bar.

The other point to which I desire to advert is the question whether the provision in the agreement of 1877 that the Respondent company should pay to the appellant £100 per imperial acre for all land covered with slag and not levelled and soiled within the specified period was in the nature of a penalty only or was an agreed assessment of damages.

The agreement does not provide for the payment of a lump sum upon the non-performance of any one of many obligations differing in importance. It has reference to a single obligation, and the sum to be paid bears a strict proportion to the extent to which that obligation is left unfulfilled. There is nothing whatever to shew that the compensation is ordinate or extravagant in relation to the damage sustained. And provision is made that the payment is to bear interest from the date when the obligation is unfulfilled. I know of no authority for holding that a payment agreed to be made under such conditions as these is to be regarded as a penalty only; and I see no sound reason or principle or even convenience for so holding. With deference, therefore, to the learned judges in the Court below, I entertain a clear

(1) 2 Court Sess. Cas. 3rd Series, p. 788.

(2) 4 Court Sess. Cas. 3rd Series, p. 10.

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opinion that the appellant is entitled to insist that he has an existing pecuniary claim against the respondent company of £100 an acre to the extent to which their obligation to level and soil remains unfulfilled. And I agree with my noble and learned friend that this may properly be fixed at £1600. I also concur in the form of the judgment proposed.

LORD BLACKBURN concurred.

LORD FITZGERALD :—

I take leave to express my complete concurrence.

I desire, however, to observe, on the proposition of Lord Young, that "the agreement contained in the 12th article of the agreement of 1877 to pay £100 per acre for ground unrestored at a particular date *is clearly a penalty* under which no more than the actual damage can be recovered," and I am induced to do so as the law of Scotland, which we are now administering, seems in this respect to agree in principle with the law of the rest of the United Kingdom; or it would be more correct to say that the law of Scotland in this respect existed in full force and equitable effect whilst we were struggling against the hard and technical rules of our common law. I am not aware that there is any enactment in force in Scotland corresponding to our statute of 8 & 9 Wm. 3, c. 11, s. 8; nor does the Scotch law seem to have required such aid. We may take it, then, that by the law of Scotland the parties to any contract may fix the damages to result from a breach at a sum estimated as liquidated damages, or they may enforce the performance of the stipulations of the agreement by a penalty.

In the first instance the pursuer is, in case of a breach, entitled to recover the estimated sum as pactional damages irrespective of the actual loss sustained. In the other, the penalty is to cover all the damages actually sustained, but it does not estimate them, and the amount of loss (not, however, exceeding the penalty) is to be ascertained in the ordinary way. In determining the character of these stipulations we endeavour to ascertain what the parties must reasonably be presumed to have intended, having regard to the subject-matter, and certain rules

have been laid down as judicial aids. Thus, in *Astley* v. *Weldon* (1), Mr. Justice Heath said: "Where articles of agreement contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty. But where it is agreed that if a party do" or (I may add) omit to do a particular thing, "such a sum shall be paid by him, there the sum stated may be treated as liquidated damages." Lord Eldon took part in the judgment in *Astley* v. *Weldon* (1), which has always been considered, so far, to state the rule correctly.

There is an Irish case particularly applicable to the case before us: *Huband* v. *Grattan.* (2) In that case there was a covenant by the grantee with his grantor (who was also the owner of adjoining lands) that he would prostrate and remove a lime-kiln before a certain day, and if not prostrated and removed before that day then the grantee should pay to the plaintiff the sum of £100 for each year during which the lime-kiln should remain, *or a rateable sum for a shorter period.* The action was for a breach in not removing the lime-kiln. Held to be liquidated and ascertained damages, and not a penalty.

In *Rolfe* v. *Peterson* (1772) (3) no reasons are given, but there Lord Camden's decision was reversed. It was a covenant by a lessee not to plough up ancient pasture, and if he does to pay an additional yearly rent of £5 an acre. Breach, ploughing up ten acres. Held, that it was not to be considered as a penalty, but as liquidated satisfaction fixed and agreed upon by the parties, notwithstanding that it was alleged "that the penalty of £5 per acre reserved during the remainder of the term for once ploughing amounted to more than thirty times the value of the inheritance of the ten acres before they were put into a state of cultivation by the respondents"; and although the parties use the words "liquidated damages" or "penalty," though such words are not to be disregarded they are by no means conclusive. Thus, in *Betts* v. *Burch* (4), Bramwell, B., correctly lays it down, "For if the whole agreement is such that the Court can see the sum is a penal sum, it must be so treated; on the other hand, if it is not

(1) 2 Bos. & Pul. 353.
(2) Alcock & Napier, 389.
(3) 2 Bro. P. C. 436.
(4) 4 H. & N. at p. 511.

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a penal sum, it would be incorrect to treat it as a penalty merely because the parties have so called it in the agreement." And so in *Kemble* v. *Farren* (1), where the sum of £1000, the subject of the action, was declared by the agreement to be liquidated damages, and not a penalty or in the nature thereof, it was held to be a penalty; but Tindal, C.J., in the course of his judgment, observes: "We see nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum they may agree."

There would be some difficulty in criticising some of the English decisions, and it would not be very profitable. Bramwell, L.J., in *Newman's Case* (2) says: "It seems to me, as I said in *Betts* v. *Burch* (3), that by some good fortune the Courts have, in the majority of cases, gone right without knowing why they did so." There could be no more competent judge. I leave it in his hands.

I am clearly of opinion with my noble and learned friend that the sum of £100 per imperial acre for all ground not restored, though described in one part of the 12th article as "the penalty therein stipulated," is not a penalty, and represents stipulated or estimated damages. It is satisfactory also to be able to make out from the uncontroverted evidence that the sum is not exorbitant or unreasonable.

LORD HALSBURY:—

I entirely concur. With regard to the observation made by Lord Bramwell (4), it had reference to cases in which the learned judges apparently decided that at law as distinguished from equity they were entitled to consider penalty as that which was to be enforced in terrorem, without having had called to their attention at all the fact that the Act 8 & 9 William 3, c. 11, existed. It was with reference to that that Lord Bramwell made the not unnatural observation that they had gone right, although they were not aware of the ground upon which at law their judgment could be supported.

Interlocutor of the Second Division of the Court of Session, dated the 27th of May, 1885, except in

(1) 6 Bing. at p. 148; 3 M. & P. at p. 441.
(2) 4 Ch. D. at p. 734.
(3) 4 H. & N. at p. 511.
(4) See *Betts* v. *Burch* (1859), 4 H. & N. at p. 511.

so far as it recalls the Lord Ordinary's interlocutor of the 22*nd of March,* 1884, *and also the interlocutor of the said Division, dated the* 20*th of June,* 1885, *be reversed. Declared that the appellant ought to have decree in his favour, decerning and ordaining the respondents to make payment to him of the principal sum of* £1600 *sterling, with interest thereon at the rate of* 5 *per cent. per annum from the term of Martinmas* 1884, *until payment; and to have decree finding and declaring that the respondents, the Monkland Iron and Coal Company, Limited, were, at the time of their going into voluntary liquidation, and still are bound to implement and fulfil to the appellant the whole obligations and liabilities undertaken by the lessees in the lease or minute of agreement libelled, dated the* 4*th,* 9*th, and* 14*th of November,* 1870, *and also the whole obligations and liabilities undertaken by them in the minute of agreement, libelled, dated the* 1*st of August and* 13*th of December,* 1877, *excepting only such obligations and liabilities as are contained in the* 13*th article of the said minute; and also that the respondents William Mackinnon and Nathaniel Spens, as liquidators of the said Monkland Iron and Coal Company, Limited, are bound to make due provision for implementing and fulfilling the foresaid obligations and liabilities, and for that purpose to set aside the surplus assets of the company remaining in their hands at the time when this action was raised, or so much thereof as may be necessary for implementing and fulfilling said obligations and liabilities; and also that the appellant ought to have decree against the respondents for the expenses of process incurred by him in the Court of Session, after the* 30*th of October,* 1884; *that subject to these declarations the cause be remitted to the*

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Second Division of the Court of Session; and that the respondents do pay to the appellant his costs of this appeal.

Lords' Journals, 29th June, 1886.

Agent for appellant: *W. A. Loch, for Dundas & Wilson, C.S., Edinburgh.*

Agents for respondents: *Grahames, Currey & Spens, for Mackenzie, Innes & Logan, W.S., Edinburgh.*

[HOUSE OF LORDS.]

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SEATH & CO. . . . . APPELLANTS;

AND

MOORE . . . . . RESPONDENT.

Scotch Law—Sale of Goods—Bankruptcy of Manufacturer—Right of Trustee to Articles in course of manufacture—Mercantile Law Amendment (Scotland) Act, s. 1.

The Mercantile Law Amendment (Scotland) Act (19 & 20 Vict. c. 60), s. 1—which provides that, "Where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller after the date of such sale to attach such goods as belong to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing the delivery of the same"—imposes no limitation upon the right of the seller's creditor or trustee until the contract of sale is so far completed as to confer a proper jus ad rem upon the purchaser.

By LORD WATSON:—The same circumstances which in England sustain the inference that a chattel has been "sold" to the effect of passing its property to the vendee, will, in Scotland, generally be sufficient to give him a jus ad rem under 19 & 20 Vict. c. 60, s. 1.

Woods v. *Russell* (except as to the rudder and cordage) (5 B. & Al. 942); *Clarke* v. *Spence* (4 Ad. & E. 448); *Wood* v. *Bell* (5 E. & B. 772, and 6 E. & B. 355)) approved.

The principles applicable to the sale of part of a ship are equally applicable to the sale of part of any corpus manufactum in course of construction. And it follows that it is competent for parties to agree for a valuable consideration that a specific article shall be sold and become the property of the purchaser as soon as it has reached a certain stage; but it