the person who desires to reduce a patent has any interest to do so, and if he thought he had none he would be very slow to grant his concurrence. At the same time, just as in a matter of relevancy the Court must decide whether the case is relevant notwithstanding the Lord Advocate has thought that a relevant case for reduction had been presented to him, so it may also be that we have a duty to consider the question of title. On that matter, however, I do not wish to express any considered opinion.

LORD GUTHRIE concurred.

The Court recalled the interlocutor of the Lord Ordinary and remitted to him to allow a proof.

Counsel for Pursuer and Reclaimer—J. R. Christie. Agents—Davidson & Syme, W.S.

Counsel for Defender and Respondent—Murray, K.C.—Maitland. Agents—Macandrew, Wright, & Murray, W.S.

Thursday, June 27.

SECOND DIVISION.

[Sheriff Court at Haddington.

DINGWALL *v.* BURNETT.

Contract—Breach—Retention—Numerous Stipulations in Contract with Deposit Directly Applicable to One—Claim to Retain Deposit Applicable to One Stipulation till Question of Damages Over Whole Contract Settled.

An agreement for the lease of an hotel contained a clause providing for the sale to the lessee of the furniture and fittings, and for consignation by the purchaser of £200 on deposit-receipt to account of the value thereof. The purchaser failed to carry out the agreement, and sued for delivery of the deposit-receipt. The vendor having refused delivery, on the ground that the purchaser had rendered himself liable in damages for breach of other clauses of the agreement, *held* that the purchaser was not entitled to delivery of the deposit-receipt until the vendor had had an opportunity of constituting his claim for damages.

Contract — Breach — Penalty — Liquidate Damages.

An agreement as to the lease of an hotel, containing various stipulations differing in importance, bound the parties "to implement their part of this agreement under a penalty of £50, to be paid by the party failing to the party performing or willing to perform, over and above performance." *Held* (1) that the £50 was not liquidate damages but penalty, and (2) that the measure of damages recoverable for breach of the contract was the amount of damage actually sustained, and was not limited to the sum stated in this penalty clause.

Johnstone's Trustees v. *Johnstone*, January 19, 1819, F.C.; *Hyndman's Trustees* v. *Miller*, November 21, 1895, 33 S.L.R. 359; and *Lord Elphinstone* v. *Monkland Iron and Coal Company, Limited*, June 29, 1886, 13 R. (H.L.) 98, 23 S.L.R. 870 (*per* Lord Fitzgerald), *commented on.*

David Dingwall, hotel manager, Glasgow, *pursuer*, brought an action in the Sheriff Court at Haddington against George Wilson Burnett, St George Stables, Dunbar, *defender*, in which he claimed (1) decree ordaining the defender to endorse and deliver to the pursuer a deposit-receipt for £200, dated 24th April 1911, and (2) payment of £58, 10s. The claim of the pursuer arose out of a minute of agreement between the pursuer, therein called the second party, and the defender, therein called the first party, dated 18th April 1911, the material clauses of which were as follows—"Whereas the first party is the proprietor of the St George Hotel, Dunbar, and has on his application *qua* proprietor received a seven days' licence in his own name for said hotel, for the year Nineteen hundred and eleven to Nineteen hundred and twelve, from the licensing authorities of the county of Haddington, in succession to the licence held by Mrs Craig, the present tenant of said hotel, and whose tenancy terminates at Whitsunday Nineteen hundred and eleven; and whereas the second party is desirous of becoming tenant of said hotel, it is hereby agreed as follows—*First.* The first party hereby lets to the second party (subtenants and assignees being excluded) the said hotel and pertinents, as presently possessed by Mrs Craig, for four-and-a-half years from and after the term of Martinmas Nineteen hundred and eleven, at the annual rent of Eighty pounds, payable half-yearly at the usual terms of Whitsunday and Martinmas, all conditional upon the granting of an application for a transfer of said licence presently held by the first party in favour of the second party at the statutory licensing court in October Nineteen hundred and eleven, which application the second party undertakes to duly lodge and follow forth. In the event of said application being refused, this agreement shall *ipso facto* come to an end. *Second.* In the event of said application being granted, the second party shall take over from the first party at mutual valuation, as at the said term of Martinmas Nineteen hundred and eleven, the furniture and fittings and stock of liquors, &c., belonging to the first party, which shall then be in the hotel. To account of the valuation price the second party hereby undertakes to consign within seven days from the date hereof, in the joint names of the first party and himself, the sum of Two hundred pounds, to be available to the party having right thereto as aforesaid. Failing the said sum being deposited as aforesaid within the time stated the first party shall have the option of terminating this agreement. . . . *Fourth.* The second party

hereby undertakes to act as the first party's manager of said hotel from the term of Whitsunday 1911 till Martinmas Nineteen hundred and eleven. . , . And it is hereby understood and agreed that the second party as manager for the first party shall week by week meet the liabilities or expenses out of the drawings, and shall consign the surplus in bank in name of the first party. He shall conduct the hotel on a proper business-like footing, and shall do nothing which is likely to prejudice the licence. In the event of the said application of the second party being refused, or in the event of him not exercising the option conferred on him in this article, the remuneration which he shall receive from the first party for acting as his manager shall be a sum equal to Three pounds per week for the whole of said period. . . . *Fifth.* Both parties hereto bind and oblige themselves to implement their part of this agreement under the penalty of Fifty pounds, to be paid by the party failing to the party performing or willing to perform, over and above performance. . . ."

The defender made a counter-claim of, *inter alia*, £250 for breach of the agreement.

The pursuer pleaded—"(1) The defences are irrelevant. (2) The said sum of £200 having been deposited by the pursuer in joint names of himself and defender to account of the price of the furniture, &c., to be taken over at valuation, and said furniture, &c., not having been so taken over at valuation, the pursuer is entitled to decree in terms of the first conclusion of the initial writ, with expenses. (3) Said sum sued for in the second place, being the amount of wages due to the pursuer at the agreed-on rate, the pursuer is entitled to decree in terms of the second conclusion of the summons, with expenses. (4) The counter-claim is irrelevant. (5) The defender's counter-claim of damages as stated is incompetent, and otherwise falls to be dismissed as wanting in specification. (6) In any event the claim for damages is excessive. (7) The defender having sustained no loss and damage through the pursuer's breach of agreement, or otherwise, his counter-claim should be dismissed with expenses: *et separatim*, in respect of the tender made by the pursuer he should be assoilzied."

The defender pleaded—"(2) In the circumstances condescended on the defender is not bound to endorse the said deposit-receipt. (3) The pursuer being in breach of said agreement, he is not entitled to decree."

The following *narrative* of the *facts* of the case is taken from the opinion of Lord Salvesen:—"The action arises out of an agreement which was come to between the pursuer and the defender for the lease of a hotel in Dunbar belonging to the defender. The defender had obtained a hotel licence as from Whitsunday 1911 in his own name on the expiry of a previous tenancy at that date. It being apparently impossible to get a transfer of that licence to any new tenant until Martinmas, the lease provided for the pursuer undertaking the management of the hotel until such licence could be obtained. The pursuer was taken bound to lodge an application for the licence; and in the event of his obtaining it the agreement provided for his becoming tenant of the hotel for a period of four and a half years at an annual rent of £80. In the event of the application being refused, the agreement was *ipso facto* to come to an end.

"The pursuer entered on the management of the hotel on 29th May 1911, and continued to act as manager until 12th October. Some months prior to that date he apparently became disappointed with the turnover, and on 24th August intimated that he did not intend to fulfil his agreement. To this position he adhered. Negotiations were then opened for the cancellation of the agreement, but these fell through. With the view of avoiding loss it was ultimately arranged that the pursuer should cease to act as manager, and a new manager was installed on 12th October, without prejudice to the defender's rights under the agreement. The pursuer has now raised the present action in order (1) to obtain a decree ordaining the defender to endorse and deliver to him a deposit-receipt for £200, dated 24th April 1911, this sum having been deposited to account of the valuation price of the furniture, fittings, &c., belonging to the defender, which under the agreement the pursuer was to take over in the event of the licence of the hotel being transferred to him; and (2) for payment of the sum of £58, 10s. as wages for the period during which he acted as the defender's manager in the hotel. The defence is that the defender is not under any obligation to endorse the deposit-receipt in face of the pursuer's admitted failure to implement the agreement, and that no wages are due because of the pursuer's mismanagement of the hotel. The defender also counter-claims for £250 as damages for breach of the agreement, and there is a further special claim of damage amounting to £79, 5s. 2d. [*His Lordship narrated a counter-claim with which this report is not concerned.*] The defender further demands an accounting of the pursuer's intromissions during the period while he acted as manager of the hotel."

On 21st February 1912 the Sheriff-Substitute (MACLEOD), as regards the first crave of the initial writ, repelled the defences as irrelevant, ordained the defender to endorse and deliver to the pursuer the deposit-receipt mentioned in the initial writ; as regards the second crave of the initial writ, repelled the defences as irrelevant, and found the defender liable to the pursuer in payment of the sum of £58, 10s. sterling. . . . As regards the counter-claim for £250, dismissed the same as irrelevant except to the extent of £50 sterling, and, of consent of the pursuer, found the pursuer liable to the defender in payment of the said sum of £50 sterling.

The defender appealed, and argued—(1) The defender was entitled to retain the

deposit-receipt till he had had an opportunity of constituting his claim for damages against the pursuer for breach of contract. The contract must be treated as a whole, and pursuer could not insist in performance of prestations in his own favour while refusing to implement those in favour of defender. (2) Further, defender was entitled to proof of his counter-claim for £250 damages, which was not limited by the amount in the penalty clause. He could not get decree *ad factum præstandum*, and this was therefore his only remedy—Ersk. Inst. iii, 3, 86; Bell's Comm. i, 655 (699). In the present case the amount in the penalty clause was too small to assess the damage as liquidate damages—*Reynolds* v. *Bridge*, 1856, 6 El. and Bl. 528 (*per* Coleridge, J., at p. 541); *Clydebank Shipbuilding and Engineering Company, Limited* v. *Don Jose Ramos Yzquierdo y Castaneda*, November 17, 1904, 7 F. (H.L.) 77, 42 S.L.R. 74. In this respect penalty differed from liquidate damages in that it was a random sum, used simply for the purpose, as Erskine put it, of quickening performance, and it was subject to modification by way of increase or diminution, the original idea being that it was "by and attour performance"—Chitty on Contracts (15th ed.), p. 817. The actual damage sustained, whether above or below the penalty, was in every case the amount entitled to be recovered—*Lowe* v. *Peers*, 1768, 4 Burr. 2225 (*per* Lord Mansfield at p. 2228); *Winter* v. *Trimmer*, 1762, 1 W. Bl. 395; *Harrison* v. *Wright*, 1811, 13 East. 343; *Stroms Bruks Aktiebolag* v. *Hutchinson*, January 26, 1904, 6 F. 486, 41 S.L.R. 274; Mayne on Damages (8th ed.), p. 289. Payment of the penalty did not excuse non-performance of the contract—*Gold* v. *Houldsworth*, July 16, 1870, 8 Macph. 1006, 7 S.L.R. 646. Lord Fitzgerald's dictum in *Lord Elphinstone* v. *Monkland Iron and Coal Company, Limited*, June 29, 1886, 13 R. (H.L.) 98, at p 108, 23 S.L.R. 870, founded on by pursuer, was *obiter* and unsupported by authority. In *Johnstone's Trustees* v. *Johnstone*, January 19, 1819, F.C., cited by pursuer, the clause was clearly liquidate damages, and *Hyndman's Trustees* v. *Miller*, November 21, 1895, 33 S.L.R., 359, simply followed it.

Argued for the pursuer—(1) Defender was not entitled to retain the deposit-receipt as against a claim of damages for breach of a separable part of the agreement. The contract as to the furniture was really a distinct contract, and there could be no compensation in such a case either at common law or under the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), rule 55—Bell's Prins., section 573, and *Christie* v. *Birrells*, 1910 S.C. 986, 47 S.L.R. 853. (2) The stipulation as to the payment of £50, failing implement, might be regarded either as liquidate damages or as penalty, but in neither case could the defender recover more than that amount. In construing such a stipulation the Courts would give effect to the true intent of the contract, and the mere name given to it, whether penalty or liquidate damages, would not matter—*Johnston* v. *Robertson*, March 1, 1861, 23 D. 646 (*per* Lord Cowan at p. 654). Pursuer maintained that on a true construction of the agreement it was liquidate damages, and if so, then that must be taken to be the parties' pre-estimate of the damages sustained, and no inquiry into the actual damage was competent—*Hinton* v. *Sparkes*, 1868, L.R., 3 C.P. 167; *Wallis* v. *Smith*, 1882, 21 Ch. D. 243; *Reilly* v. *Jones*, 1823, 1 Bing. 302. If, however, the clause was to be regarded as a true penalty clause, though then it did not assess the damage, still it limited it, and nothing could be recovered beyond that figure—*Johnstone's Trustees* v. *Johnstone* (*cit. sup.*); *Hyndman's Trustees* v. *Miller* (*cit. sup.*): *Lord Elphinstone* v. *Monkland Iron and Coal Company, Limited* (*cit. sup.*) (*per* Lord Fitzgerald at p. 108); *Craig* v. *M'Beath*, July 3, 1863, 1 Macph. 1020 (*per* L.J.-C. Inglis at p. 1022); Bell's Prins., section 34. Pursuer also referred to *Stewart* v. *Kennedy*, February 17, 1890, 17 R. (H.L.) 1 (*per* Lord Herschell at p. 5), 27 S.L.R. 386.

At advising—

Lord Salvesen—[*After the foregoing narrative of the facts of the case*]—In this case the Sheriff-Substitute has found it possible to dispose without inquiry of all the conclusions of the action with the exception of the demand for accounting made by the defender. As I am unable to reach the same result I think it necessary to deal with the case in some detail.

[*His Lordship then narrated the facts as quoted above.*]

As regards the first crave the Sheriff-Substitute has repelled the defences as irrelevant and ordained the defender to endorse and deliver the deposit-receipt referred to; as regards the second crave he also repelled the defences as irrelevant and finds the defender liable in payment of £58, 10s. in name of wages, although the agreement does not provide for the rate of wages in the event which has happened. He has further dismissed *in toto* the counter-claim for £79, 5s. 2d., and also the counter-claim for £250 except to the extent of £50 sterling. He has thus disposed of the whole cause with the exception of the defender's claim for an accounting, with regard to which there is no dispute.

I am unable to agree with the Sheriff-Substitute in any of his conclusions. The averments of negligence are, I think, quite relevant to be remitted to probation. [*His Lordship then dealt with the averments of mismanagement and with another counter-claim with which this report is not concerned.*]

There is more difficulty as to whether the pursuer is entitled to have the deposit-receipt endorsed and delivered to him. His counsel urged that this was a separable part of the agreement, and that the money having been consigned as security for the valuation price of the furniture, fittings, and stock in the hotel, now that he had resolved not to go on with the agreement or to take over these effects,

the defender had no right to keep the pursuer out of his own money. It is true that the principle of compensation or set-off is not applicable to such a claim. But there is another principle equally well recognised which was expressed by Lord Justice-Clerk Moncreiff in *Turnbull* v. *M'Lean* (1 R. 730) as follows—"I understand the law of Scotland in regard to mutual contracts to be quite clear—first, that the stipulations on either side are the counterparts and the consideration given for each other; second, that a failure to perform any material or substantial part of the contract on the part of one will prevent him from suing the other for performance; and third, that where one party has refused or failed to perform his part of the contract in any material respect, the other is entitled either to insist for implement, claiming damages for the breach, or to rescind the contract altogether—except so far as it has been performed." The present case seems to me to fall within these rules. The pursuer has declined to perform his contract altogether, and he cannot therefore call upon the defender to fulfil his obligations until the latter has had an opportunity of constituting his claim of damages for the breach of the contract. As Lord Benholme said—"In mutual contracts there is no ground for separating the parts of the contract into independent obligements, so that one party can refuse to perform his part of the contract and yet insist upon the other performing his part. The unity of the contract must be respected." I am therefore of opinion that the Sheriff-Substitute has erred in granting a decree ordaining the defender *de plano* to endorse the deposit-receipt.

The remaining part of the judgment raises an interesting question of law about which there has been an apparent variety of judicial dicta. The last article in the mutual agreement between the parties is expressed in these terms—"Fifth. . . . [*quotes, v. sup.*] . . ." The Sheriff-Substitute has held that this sum of £50 represents the maximum to which the defender is entitled in respect of the admitted breach by the pursuer of his part of the agreement; and that as the pursuer is willing to allow this sum of £50 to be deducted from any claim which he may establish to wages, no inquiry need be led as to the loss the defender has actually or potentially suffered. He says—"Realising the speculative nature of the enterprise, the parties were careful in advance to translate the situation of a breach into a figure, and that is the figure for which the pursuer admits liability." I understand the learned Judge to mean by this that the parties intended that the sum of £50 should represent the liquidate damages in case of a breach by either; and if he were correct in so thinking there is no fault to be found with his law. The intention, however, must be gathered from the words of the contract; and I confess that I do not find anything in the penalty clause to suggest that the sum of £50 there mentioned was an agreed-on pre-estimate of the damage which either might sustain by the failure of the other to perform his part of the contract. In the first place, the word used is "penalty" and not liquidate damages. I attach some importance to this, although the Courts have in special circumstances construed the word "penalty" as equivalent to liquidate damages, and conversely. A more important point is, however, that the penalty is to be "over and above performance." Now, it is also true that these words will be implied where the Court is of opinion that the sum agreed on for breach of the agreement is so agreed on by way of penalty merely, and is not to be treated as liquidate damages; but I do not know of any case, and we were referred to none, where such words, when expressed, were held to be consistent with an intention of parties to fix the liquidate damages. An even more important consideration in determining whether the sum stipulated to be paid in the event of a breach of contract is liquidate damages or merely represents a penalty, is to ascertain whether the sum conditioned to be paid bears (in the words of Lord Justice-Clerk Inglis in *Craig*, 1 Macph. 1020) "a clear proportion to the amount of loss sustained by the party entitled to claim it"; and very similar language was used by some of the noble Lords who decided the case of *Elphinstone* (13 R. (H.L.) 98). The Lord Chancellor (Lord Herschell) in holding that the stipulated sum in that case represented liquidate damage, said—"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." In this case the very opposite holds good. The agreement imposes on the pursuer many obligations of an entirely different kind. There is first an undertaking that he shall duly lodge and follow forth an application for a transfer of the licence to himself. Then he is taken bound to take over at mutual valuation certain furniture, fittings, and stock. Further, he undertakes to act as the defender's manager, and account to him for the whole drawings of the hotel—also week by week to consign the surplus of drawings over expenses in bank in name of the defender, and to conduct the hotel on a proper business-like footing, and do nothing likely to prejudice the licence. For a breach of any of these obligations—some of them of a kind which might not involve actual loss, and others a loss that could certainly not be material, as, for instance, the failure to consign in a single week the surplus drawings—the same penalty is prescribed. But I need not pursue the subject, for I do not think the clause with which I am dealing could have been more clearly expressed as a penalty clause or one which is less calculated to indicate an intention of the parties to treat the stipulated sum as liquidate damages,

whether in respect of a partial or entire breach of the obligations undertaken by the pursuer.

Even on the assumption, however, that this is a penalty clause, the pursuer argued that while it would be open to him to call upon the defender to prove his actual damage, the latter can never recover more than the stipulated penalty, although he (the pursuer) is not bound to pay more than the actual damage if it be less. This is a somewhat startling proposition, but it is not unsupported by authority. The earliest case to which we were referred on the subject is that of *Johnstone's Trustees* (19th January 1819, F.C.). In that case a property was exposed for sale under articles of roup which obliged the highest offerer within thirty days after the day of roup to grant bond for the price offered by him to the satisfaction of the exposers, with a fifth part more than the price of liquidate penalty in case of failure; "and if any purchaser shall fail in granting the said bond, he shall, besides incurring a penalty of a fifth part more than the price, forfeit his interest in the purchase; and it shall be in the option of the exposers to compel the purchaser to implement his bargain or to hold the said lands and others themselves as being unsold and of new to expose them to sale." Dr Johnstone bought part of the lands at an upset price of £15,646, but having afterwards relinquished the purchase, the trustees brought an action against him concluding for a fifth of the purchase price, being the penalty incurred by his failure in implementing the conditions of the articles of roup, and also for £5000 damages. Lord Reston (Ordinary) found that the amount of the damage must be the difference between the sum of £15,646, the upset price at which the lands were purchased for behoof of Dr Johnstone, and the amount of the price which should be received by the pursuers when a sale of the whole lands had been effected, together with the difference between the interest on the price offered and on the actual proceeds of the lands. It is thus plain that he treated the clause on which the pursuers founded, not as one by which the damages were liquidated, but as a proper penalty, notwithstanding that it bore a certain relation to the price of the property. The report further bears that his Lordship afterwards found that the sum exigible from the defender could in no event exceed the penalty. A reclaiming petition was presented by the trustees, but the Court refused the petition, without answers. Unfortunately the report does not contain the opinions of the Judges in the Inner House. This case was followed by Lord Wellwood in the Outer House in the case of *Hyndman's Trustees* (33 S.L.R. 359), although his Lordship stated that but for that case his decision would have been the other way. His decision was not reclaimed against, but one main reason for not presenting a reclaiming note (as I happen to know, from having conducted the case in the Outer House) was that it was doubtful if even the sum decerned for could be recovered against the defender. It is further not to be left out of view that Mr Bell in his Principles treats the case as authoritative; for he lays down as a proposition in relation to stipulated damages that "the obligation may be fortified by a penalty which is held to cover but not to assess the damage, to entitle the jury to find under it the true amount of damage not exceeding the penalty." Lastly, Lord Fitzgerald's opinion in the case of *Elphinstone* contains the following passage—"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 agreemeut 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." This latter dictum was not necessary for the decision of the case before the House, as the sum stipulated in the event of a breach was held to be liquidated damages, and none of the other learned Lords referred to it in their opinions.

It is to be noted that in *Johnstone's* case the pursuers concluded for a penalty although they had a separate and additional conclusion for damages. They were thus founding on the penalty clause, and it may be that in such circumstances they were not entitled to ask any more than the penalty. Possibly this may afford a key to the decision, and also to the dicta of Mr Bell and Lord Fitzgerald. If that is not the true view I confess that I am quite unable to reconcile these authorities with the other principle which has been firmly fixed in our law by a series of decisions, and which is thus stated by Mr Bell in his Principles (section 34), "that the stipulation of a penalty (unless when expressly so declared) is not alternative, and does not discharge the obligation on payment of the penalty." I need only refer to one case as illustrating this principle, that of *Gold* (8 Macph. 1006). Suppose that in the present case, after the pursuer had obtained a transfer of the licence and had performed, or was willing to perform, all the obligations incumbent on him by the agreement, but that the defender proposed to let the hotel to some other person at a higher rent. According to the principle of the case last cited, would the pursuer not have been entitled to insist on specific implement, or could the defender have tendered him a sum of £50 sterling as in full of the damages claimable through his breach of contract? In my opinion he could plainly not do so. Or again, to take the decision in the case of *Johnstone's Trustees*, suppose the trustees had attempted to resile from their bargain, is it not plain that it would have been open to the purchaser to have obtained a

decree ordaining them to execute a disposition on payment of the price, or in default of their doing so to grant an adjudication in implement of the sale? To my mind it is obvious that this latter remedy would have been open to the purchaser. It is true that in the case of the purchaser who resiles from his contract the remedy of a decree *ad factum præstandum* is not open, nor would it be available to the pursuer here. The only performance of the contract which can be obtained in such a case is full compensation for the breach. I cannot conceive any ground upon which it can be held consistently with principle that one of the parties should escape all the consequences of his breach on payment of a stipulated sum which is stated by way of penalty, when the other may be compelled to implement the contract in its entirety. That is to read a penalty clause which *ex hypothesi* does not assess the damages as nevertheless assessing it where the actual damage sustained is more than the stipulated sum. I am fortified in this view by the circumstance that the rule has been fixed in England in a sense opposite to that indicated in the Scotch authorities I have quoted. In the case of *Harrison* v. *Wright* (13 East. 343) a charter-party had been entered into between the parties for a voyage from Sweden to Hull. It contained a clause, "penalty for non-performance, £1300." The shipowner afterwards refused to allow the vessel to sail, and the charterers claimed £3000 damages for breach of contract. An arbiter awarded the plaintiffs £1860, though it was objected before him that not more than £1300, the amount of the penalty as liquidate damages, could be recovered. Lord Ellenborough, following a prior decision of Lord Mansfield in *Winter* v. *Trimmer* (1 W. Bl. 395), held that the penalty was auxiliary to the enforcing performance of the contract, and that the party aggrieved might either take the penalty as his debt at law and assign his breach under the statute of William III, cap. 11, section 8, or he might bring his action for damages upon the breach of the contract, and that the arbitrator was warranted in awarding the sum which he had given to the plaintiffs. That decision has been recognised ever since as a correct statement of the law of England, and in the ordinary text-books on shipping and contracts the matter is treated as no longer open. Thus Mr Carver in Carriage by Sea, section 722, says—"A clause such as 'penalty for non-performance estimated amount of freight' (or some fixed sum) is frequently found in charters, but practically it appears to have little effect. On the one hand, it does not limit the amount of damages which may be claimed; on the other hand, it does not entitle either party to claim the amount of the penalty for a partial breach of the contract." The decision of the Privy Council in the case of *Dimeck* v. *Corlett* (12 Moor P.C. Cases) is not really inconsistent with the law as thus stated, although it was there held that in the case of an entire non-performance of a contract of affreightment the party aggrieved was entitled to recover as damages the full amount of freight stipulated for in the instrument. In effect the Court there decided that the estimated amount of freight was to be dealt with as liquidate damages in the event of entire failure to perform the contract. In a later case, that of *Godard* v. *Gray* (L.R., 6 Q.B. 139), Blackburn, J., quoted with approval the following passage in Abbott on Shipping—"Such a clause is not the absolute limit of damages on either side; the party may, if he thinks fit, ground his action upon the other clauses or covenants, and may in such action recover damages beyond the amount of the penalty if in justice they shall be found to exceed it. On the other hand, if the party sue on such a penal clause he cannot in effect recover more than the damage actually sustained." The decision in the case of *Craig* (1 Macph. 1020), to which I have already referred, is not, as I read it, in the least degree inconsistent with the principle thus stated, but is entirely on the same lines. I think all the authorities that appear to be to a contrary effect in Scotland may be explained by the passages being elliptical and omitting what is clearly stated in the passage from Abbott, that a stipulated amount of penalty is the maximum amount recoverable if the party aggrieved sues on the penalty clause.

It cannot be maintained that a different principle of construction is to apply to a contract of affreightment, which is after all the lease of a vessel, from what is applicable to the lease of a heritable subject.

I have come, therefore, in the end to be very clearly of opinion that the laws of England and Scotland are the same as regards the matter, and that the defender is entitled to recover whatever loss he is able to qualify in respect of the pursuer's breach of contract. We ought, therefore, to recall the interlocutor appealed against; to repel the first, fourth, and fifth pleas-in-law for the pursuer and the second alternative of plea 7; and remit the case to the Sheriff-Substitute to allow parties a proof of their respective averments.

Since this case was argued counsel for the pursuer has directed our attention to the case of *Webster* v. *Bosanquet* ([1912] A.C. 94). I have accordingly considered the decision of the Privy Council, with the result that I do not think it in any way aids the pursuer's argument. The clause of the contract on which action was there taken is in marked contrast to the one which occurs in the contract between the parties here. It provided for a specified amount to be paid in the event of breach "as liquidated damages and not as penalty." The main value of the decision lies in this, that such a stipulation will be fairly construed, and that the stipulated sum of liquidate damages will not be due unless there has been a substantial breach of the contract; or, to put it another way, that the mere fact that on a literal construction of the clause it might be possible to say that it provided for payment of liquidate damages for any trifling breach was

not to be held as converting it into a mere penalty clause, for the Courts must construe a contract according to the presumed intention of the contracting parties. The case lays down no new law, but professedly follows the decision in the *Clydebank Engineering Co.* (7 F. (H.L.) 77), to which we were referred in the course of the argument. It does not support to any extent the view that when an action is laid on breach of contract the damages are to be held as limited to the amount stipulated in a proper penalty clause.

The LORD JUSTICE-CLERK and LORD GUTHRIE concurred.

LORD DUNDAS, who was present at the advising, gave no opinion, not having heard the case.

The Court recalled the interlocutor of the Sheriff-Substitute and remitted the cause to him to allow parties a proof of their respective averments.

Counsel for the Pursuer (Respondent)—Morison, K.C.—Guild. Agents—Dalgleish, Dobbie, & Co., S.S.C.

Counsel for the Defender (Appellant)—Horne, K.C. — D. Anderson. Agent — A. C. D. Vert, S.S.C.

Wednesday, July 10.

FIRST DIVISION.

NOBLE AND OTHERS (NOBLE'S TRUSTEES), PETITIONERS.

Trust—Nobile Officium—Administration—Powers of Trustees—Application of Sum of Money out of Trust Estate in Meliorating Heritable Subjects Forming Part of the Estate—Long Lease of Same.

Part of a trust estate consisted of certain heritable subjects which were let on lease. The tenant intimated to the trustees that if they desired at the termination of the lease to continue his tenancy they would require to make certain meliorations on the subjects and renew the lease of them for a period of twenty-one years. The trustees being of opinion that it would be in the interests of all the beneficiaries in the estate that the present tenant should be retained, presented a petition to the Court of Session, in the exercise of its *nobile officium*, for power to uplift and apply a sum of money out of the trust estate in making the necessary meliorations on the subjects, and for power to grant a lease of them for twenty-one years.

Held that whether the trustees ought so to uplift and apply a sum of money out of the trust estate, and to grant a lease of the subjects for twenty-one years, were matters of administration which it was for the trustees to determine, and with regard to which the Court could not give advice.

Matthew Carstairs Noble, merchant, Jedburgh, and others, the trustees acting under the trust-disposition and settlement of the deceased Robert Noble, sometime merchant in Jedburgh, presented a petition to the Court for authority (1) to uplift from the capital of the trust estate a sum of money, and to apply it in altering and adding to the buildings on certain heritable subjects forming part of the trust estate, and (2) to grant a lease of these subjects for twenty-one years.

Robert Noble died on 24th June 1902, leaving a trust-disposition and settlement dated 28th April 1897, and relative codicils, all registered in the Books of Council and Session on the 28th June 1902, whereby he conveyed his whole estate, heritable and moveable, to certain trustees for the purposes therein mentioned. The truster, after providing for payment of his debts and funeral expenses, and making certain legacies and bequests of minor importance, directed that the residue of his estate should be held for his seven children in liferent and for their issue, and the issue of a daughter who had predeceased him, in fee. Certain of the children were given a larger share of residue than others, and the trustees were given power to advance to any of the children part, or even the whole, of the capital of the share of residue held for them in liferent.

The *trust* provided that "my trustees and executors shall be entitled to the fullest powers and exemptions usually conferred in similar cases according to the most liberal interpretation: And particularly I authorise and empower them to submit to arbitration or settle by the advice of counsel all disputed claims competent to or against the said trust subjects and estate or among the parties interested therein; to compound and take part for the whole of any disputed debts or claims; to lend out the whole or any part of the trust funds and estate on heritable security . . . or to invest the same . . . in the purchase of heritable property, feu-duties, ground annuals, or other heritages, and from time to time to alter and renew the securities as may be necessary or as may seem to them expedient; to hold the investments, whether heritable or moveable, in which the trust funds and estate may be invested at the time of my decease so long as it may seem to them expedient."

The *petition* stated, *inter alia*—"The capital value of the heritable and moveable estate at 31st December 1910 (the date of the last trust account) was £12,553, 14s. . . .

"Part of the heritable estate left by Mr Noble consists of the property No. 51 High Street and Smith's Wynd, Jedburgh, comprising the front tenement No. 51 High Street, three storeys in height, and outhouses and courtyard at back, and piece of ground at rear of these and extending to Queen Street, which street runs parallel to High Street. The tenement of buildings contains on the ground floor a large shop used and fitted as the Post Office of Jedburgh. The outhouses and courtyard also