On Mr Lucas' death the trustee entered on the management of the estate and began payment half-yearly of the two annuities to the testator's half-sisters which were to come into immediate operation. The children of James M'Laren, who were to receive legacies of £100 on the death of Mrs Lucas, were ten in number, the youngest of them being three years of age. Their father was forty-nine years of age, their mother fifty years. Robert Donaldson's annuity, provided he resided in this country and in the trustees' opinion required it, was also not to become payable till the death of Mrs Lucas. He returned to this country and took up his residence in Bridge of Allan. Mrs Lucas repudiated the provisions in her favour above narrated and elected to take her legal rights. The trustees therefore made payment to her of her *jus relictæ*, and were also prepared to satisfy her right of terce. In these circumstances the only purposes of the trust remaining to receive effect were the annuities payable and to be payable, the legacies to become payable, and the conveyance of the residue to the patrons of the Lucas' Trust, who maintained that the trustees under the settlement were now bound, after providing for the widow's right of terce and for the legacies and annuities still payable and to be payable, to convey the residue to them for the purposes of the Lucas' Trust; or otherwise, that it was the duty of the trustees under the settlement to convey the whole estate to them under burden of paying and providing *ante omnia* for the widow's right of terce and the annuities and legacies payable and to be payable.

In these circumstances this Special Case was presented to the Court for the testamentary trustees as first parties, and the patrons of Lucas Trust as second parties.

The questions for opinion and judgment were —"(1) Are the parties bound to retain the said residue and accumulate the balance of income accruing thereon until the death of the said Mrs Lucas? or (2) Are the second parties, subject to the said existing and contingent interests, entitled to an immediate conveyance of the said residue? or (3) Are the second parties entitled during the lifetime of the said Mrs Lucas to payment of the balance of income derivable from the said residue, and on her death to payment of the residue, subject to the then existing interests?"

Argued for the first parties—The legacies to the children of Mr M'Laren were special legacies to each of the children who might be alive at the death of Mrs Lucas. More children might yet be born to Mr M'Laren. If the widow's repudiation of the provisions on her behalf were held as in the circumstances equivalent to her death, as the second parties contended, such future born children would lose their legacies. The first parties were bound to retain the estate for payment of the annuity to Robert Donaldson in the event of their holding him entitled to receive it—*White's Trs.* v. *Whyte*, June 1, 1877, 4 R. 786.

Argued for second parties—The difficulty as to Robert Donaldson's annuity would have been exactly the same if the wife had died instead of repudiating her provisions. The testator's object was just to secure the annuity, and that object would be served by the Lucas Trust undertaking to pay it if so directed by the first parties—*Alexander's Trs.* v. *Waters*, Jan. 15, 1870, 8 Macph. 414; *Cameron* v. *Young*, Feb. 8, 1873, 45 Jurist 272. As to the existence of future children of Mr and Mrs M'Laren, in the parallel case of *M'Niven's Trs.* v. *M'Niven*, June 9, 1847, 9 D. 1201, the Court took the class of persons to be benefited as they existed at the date of the repudiation.

Their Lordships, without delivering any opinions, pronounced this interlocutor:—

"Find, in answer to the first question, that the first parties are not bound to retain the residue of the trust-estate and accumulate the balance of income accruing thereon until the death of Mrs Lucas; and, in answer to the second question, that the second parties are entitled to an immediate conveyance of the said residue, subject to existing and contingent interests, and subject to the provision with reference to the annuity bequeathed to Robert Donaldson, that the first parties shall give intimation to the second parties if in their opinion the conditions under which the annuity is by the trust-deed bestowed on him have not been fulfilled: Find that it is not necessary to answer the third query; and decern."

Counsel for First Parties—Dickson. Agents—Duncan & Black, W.S.

Counsel for Second Parties—J. A. Reid. Agent—Henry Buchan, S.S.C.

Wednesday, March 2.

SECOND DIVISION.

[Lord Lee, Ordinary.

ROBERTSON *v.* DRIVER.

Breach of Contract—Liquidate Damages—Penalty.

When parties have entered into a time bargain, a stipulation reasonable in itself, that the party failing to perform his part by the time appointed shall pay a certain sum during such failure, will receive effect.

Observed that the Court will not enforce a claim for penalties beyond the amount truly due as compensation for breach of contract.

Terms of contract on which *held* (*altering* judgment of Lord Lee) that a stipulation under which the party failing should pay a certain sum to the party performing was not sufficiently specific to receive effect.

In April 1876 John Henry Driver, residing at Springfield House, Dollar, invited John Robertson, joiner in Dollar, to furnish specifications for certain alterations on Springfield House. Robertson furnished specifications, and offered to do the work for a certain sum. This offer was accepted. In August 1876 Robertson furnished specifications for oriel windows which it was proposed to add to the house. A written contract was entered into whereby he undertook to do this work also for a sum of £314. This latter contract contained this provision—"The roof of oriel windows to be made ready for the slates within

two days after the time specified for the completion of the mason work, and the portions of rooms requiring to be plastered to be made ready for the first coat of plaster within two days thereafter, and the internal finishings proceeded with as soon as possible." It also contained general conditions, of which article 2 was as follows:—"Should the contractor refuse or delay so to carry on his work, as that it may be fully and properly completed in every respect, viz., mason, joiner, slater, plumber, glazier, and all other work, on or before seven weeks from the date of contractor's receiving the acceptance of offer, it shall be in the power of the proprietor, after giving two days' notice in writing to the contractor of his intention so to do, to employ other tradesman to carry on and complete the work on the contractor's expense." Article 6 was as follows—"The contractor to receive one-third of the contract price as soon as the mason has the stone work of the oriel windows completed, the other third to be paid after the glazier, slater, and plumber work is completed, the remaining third to be paid on the completion of the work, but said price shall be subject to deduction of £2 for each day, or part of a day, after date as before specified, for the completion of the work, during which the work may remain unfinished, or in manner incomplete, of which the proprietor, or architect, or inspector foresaid, shall be sole judge." In February 1879 certain questions having arisen as to Robertson's accounts, and certain disputes as to principles on which they were made up, he raised an action concluding for various sums, amounting in all to £366, 15s. 1d., being the amount alleged to be due under deduction of certain payments to account on both contracts and for certain extras furnished by him. The Lord Ordinary (YOUNG) remitted the case to a reporter, who in his report brought out a balance due to the pursuer of £324, 5s. 6d., subject to certain deductions. He explained in his report that the question would remain for decision whether the defender was entitled to set off against a sum due to the pursuer a sum of £124 sterling, being penalty for sixty-two days at £2 per day, under article 6 of the oriel-window contract, which he claimed right to deduct on the ground of the pursuer's delay in completing the works within the stipulated period.

On 24th Dec. 1880 the Lord Ordinary (LEE) found the defenders entitled to a deduction for twenty-four days at £2 per day, amounting to £48.

His Lordship appended this note to his interlocutor:—". . . Now, as the period of seven weeks from the contractor's receiving the acceptance expired on 16th October, it is plain that if the contract contains an obligation to complete the work by that date, to which the stipulation in article 6 of the conditions is referable, a question arises concerning the import and effect in the circumstances of the alleged penalty and deduction from price. The Lord Ordinary has imagined from the record that the pursuer's reply to the defender's counter-claim was that stated in the 4th plea-in-law, viz., 'That the defender being responsible for any delay which occurred, is not entitled to recover the penalties referred to.' But it appeared at the proof and debate that the pursuer now maintains that the contract imposed no obligation upon him to complete the whole work within any specified time." . . .

His Lordship then went on to explain the grounds in fact on which he found that a deduction was to be allowed for the period of twenty-four days, and then went on to say—"The question then is, What is the effect under the contract of the stipulated penalty or reduction of £2 per day? Although it has been called a penalty on the record, the Lord Ordinary holds that in determining the effect of the stipulation, and whether it is incumbent upon the employer to prove damage by the delay, or whether it rests with the contractor to show grounds of abatement, the thing to be considered is the real nature and substance of the stipulation. It may be either (1) a penalty properly so called, viz., a sum imposed *in pœnam;* or (2) an adjusted and agreed-on rate of damages proportionate to the breach of contract; or (3) a rate of damages agreed upon, but exorbitant and unconscionable. The cases of *Craig* v. *M'Beath*, 1 Macph. 1020; *Johnstone* v. *Robertson*, 23 D. 646; *Forrest & Barr* v. *Henderson*, 8 Macph. 187, illustrate the distinction between these several cases. The result of them appears to be that if the sum be truly penal it will not be enforced beyond the damage actually suffered. Even where the sum bears to be agreed upon as liquidated damages, the Court may modify it if exorbitant and unconscionable. But where intended as liquidated damages, and there appears to be nothing exorbitant in the stipulation but a reasonable and fair proportion between the consequences of a breach of contract and the penalty, a Court of Justice will not interfere (1 Bell's Com. 5th ed. 655; and *Johnstone* v. *Robertson*). If it be maintained in any case that the stipulated sum is excessive and exorbitant, it rests with the party alleging this to set forth and establish grounds for modification, otherwise the party claiming the penalty is entitled to assume that the damage has been justly assessed by the contract at the amount of the penalty (*Craig* v. *M'Beath*).

"In the present case the party claiming the penalty does not allege actual damage except in so far as the want of the front part of his house implies damage. His claim is founded entirely on the contract. On the other hand, the party resisting the deduction so claimed sets forth no grounds for abatement or modification, but pleads non-liability, in respect that any delay which occurred was caused by circumstances for which the claimant was alone responsible.

"The Lord Ordinary is of opinion that according to the true meaning of the contract the sum stipulated as a deduction from the price in the event of a breach of the obligation as to time is of the nature of pactional damage and not of penalty. He cannot distinguish the stipulation in substance from that in *Johnstone* v. *Robertson*. He holds that there is nothing manifestly disproportionate and exorbitant in the rate agreed upon by the parties. His view is that the parties, knowing the kind of house and having before them the extent of inconvenience that must be caused to the employer by delay, assessed the damage at a rate which they mutually agreed upon as proportionate to the breach of contract. The stipulation of the second article of the conditions does not seem to be at all inconsistent with this view. It is intended to provide against unreasonable delay or refusal to do the work. Article 6 assumes that the work is proceeded with

and done, but that the contractor fails to implement his obligation to do it in the time stipulated.

"In this view the only question comes to be, Whether the pursuer has established as a matter of fact that any delay which occurred was caused by circumstances for which the defender is responsible? The alleged delay in sending the plan the Lord Ordinary has already dealt with. He holds that in the circumstances it goes to the date of receiving the acceptance, and cannot exclude the defender from enforcing the contract. The case of *M'Elroy* v. *Tharsis Co.*, 17th Nov. 1877, 5 R. 161 (H. of L. 171), was different, and the judgment in that case has no application to this cause of delay; for in that case the Court proceeded upon fault during the time allowed for executing the contract. Here the delay was in concluding the contract, and thus fixing the time for its commencement."

The pursuer reclaimed.

At advising—

LORD JUSTICE-CLERK—That the parties to this meant to make a time bargain there can, I think, be no doubt. That the period which the work occupied was somewhat protracted is manifest, and I am not sure that it might not have been rendered shorter if activity had been shown in prosecuting the work. But when we come to the penal clause, and look at the stipulation upon which it rests, I do not think we can tie the defender down to the position in which he is placed by the conclusion of the Lord Ordinary. In that conclusion I cannot concur. The stipulation as to the oriel windows is, that the roofs of them are to be "ready for the slates within two days after the time specified for the completion of the mason-work, and the portions of rooms requiring to be plastered to be made ready for the first coat of plaster within two days thereafter, and the internal finishings proceeded with as soon as possible." That would never lay a foundation for exacting a penalty. I am willing to give the defender the benefit of reading the contract, as he contends, that the date specified is to be seven weeks. But if that be so, what he undertook was impossible; for it is proved that the plaster-work could not be ready for the joiner-work for a fortnight afterwards. The Court cannot enforce a penalty where the work undertaken could not possibly have been done in the time.

LORD YOUNG—I am of the same opinion. I agree with your Lordship that this is not a case in which the penal clause is, having regard to the evidence, capable of being enforced. Where we have a distinct time bargain and a stipulation by the parties that in case of failure of one to perform his part within the time distinctly limited, that then a certain sum shall be paid per day or week so long as the failure shall continue, we should in the ordinary case give effect to such a stipulation if it were not unreasonable in itself.

If, again, the sum to be paid is a penalty, properly speaking, *i.e.*, the one party punishing the other, we do not allow of that, for the law does not allow people to contract that one shall be entitled to punish the other. What is in the nature of indemnification the Court will give effect to, but anything beyond compensation for breach of contract, and which is properly penalty, cannot be contracted for, and will not be awarded by the Court. That is the principle of the decisions. They do not regard the names penalty or damages, for often what is called penalty means damages, and what is called liquidated damages is really penalty. In this case I do not know whether the £2 penalty would be held, if we had to decide upon it, penalty or liquidate damage, but whatever it is I do not think that in the circumstances it is enforceable at all.

LORD CRAIGHILL—I concur. If the stipulation here were clear and express the defender would prevail, whether we held that the claim he makes were damages or penalty. If I were to hold it a penalty I should agree with the Lord Ordinary, for where the parties have fixed a sum it is a strong thing for the Court to allow it to be altered. But it is unnecessary to consider that, because the contract did not require to be finished by any particular day. It is possible that the parties meant that six weeks and four days should be allowed for a part of the work, and everything else was to be done in the other three days, though there is no evidence of that. The evidence is the other way. On this ground it is unnecessary to enforce the penalty.

The Court altered the judgment reclaimed against and refused to allow the deduction claimed by the defender.

Counsel for Pursuer—J. A. Reid. Agent—J. B. M'Intosh, S.S.C.

Counsel for Defender—Macdonald, Q.C.—Rhind. Agent—R. Menzies, S.S.C.

Friday, March 4.

FIRST DIVISION.

[Sheriff-Substitute of Lanarkshire.

ALLAN *v.* SANDEMAN.

Process—A.S. 10th March 1870, *sec.* 3, *sub-secs.* 1 *and* 3—*Competency.*

Held that an application presented after the expiry of eight days, but within fourteen days from the date on which an appeal was received by the clerk, praying the Court to extend the time for printing in respect that the process was before the reporters on the *probabilis causa litigandi*, was incompetent and fell to be refused.

The Act of Sederunt of 10th March 1870 provides as follows with regard to appeals from Inferior Courts:—

Section 3, sub-section 1—"The appellant shall, during session, within fourteen days after the process has been received by the Clerk of Court, print and box the note of appeal, record, interlocutors, and proof, if any, unless within eight days after the process has been received by the Clerk he shall have obtained an interlocutor dispensing with printing in whole or in part; in which case the appellant shall only print and box as aforesaid those papers the printing whereof has not been dispensed with . . . and if the appellant shall fail within the said period of fourteen days to print and box . . . the papers re-