therefore to consider whether the pursuer can recover more than that sum. But for the decision in *Johnstone's Trustees* v. *Johnstone*, January 19, 1819, F.C., I should have been disposed to hold that in such a case the party willing to perform the contract might at his election either sue for the penalty, in which case the amount of the penalty would be the limit of the damages which he could recover, or, ignoring the penalty, he might sue for the actual amount of damage sustained, whether more or less than the sum contained in the penalty. But the decision in *Johnstone's Trustees* v. *Johnstone* decided that in circumstances similar to those in the present case damages incurred for non-implement of an offer to purchase made at a public sale could in no event exceed the penalty named. In that case the clause in the articles of roup was as follows—'That the last and highest offerer for each lot shall be obliged, within thirty days of the date of roup, to grant bond for the price offered by him to the satisfaction of the exposers, payable within the City of Edinburgh at the terms above specified, with a fifth part more than the price of liquidated penalty in case of failure and annual rent as aforesaid; 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.'

"The defender Dr Johnstone bought part of the lands at the price of £15,646, 11s. 1d.; but having resiled from the purchase, the pursuers brought an action against him, concluding first for £3129, 6s. 2d., a fifth part of the price, and in addition for £5000, or such sum, less or more, as should be found to be the amount of further damage sustained. The Lord Ordinary at first found generally that the defender was liable in damages, and found the footing on which they were to be estimated. But afterwards he found 'that the sum exigible from the defender can in no event exceed the penalty.' Against this interlocutor the pursuers petitioned, and pleaded that as, according to later practice, a penalty for non-performance fell to be modified if it exceeded the actual amount of damage, so it was reasonable that where the actual damage sustained exceeded the sum named, the injured party should not be restricted to the penalty, but be entitled to recover full damages for breach of contract. Otherwise the adjection of a penalty would be a disadvantage instead of an advantage to the party willing to perform the contract.

"But this representation did not prevail, and the Court, without calling for an answer, adhered.

"In practice that judgment has been held as establishing that in articles of roup such a penalty, when stated, is the maximum of damages which can be recovered for non-implement of an offer at a public sale. This is so stated by Professor Montgomerie Bell in his Lectures, vol. ii. p. 728, 3rd ed., and by Professor Menzies in almost the same terms at p. 390 of the 3rd ed. of his Lectures. This statement of the understanding and practice in the profession made by two writers of so great practical experience is entitled to weight. The pursuers maintain that as the penalty is stipulated to be over and above performance, they are not restricted to the amount in the penalty, but are entitled also to recover further damages for breach of contract. But all penalties are in a sense 'over and above performance,' even although these words should be omitted. As Erskine says, iii. 3, 86—'By our customs also such penalties are not unfrequent. But they have no tendency to weaken the obligation itself, being adjected purely for quickening the performance of the debtor, who therefore cannot get free by offering payment of the penalty, though the words of style, "by and attour performance," should be omitted.'—See also *Frost and Barr* v. *Henderson, Coulborn, & Co.*, 8 Macph. 187; *Gold* v. *Houldsworth*, 8 Macph. 1006; and 2 Bell's Comm. p. 699, 7th ed. The party seeking to enforce the contract is not prevented from suing for implement by the other tendering payment of the penalty. This does not necessarily imply, and it has not in practice been held to imply, that if the party chooses not to enforce implement of the contract, he can both claim the penalty and such further damages as he is able to instruct. In the case of *Johnstone's Trustees* the exposers had the option of compelling the purchaser to implement his bargain. But as they did not choose to do so, they were held not entitled to damages in respect of non-performance beyond the amount of the penalty.

"I am therefore of opinion that the pursuers are entitled to recover damages, but that those damages must be limited to the sum of £100. But before decree for that sum is given, the abortive decree for implement, which the pursuers obtained against the defender, must be departed from."

Counsel for the Pursuers—Baxter. Agent—W. Kinniburgh Morton, S.S.C.

Counsel for the Defender — M'Lennan. Agents—Miller & Murray, S.S.C.

Tuesday, December 10.

OUTER HOUSE.

[Lord Moncreiff.

DICK *v.* MANSON.

Poor—Lunatic—Aliment—Claim of Parish for Arrears Against Relative.

A parochial board has no claim against the relative of a pauper lunatic for reimbursement of sums expended on the aliment or maintenance of the lunatic, except for those years during which the relative was himself in a position to have maintained the lunatic.

Mrs Margaret Gilbert or Corstorphine, residing at Kirknewton, died on 1st May 1894, predeceased by her husband but survived by her daughter Elizabeth Corstor-

phine, who had been since 1861 a lunatic and chargeable to the parish of Kirknewton.

Mrs Corstorphine left a trust-disposition and settlement by which she bequeathed to trustees sums amounting to £1350 or thereby. It was proved that she was possessed of this sum, or a large part of it, in May 1875, but it did not appear how she obtained it or whether she had any funds prior to that date. She had all along concealed the amount of her resources and declined to contribute to the support of her daughter on the plea of poverty. In 1883, however, under pressure from the inspector of poor, she had agreed to contribute three shillings a-week and had done so ever since.

The present action was brought at the instance of the Inspector of Poor of Kirknewton against Mrs Corstorphine's trustees, and concluded for payment of £1424, 1s. 7d., being the amount paid by the parish of Kirknewton for the support of Elizabeth Corstorphine from the year 1861, with interest, but under deduction of the amount paid by Mrs Corstorphine as above stated.

On 10th December the Lord Ordinary pronounced an interlocutor finding the pursuer entitled to the principal sums claimed from 1st January 1875, with interest from the date of the advances at 4 per cent., under deduction of payments to account made by Mrs Corstorphine, and *quoad ultra* assoilzied the defenders, and found the pursuers entitled to expenses.

Opinion.—"The Parochial Board of Kirknewton claim from the trustees of Mrs Gilbert or Corstorphine, who died on 1st May 1894, payment of £1424, 1s. 7d., being the amount of arrears of aliment, with interest added, expended upon the maintenance of Mrs Corstorphine's lunatic daughter between April 1862 and November 1894.

"In my opinion there is no difficulty as to the defender's liability for the principal sums claimed from the beginning of 1875 onwards, because it now appears that at latest in May of 1875 Mrs Corstorphine was possessed of a sum of £1071, because she deposited that sum with the City of Glasgow Bank. Whence it came, whether it represented a legacy paid her at that time or years before, or whether it was the accumulation of the savings of a lifetime, there is no evidence. But it is proved that in 1875 she was possessed of that sum, and at the date of her death it had increased to very nearly £1500.

"Now, down to 1883 she represented to the inspector of poor that she was absolutely unable to contribute to the support of her daughter. But in that year the inspector received a hint that she had some funds of her own. She protested that she had only a few bawbees, and the inspector credited her statement and with considerable difficulty induced her to subscribe three shillings a-week, which she protested was more than she could conveniently do. It seems a little strange that having been led to suspect that Mrs Corstorphine had some means, the pursuer should not have probed the matter further. If he had done so the hoard would have been discovered. But I take it that she acted her part so well that he was completely deceived.

"It is pleaded for the defenders that Mrs Corstorphine was not bound to trench upon her capital, and that as the average annual return at deposit rates did not exceed £30 a-year the sum of £7, 16s. a-year which she agreed to pay was a fair proportion. I do not think that that is a correct view of her liability. The extent in money of the liability of a person who is bound *super jure naturæ* to aliment another, whether ascendant or descendant, depends on circumstances. And it is in the discretion of the Court to decide how it is to be measured. In the cases with which we are most familiar the contribution enforced is usually a proportion of the income; because to encroach upon the capital of persons in humbler circumstances would practically be to ruin and speedily pauperise the person upon whom the obligation to aliment lies. But in the present case there is no difficulty. The pauper was Mrs Corstorphine's only child and only dependent. If the hoard of £1300 or £1400 had been more profitably invested at 3¾ or 4 per cent., it would have yielded enough both to support Mrs Corstorphine, and to pay the full board—£22—of the daughter. Or if such an investment could not have been obtained, Mrs Corstorphine, who was a woman of over seventy in 1880, could for £400 or £500 have obtained an annuity on her own life of £50 a-year; and if anything more was required there would have remained nearly £1000 to be applied in one way or another towards the maintenance of the daughter.

"I forgot to observe that the plea of prescription does not apply to such a case where the creditor's failure to sue for his debt is due to the fraud or concealment of the debtor—*Caledonian Railway Company* v. *Chisholm*, 13 R. 773.

"There is more difficulty about the pursuer's claim for the period prior to 1875, because whatever suspicion there may be, there is no proof that prior to that date Mrs Corstorphine was possessed of the fund in question, and if she was not, it is not suggested that she could have contributed. The pursuer's counsel pleaded that it was enough to show that there was now sufficient funds to cover the arrears; but I do not think that that is the true view. By the 77th section of the Lunacy Act of 1857, it is enacted—"The expense incurred by any superintendent of any asylum, or by any other party, for or in relation to the examination, removal, and maintenance of any lunatic, shall be defrayed out of the estate of such lunatic; or, if such lunatic has no adequate estate, and if such expense shall not be borne by the relations of such lunatic, then the lunatic shall be treated as a pauper lunatic, and such expense shall be defrayed by the parish of the settlement of such lunatic, and the superintendent or other party disbursing such expense shall be entitled to recover the same from or out of the parties or estate liable to defray the same as aforesaid."

"Now, it seems to me that the liability of the relations of the lunatic who are bound

to support her cannot in a question with the parochial board exceed their legal liability, that is, their liability had it arisen in a question with the pauper herself. The right of the parochial board as against the pauper is to insist that his or her existing estate shall be applied to the maintenance of the pauper. If the pauper has no estate, and no relative bound and able to support her, the parochial board are bound to support her, and if she subsequently acquires funds by succession, the parochial board is not entitled to reimbursement out of such estate for prior outlays which it has made. If, again, the pauper has no estate of her own, the parochial board may claim payment from those relations who are legally bound to support her; but the measure of their liability is what they can at the time afford after reserving enough for their own support, and if there is no superfluity they are assoilzied—*Hamilton* v. *Hamilton*, 4 R. 688. No doubt a relative who is liable for the aliment of a pauper, and is not at once proceeded against, continues liable in this sense that when discovered he is bound to pay arrears of aliment which has been advanced by the parochial board. But that is on the footing that when the advances were made the relation was not only bound but able to contribute. It may be that it lies upon the relation to prove that he was unable to contribute or pay when the advances were made; but that does not alter the legal measure of his liability. This point is noted by Lord Fraser in his elaborate opinion in the case of *The Inspector of Poor of Kilmartin* v. *Macfarlane*, 12 R. 713, in which he says—'If there be an existing source from which the pauper can obtain maintenance without coming upon the parish, that must be drained dry before the parish can be burdened. But that is a totally different case from what we are here dealing with—of a pauper who had nothing at the time relief was granted, either in the shape of property of her own or of relatives who could support her. The argument would be of force if a claim could be made against a relative of a pauper for repayment of the expense of the maintenance of the pauper for nineteen years, on the ground that the relative had succeeded at the end of that time to a fortune. But no such claim can be made against the relative if it could not be against the pauper himself. This is indeed *idem peridem*. The past aliment has been absolutely given at a time when neither the relative nor the pauper had estate to meet it. Whatever may be the case as to maintenance given after the fortune has been acquired by either, the past maintenance grounds no claim for repetition.'

"I was referred by the pursuers' counsel to a case, *Duncan* v. *Forbes*, 15 S.L.R. 371, in which the late Lord President said—'I must add that the question for us is not to settle whether he was unable to pay at the time that the aliment was paid, but whether he is able to do so now. For the parochial board when it aliments a person, always has a continuing claim for the sum against anyone who is bound to maintain the pauper.' I cannot ascertain from the report what was the point in the evidence or argument with reference to which this observation was made. It may simply mean that a temporary deficiency of income in any one year will not excuse ultimate payment of arrears. But as no notice is taken of the *dictum* in the subsequent case of *Kilmartin*, in the absence of further authority to the same effect I feel justified in following the views expressed by Lord Fraser in the case of *Kilmartin*, with which I agree." . . . .

Counsel for the Pursuer—Maconochie. Agents—Maconochie & Hare, W.S.

Counsel for the Defender — Young. Agents—Welsh & Forbes, S.S.C.

Friday, December 13.

OUTER HOUSE.

[Lord Kyllachy.

MEIKLE *v.* MEIKLE.

Contract—Pactum illicitum—Restraint on Trading — Partnership — Dissolution of Partnership.

A contract restricting a former partner of a firm from carrying on the trade of the firm in any area, however wide, is valid and binding, unless it appears from the nature and extent of the business of the firm that the restriction is wider, either as regards the whole business or any separable part of it, than is reasonably necessary for the protection of the party in whose favour the restriction is imposed.

This action was raised at the instance of William Tait Meikle, wholesale glass merchant and glazier, Glasgow, and concluded for declarator that James Harvie Meikle, 19 Royal Terrace, Glasgow, was not entitled to carry on business in Scotland as a wholesale or retail glass merchant or glazier, in opposition to or in competition with the pursuer, or the pursuer's firm of William Meikle & Sons, and for damages in respect that the said James Harvie Meikle had already done so.

The circumstances of the case as they appeared on a proof were as follows:—Prior to 1892 the pursuer and defender had been partners in the firm of William Meikle & Sons, wholesale glass merchants and glaziers, Glasgow. At that date negotiations were entered into, the upshot of which was that the defender agreed to retire from the business on 31st December 1894. This arrangement was expressed in an agreement, dated 19th January 1892, by the sixth article of which it was provided—"In respect that it is reasonably necessary for the protection of the interest of the first party (the pursuer) having regard to the nature of the business carried on by the firm throughout Scotland, the second party (the defender) binds himself not to commence business in that country as a