Friday, March 12.

FIRST DIVISION.

[Lord Sands, Ordinary.

GATTY *v.* MACLAINE AND OTHERS.

Right in Security—Contract—Construction —"Punctual"—"Punctually."

A debtor borrowed £36,000 and £2000, and granted two bonds and dispositions in security, under which he bound himself to pay interest at 5 per cent. per annum quarterly on 1st February, 1st May, 1st August, and 1st November. Both bonds were qualified by back agreements of the same dates as the bonds, under which the creditors agreed that, "provided the interest on the [loans] be punctually paid in terms of the [bonds]," they would not call up the loans for a number of years, and that they would accept repayment of the whole sums, or instalments of not less than £500, upon short notice. They further agreed, notwithstanding the terms of the bonds, "to modify the rate [of interest] to 4 per centum per annum provided and so long as punctual payment shall be made of interest at said lower rate." On one occasion the interest at 4 per cent. due on Thursday 1st August was not tendered to the creditors till Wednesday 7th August, the intervening Monday being a bank holiday. The creditors refused to receive it and demanded interest at 5 per cent. They brought an action concluding for declarator that the interest not having been punctually paid they were entitled to call up the principal and for payment of interest at 5 per cent. for the quarter in question. *Held* (*rev.* Lord Sands, *dis.* Lord Mackenzie) that the interest had not been punctually paid, and that the pursuers were entitled to the remedy sought.

Sir Stephen Herbert Gatty and Lady Gatty, *pursuers*, brought an action against Kenneth Douglas Lorne Maclaine of Lochbuie, and, for any interest they might have, against Mrs Catherine Marianne Schwabe or Maclaine, his mother, and others, trustees (the Lochbuie trustees) nominated by and acting under an *inter vivos* disposition and assignation in trust granted by Maclaine, *defenders*, concluding for declarator that a sum of £350, being the interest due and payable on 1st August 1918 to the pursuers under a bond and disposition in security dated 9th November 1910 and relative back agreement of the same date, and a further sum of £20, being the interest due and payable on 1st August 1919 to the pursuers under a bond and disposition in security dated 16th March 1911 and relative back agreement of the same date, had not been punctually paid to the pursuers in terms of the foregoing writs, and for declarator that the pursuers were entitled to call up the principal sums in the bonds, and for decree for payment of £450, being interest at 5 per cent. upon the principal sums borrowed under the bonds.

The *bond and disposition in security* of 9th November 1910, after setting forth that Maclaine had received £36,000 from the pursuers, provided — "Which sum I [the principal defender] bind myself and my heirs, executors, and representatives whomsoever, without the necessity of discussing them in their order, to repay to the said Sir Stephen Herbert Gatty and Lady Gatty or the survivor of them, or their, his, or her assignees whomsoever, or the executors of such survivor or their assignees, at the term of Whitsunday 1911, within the head office of the Commercial Bank of Scotland, Limited, at Edinburgh, with a fifth part more of liquidate penalty in case of failure, and the interest of said principal sum during the not-payment of the same at the rate of £5 per centum per annum from the date hereof, and that by equal quarterly payments on the first day of February, the first day of May, the first day of August, and the first day of November in each year, beginning the first payment of the said interest on the first day of February 1911 for the interest due preceding that date, and the next payment thereof on the first day of May following, and so forth quarterly thereafter during the not-payment of the principal sum, with a fifth part more of the interest due at each of the dates of payment of liquidate penalty in case of failure in the punctual payment thereof."

The *back agreement* of the same date provided — "The parties agree and acknowledge that the said loan was made on the conditions herein expressed:—1. Lochbuie covenants and agrees with the lenders that so long as the said loan of £36,000 or any part of it shall remain due to the lenders, he will not raise any more money on the security of the estate of Lochbuie or any part thereof, and will not burden the estate or any part of it, directly or indirectly, with any new or additional debt, security, charge, or incumbrance, unless he shall have first obtained the lenders' consent thereto in writing. 2. Provided the covenant in article 1 hereof be duly observed, and the interest of the loan be punctually paid in terms of the bond and disposition in security as modified by the immediately succeeding clause, article 3 hereof, the lenders agree not to call in the loan for a period of fourteen years from and after the term of Martinmas (being 11th November) 1910; but Lochbuie shall be at liberty to repay the loan in whole or in sums of not less than £500 at a time at any term of Whitsunday or Martinmas on giving the lenders three months' previous notice in writing of his intention. 3. Notwithstanding the said bond and disposition in security specifies 5 per centum per annum as the rate of interest which the loan is to bear, the lenders agree to modify the rate to 4 per centum per annum provided and so long as punctual payment shall be made of interest at said lower rate, and they further agree either to allow Lochbuie a deduction from the said interest at the rate of £200 per annum, or alternatively in their option they will pay £200 of the

interest of the loan to Mrs Catherine Marianne Schwabe or Maclaine or Lochbuie."

The bond and disposition in security of 16th March 1911 was in similar terms to those of the prior bond, the principal sum borrowed being £2000, and the back agreement was in similar terms to those of the earlier back agreement.

Answers were lodged by Maclaine and the Lochbuie trustees.

The *facts* of the case appear from the following narrative, which is taken from the opinion of Lord Mackenzie—"The pursuers became tenants of Lochbuie for fourteen years from 1st November 1910 at the rent of £1900. They had a break in their favour at 1917 and 1920. The day the agreement and lease was signed, 9th November 1910, the defender granted the bond and disposition in security in question in this case in favour of the pursuers for £36,000 over the estate. By the said agreement and lease it was provided that the defender was not to sell or convey the estate so long as the debt remained upon it without first offering the estate to the male pursuer at the figure at which it was proposed to sell it. The clause as to payment in the bond was as follows—'. . . *quotes* v. *sup.* . . .' On the same date an agreement was entered into by which under article 1 Lochbuie covenanted and agreed with the lenders that so long as the loan of £36,000 and any part of it should remain due to the lenders he would not raise any more money on the security of the estate. [*His Lordship quoted articles* 2 *and* 3 *of the agreement.*] An additional £2000 was advanced by the pursuers to Lochbuie, with reference to which a bond and disposition in security and relative agreement in terms similar to the above were executed on 16th March 1911. The pursuers took advantage of the break in their favour and terminated the lease as at 31st October 1917. Down to that date there had been no difficulty in arranging about the interest on the debt. The instalments as and when they fell due were compensated by the rents payable by the pursuers. It is stated that Lochbuie was serving abroad when the pursuers terminated the lease, and that he had no personal knowledge of the matter, which was dealt with by the agents for the trustees to whom the estate had been conveyed. These trustees are Mrs Catherine Marianne Schwabe or Maclaine, residing at 48 Connaught Street, Hyde Park, London; Edwin Sandys Dawes, sometime of 94 Piccadilly, in the county of London, now major in His Majesty's Army; and Alexander Maclennan, agent of the National Bank of Scotland at Oban. They are called as defenders in the action. The agents are Messrs Hope, Todd, & Kirk, W.S., Edinburgh. What followed upon the termination of the lease appears from the pleadings and correspondence. There was a delay on the part of the pursuers in settling the rent due on 1st November 1917 for the last quarter owing to delay in the adjustment of the amount of income tax. The pursuers' agents volunteered to pay interest on the net amount. In consequence of this delay the defenders' agents did not pay the interest falling due under the bonds on 1st February 1918, and the pursuers' agents acquiesced in this. On 18th April 1918 the pursuers' agents wrote intimating that they were ready to settle the November rent. At the same time they enclosed a note of the November rent and of the interest due to the pursuers on 1st February 1918. The factor for these defenders was away from home at this time, and as the matter had already remained over for a considerable time, it was left to await his return. On 29th April 1918 the pursuers' agents wrote to these defenders' agents as follows—'Referring to our letter of 18th inst., we must ask you to let us have without further delay a remittance for the interest payable on our clients' bonds on 1st February last. Another quarter's payment of interest amounting to £285 falls due on 1st proxo., and you may be so good as to send us a remittance for it at the same time. We are instructed to say that unless the interest be in future regularly and punctually paid, interest at the rate (5 per cent.) stipulated in the bonds will be exacted.' The settlement was not carried through until 13th May 1918, when, notwithstanding the intimation as to interest made in the letter just quoted, the pursuers accepted interest at the rate of 4 per cent. On 24th July 1918 the pursuers' agents wrote this letter to the defenders' agents—'Dear Sirs, We send you herewith note of interest due to Sir Stephen and Lady Gatty by the Maclaine of Lochbuie in respect of loans over the estate of Lochbuie, as at 1st proximo, and shall be glad to receive a remittance for the amount of the interest, less tax, in due course.' Messrs Hope, Todd, & Kirk sent on 7th August a cheque in favour of the pursuers' agents for £266, and received the following letter, dated 8th August, in reply—'Dear Sirs, We have this morning received your letter of yesterday's date in which you tender us your cheque for £266 as in settlement of the interest which fell due on our clients' bonds on 1st instant. We cannot treat this tender as either timeous or sufficient, and beg to return the cheque herewith. Default in payment of interest having arisen, in terms of the agreements relative to the bonds interest has become payable at the rate specified in the latter, namely 5 per cent., and you may be as good as to send us your cheque for the amount, less tax (£332, 10s.), of the last quarter's interest at that rate. We have further to intimate that in respect of the default which has occurred in punctual payment of interest in terms of the bonds, our clients now hold themselves at liberty to exercise their full rights and powers under their bonds, free from any restrictions imposed upon them by the agreements.' What had happened was this, as sufficiently appears from Messrs Hope, Todd, & Kirk's letter of 14th August to Messrs John C. Brodie & Sons, in consequence of Mrs Maclaine's movements the cheque sent Mrs Maclaine had not reached her to allow her to sign and return it by 1st August. The cheque reached Messrs Hope, Todd, & Kirk's office on 2nd August, which was a Friday. The Monday following, 5th

August, was a bank holiday. Payment was tendered on Wednesday the 7th, and refused."

The pursuers *pleaded, inter alia*—"1. The terms of payment of the principal sums under the bonds and dispositions in security condescended on being long by-past, and the defender, the said Kenneth Douglas Lorne Maclaine, having failed to make punctual payment of the interest due thereunder as modified by the relative minutes of agreement, the pursuers are presently entitled to call up and demand payment of said principal sums. 2. The defender, the said Kenneth Douglas Lorne Maclaine, having undertaken, in terms of the bonds and dispositions in security referred to in the summons, to make payment at the term of 1st August 1918 of the sums of interest sued for, being at the rate of £5 per centum per annum upon the principal sums borrowed by him, and having failed to make punctual payment of the modified interest provided for by the relative minutes of agreement, decree for payment should be pronounced as concluded for."

The defender Maclaine pleaded, *inter alia*—"1. The averments of the pursuers are irrelevant and insufficient to support the conclusions of the summons. 2. The defender not being in default in punctual payment of the interest due should be assoilzied from the conclusions of the summons. 3. The pursuers being barred by their actings from objecting to the timeousness of the payment tendered, the defender should be assoilzied. 4. The payment of the interest having been timeous in view of (*a*) the course of dealing, and (*b*) the recognised custom condescended on, the defender should be assoilzied. 5. In the circumstances condescended on the action is nimious and oppressive, and should be dismissed."

The Lochbuie trustees pleaded, *inter alia*—"1. The averments of the pursuers being irrelevant and insufficient to support the conclusions of the summons, these defenders are entitled to absolvitor. 2. The expression punctual payment in the said minutes of agreement must be reasonably construed, and payment in the sense of the said expression as so construed having been tendered the defenders are entitled to absolvitor. 3. Payment of the interest having been timeously made in accordance with recognised custom, the defenders are entitled to absolvitor. 4. The pursuers having waived their right to payment of the said interest on 1st August 1918, the defenders are entitled to absolvitor."

On 12th March 1919 the Lord Ordinary (SANDS) sustained the first plea-in-law for the defenders and dismissed the action.

Opinion.—"The pursuers are heritable creditors upon the Lochbuie estates in right of two bonds for £36,000 and £2000 respectively. These bonds are in ordinary form payable at the next six monthly term after the date of granting, with interest at the rate of five per cent. Both bonds were qualified by back agreements, under which, if the interest was punctually paid the rate should be four per cent., and the bonds should not be called up until Martinmas 1924. To one unaccustomed to our system of conveyancing these might appear extraordinary concessions in view of the letter of the formal bonds. But this is not so. The back letter, or the agreement corresponding thereto, really embodies what the parties have contemplated throughout. The provisions of the principal deed, if not technically penal, are substantially so, or at all events are precautionary merely. When the current rate on first-class securities was three per cent. five per cent. was still inserted in bonds; and people borrow large sums solemnly stipulating to pay them back at the next term though the expense of such borrowing, if repayment at next term was contemplated, would be ruinous. The expressions in the present back agreement, 'provided . . . the interest of the loan be punctually paid,' and 'provided so long as punctual payment shall be made of interest,' are general expressions. Had the intendment been that if on any single occasion through any possible inadvertence payment was a day late after the term the agreement should be void, I should have expected some more precise provision, and I doubt if any borrower who was not under dire stress would have entered into any such agreement. If under a contract of employment it was intended that the employment should terminate if the employee on a single occasion was five minutes late, I should expect this to be articulately set forth. If the stipulation was simply that he should be punctual it seems to me that the contention that the agreement was terminated if on a single occasion he was five minutes late would be extravagant.

"The course of the dealings of the parties as regards interest seems to have been as follows:—Down to November 1917, pursuers' rent due to defenders was in excess of the interest, and was set against it *pro tanto*. Pursuers' tenancy came to an end in November 1917, and when the interest became due upon 1st February there was no current rent to set against it. But pursuers' rent past due had not, for reasons into which it is unnecessary to enter, been squared by 1st February, and there was no settlement at that date. The matter of rent was not settled up until April. Pursuers' agents then wrote the defenders' agents upon 29th April — 'Referring to our letter of 18th instant, we must ask you to let us have, without further delay, a remittance for the interest payable on our clients' bonds on 1st February last. Another quarter's payment of interest, amounting to £285, falls due on 1st proximo, and you may be so good as to send us a remittance for it at the same time. We are instructed to say that unless the interest be in future regularly and punctually paid, interest at the rate (five per cent.) stipulated in the bonds will be exacted.'

This letter makes no reference to abrogation of the time bargain, and I think that if I had been in the position of the recipients I should have been disposed to interpret it as meaning that any future instalment not punctually paid would be charged at five

per cent. I do not, however, proceed upon this construction of the letter.

"It is important, however, to note the circumstances under which the letter was written. It purports, whether justly or not in the circumstances, to proceed upon a delay of three months. I cannot, particularly in view of what followed upon this letter, interpret it as a warning that if ever the interest should on a single occasion be a day or two late the back agreement would be voided. Interest was not paid by 1st May; an explanation of the delay was sent and was not demurred to. Upon 13th May the February and the May instalments were paid and payment was accepted without comment or demur.

"It occurred to me that the delay in May might be founded upon as depriving the delay in August of the character of an isolated inadvertence. But I find that by answer 5 to defendants' statement pursuers expressly disclaim founding in any way upon the February and May payments. There is therefore no case of cumulative delays.

"Upon 24th July pursuers' agents sent defenders' agents a reminder of the interest due upon 1st August. Payment was not made upon 1st August. Pursuers' agents were in Edinburgh, so were defenders'. If pursuers had been insistent upon payment on the exact day, and disquieted by the failure, and not simply lying by to catch defenders out, I should have expected their agents to have asked defenders' agents for an explanation on 2nd August and to have intimated that if the interest was not paid within forty-eight hours, or some short period, serious consequences would be entailed. No communication, however, was made. Payment was tendered upon 7th August, two *dies non* having intervened. Certain explanations of the delay are given by the defenders, for which I refer to the record. Acceptance of this payment was however refused, the back agreement was denounced, and this action was begun.

"It is difficult to regard such proceedings otherwise than as oppressive, especially if pursuers knew of the absence of Lochbuie, the person principally interested, on military service at the time. But the matter falls to be considered on its merits without prejudice.

"In my view the words 'punctually paid' and 'punctual payment' fall to be construed reasonably. That was the opinion of Lord Low in the case of *Scott Chisholm* v. *Brown*, 20 R. 575. Lord Kinnear states that he concurs in Lord Low's construction of the contract. The opinion of Lord M'Laren is to a similar effect, for he thinks that there must be some elasticity. It is true that there was a division of opinion in that case and that Lord Kinnear and Lord Low were in the minority. But I find nothing to the contrary upon this point in the only other reported opinion—that of the Lord President. He does not demur to the opinion that there may be a certain elasticity, but he holds that when all bounds of elasticity are passed, as the word 'punctual' is a word of time, there is no room for construction. What he says in effect comes to this—'If you had agreed to be there at four o'clock, and did not appear until six, you might perhaps be allowed to show that it was impossible to have been earlier, but you cannot be allowed to argue that in the circumstances you arrived at four o'clock as that expression may reasonably be construed.' That does not appear to me to involve any opinion adverse to the proposition that if you arrived at 4.1 you might reasonably contend that you had fulfilled your engagement to arrive at four o'clock. In the case in hand the Lord President held that 'punctual' is a word of time and that it could not be maintained that a payment which was five months late was punctual.

"Now attempting to construe the words in the present contract reasonably it appears to me that if a term's interest had been allowed to fall several months into arrears the conditions would not have been fulfilled. The same result would have followed if payment of interest had been repeatedly a few days late, and this had been persisted in, in the face of remonstrance. Having regard, however, to the serious nature of the consequences involved I cannot hold that on a reasonable construction of the contract these consequences attach to what I must treat as a single and isolated case of delay of six days, particularly during a period of public stress and general unsettlement of family and business arrangements.

"I shall accordingly sustain the first plea-in-law for the defenders and dismiss the action with expenses."

The pursuers reclaimed, and argued—The Lord Ordinary was wrong. The stipulation in the agreements was either to be regarded as a privilege to the debtor or as an express term of the bargain. If it was regarded as a privilege, then the conditions upon which the privilege was granted must be strictly observed, and if not, as there was no question of forfeiture or penalty there could be no equitable relief—*Ford* v. *Earl of Chesterfield*, 1854, 19 Beav. 428, *per* Sir John Romilly, M.R., at p. 434; *Davis* v. *Thomas*, 1830, 1 R. & M. 506, *per* Sir John Leach, M.R., at p. 507. As a term of the bargain it was clearly of the essence and onerous. The bargain was reasonable but the security was doubtful, and the creditors were tying up their capital for a long period. If the borrower was to get the money on such easy terms as the payment of four per cent., less the £200 to be paid to Mrs Maclaine, it was only natural that there should be a counter stipulation in favour of the lenders. Time was the whole consideration for the contract. There was no question of penalty—the stipulations were mutual. "Punctual" was in itself a word which admitted of no latitude in meaning, but it was in the bonds as to payment of interest as well as in the agreement. That being so the agreements were intended to mean and could only mean payment of interest exactly on the day stipulated. In England the matter was completely covered by decision—*Leeds and Hanley Theatre of Varieties* v. *Broadbent*, [1898] 1 Ch. 343; *Hicks* v. *Gardner*,

1837, 1 Jur. 541. In Scotland *Paterson* v. *Tod*, 1828, 6 S. 1062, would have been decided in the sense for which the reclaimers contended had there not been personal bar. *Scott-Chisholme* v. *Brown*, 1893, 20 R. 575, *per* Lord President Robertson at p. 579, concurred in by Lord Adam, 30 S.L.R. 558, was in the reclaimers' favour. Lord Kinnear dissented, but not upon the meaning of "punctual." Lord M'Laren was contrasting an obligation to pay on a day as against to pay punctually, but he had not in view an obligation such as the present, to pay punctually on a day. The same result should follow even if the payment had been a day late. If any latitude were allowed the stipulation would become worthless, for it would always raise the question of how many days' latitude was reasonable. No relevant case of waiver or personal bar had been set out.

Argued for the defender, Maclaine—The word "punctual" was not absolute in its meaning. It was not so even in a dictionary sense. Further, there was no reason here to read the clause in anything more stringent than its reasonable meaning, for no privilege was given. The lenders were obtaining the market value of their money, and the stipulation was merely to provide the remedy. "Punctual" constantly occurred in such deeds as the present. It was found in the penalty clauses of bonds both in the traditional and the statutory styles. It was open to construction, and meant that the interest should not be allowed to fall into arrears. It it had been intended that the interest should be paid on or before a certain date those words should have been used. So long as there was substantial performance that was sufficient. The opinions of Lord M'Laren, Lord Kinnear, and Lord Low in *Scott Chisholme's* case, and of Lord Alloway in *Paterson's* case, were in favour of an elastic construction of punctual. In all the English cases cited for the pursuers there was a material breach of the stipulations. Time was never of the essence of a contract unless it was expressly so made—Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), section 10 (1); Gloag on Contract, p. 717 and p. 719. Where there was no material failure to pay as in the present case the remedy could not be enforced—*Nova Scotia Steel Company* v. *Sutherland Steam Shipping Company*, 1899, 5 Com. Cas. 106, *per* Bigham, J.; *Thoms* v. *Wilson*, 1862, 4 Best & Smith 442, *per* Cockburn, C.J., at p. 453, approved in *Moore* v. *Shelley*, 1883, 8 A.C. 285, *per* Sir Barnes Peacock at p. 293. In any event the averments of the pursuers showed that they were barred by their actings from insisting upon payment upon the exact day.

Counsel for the defenders, the Lochbuie trustees, adopted the argument for Maclaine.

At advising—

LORD PRESIDENT—The circumstances out of which this action has arisen are fully set forth in the opinion of the Lord Ordinary. I repeat them only in so far as necessary to make clear my grounds of judgment. The defender borrowed from the pursuers on the security of his estates in Mull two sums of money. The conditions on which the loan was made were expressed in a minute of agreement. One of the conditions was, that provided the interest on the loan "be punctually paid in terms of the bond," the lenders agreed (1) not to call in the loan for a period of fourteen years, and (2) to modify the rate of interest to four per cent. A quarterly payment of interest in terms of the bond became payable on the 1st of August 1918. But this interest was not paid till the 8th of August 1918. The question for decision is—Was this punctual payment in terms of the bond? Differing from the Lord Ordinary, I am of opinion that it was not. When the defender agreed to make payment "punctually" on the 1se of August I think he must be taken to havt meant what he said. Punctual payment "in terms of the bond" means payment made punctually on the day fixed for payment in the bond, that is, on the 1st day of August. That is the plain and natural meaning of the language used. It is not open to any other interpretation. The ordinary meaning of "punctuality," according to the dictionary, is "scrupulous exactness as to time." I am not aware that the word is used in any other sense in this agreement. Payment made six days later than the day fixed for payment by the agreement cannot be said to have been made with "scrupulous exactness as to time." It is not a punctual payment. If a payment six days later is "punctually" made, I am unable to discover where the line is to be drawn between punctuality and unpunctuality. It must, I suppose, be left to the discretion of the judge who tries the case, although the parties to the agreement expressed their meaning in plain and simple language. If authority were needed in support of the proposition that a payment of money on the 7th of August is not punctual payment on the 1st of August, we have it in the judgment of the Court of Appeal in the case of the *Leeds and Hanley Theatre* v. *Broadbent*, [1898] 1 Ch. 343. That case is on all-fours with the case before us. It is not binding on us, no doubt, but I consider it a sound decision given by very eminent judges, whose opinion on a question identical with the one before us I could not disregard. That case seems not to have been cited to the Lord Ordinary. If it had been, I do not think he could have reached his conclusion without disregarding it. In the case of *Scott-Chisholme* v. *Brown* (1893, 20 R. 575, 30 S.L.R. 558) the opinions of the majority of the Court place the same interpretation on the word "punctually" that I do here. Punctual payment, said the Lord President, is payment "at the time"—that is, payment at the time fixed by the parties and not by the judge. The Lord Ordinary proposes a "reasonable" construction of the term "punctually." So do I. But reasonable construction in my view means to take the words used by the parties in their plain and natural sense and not in the sense which a judge may think fit to put upon the term. It was urged on behalf of the defender that time was not of the essence

of this contract, and that there being no material delay and no injury alleged to have been suffered by the pursuers, there was no room for finding that the contract had been broken. I think the true answer to that argument is that time is here the sole consideration for the contract—*Ford* v. *Earl of Chesterfield*, 1854, 19 Beav. 428. In my opinion a bondholder is entitled to have a condition of this kind construed according to its plain meaning, and if payment be not made *modo et forma* he who stipulates for it is entitled to have what he stipulates for in that event. If parties contract on the footing that "scrupulous exactness" be observed, then "scrupulous exactness" is the law of that contract. In the facts of the case as set out on record I can find no support for the plea of waiver, nor apparently could the Lord Ordinary. The whole controversy turns upon the interpretation to be placed on what I consider to be plain and unambiguous words. When accurately put the question at issue answers itself—What is punctual payment on a fixed day? I propose that we should recal the interlocutor of the Lord Ordinary and grant decree in terms of the conclusions of the summons.

LORD MACKENZIE—[*After the narrative above quoted*] — The question is whether there has been such a breach of contract on the part of the defender as will entitle the pursuers to call up their loan. The pursuers found upon the expression "punctually" which is used in the agreement, and say that this means upon the day, and that if from whatever cause payment is not made upon the day stipulated, even though only a day later, there is a breach of contract entitling the pursuers to call up the loan. I will assume for the present that the pursuers are right in the meaning they put upon "punctual payment," though I think this would be to construe the contract here in a judaical and not a reasonable manner. Even on that view there are two reasons why the pursuers are in my opinion not entitled to what they ask. In the first place the breach cannot be described as a material breach. It was of a purely technical character. It is, no doubt, true that in certain cases it may be possible to say of a contract that time was the whole consideration for it. In the case of contracts with bill brokers this might well be said. But there is nothing to suggest that it can be said in the present case. The argument which was pressed by the pursuers here is just the unsuccessful argument in *Paterson* v. *Tod*, (1828) 6 S. 1062. In that case the lender had advanced money on a heritable bond at 4 per cent. under an obligation not to call it up for five years if the interest was regularly paid. The Lord Ordinary ordered cases, and it was pleaded for the pursuer — "Regular payment of interest is payment on the term day; and Tod, having allowed two days to elapse after the term of Whitsunday 1826 without sending the interest, liberated Paterson from the obligation not to call up the money, which was conditional on the interest being regularly paid." The view of the Lord Ordinary was as follows:—"It seems impossible to say that the payment of interest was regular, such as must be understood as the stipulated condition of a suspension of payment of the principal. The Lord Ordinary cannot understand this in any other way than payment to the creditor on the term day." The Lord Ordinary held the pursuer entitled to adjudge. The Court altered and assoilzied unanimously. Lord Glenlee says —"This loan is certainly so qualified that Paterson might have given notice that if the interest was not paid on the term day he would call it up. But his conduct led the borrower to expect that it was not to be demanded strictly on the term day. He might, however, at any time have said, 'You must now pay me the interest on the term day, or I will call the money up.' But as his own conduct gave reason to believe that a day or two days' delay would be considered sufficiently regular payment as on the former occasions, although his having formerly passed over the irregularity was no ground to bind him in future, still it prevents him from going back and taking advantage of failures before warning."

Now looking at the correspondence in the present case, it appears to me that the defenders' agents are entitled to say they were lulled into thinking that payment a few days late would be regarded as sufficiently punctual payment. The immediately preceding quarterly interest which fell due on 1st May was not paid until 13th May, and there is no suggestion that this was not considered punctual payment, as the contract was construed by the actings of parties. The terms of the letter of 24th July 1918 seem to me to be lacking in the elements of fair play if it was intended by the writer to maintain as was done by counsel that failure to pay a day later than the 1st August would infer a material breach of contract. I think, as Lord Glenlee says, the conduct here prevents the pursuers taking advantage of a failure without warning.

The case of *Leeds and Hanley Theatre* ([1898] 1 Ch. 343) was urged as an authority in favour of the pursuers. The mortgagees had sold a theatre or music hall to the mortgagors for £10,500, entering into a contract that £7000 of the pursuers' price would remain on mortgage on the theatre. The mortgage deed contained a clause that payment of the principal money should not be required by the mortgagees until the expiration of three years "if in the meantime every half-yearly payment of interest shall be punctually paid." The full half-year's interest fell due on 15th August. What Lindley, M.R., says is this — "The money was not paid on the day, nor for several days afterwards, and no attempt was made to provide for payment at all on August 15th, when the first half-yearly interest became payable, and there being no sign of payment, the mortgagees served a notice calling in the money." It was in these circumstances that the Master of the Rolls says that the mortgagors had only themselves to blame if they were put to inconvenience by neglecting to discharge their obligations according to the tenor of the instrument.

The circumstances of that case appear to me different from the present.

Upon the construction of the word "punctually" the view of Kekewich, J., was that the word ought to receive a somewhat liberal construction—"It would be pedantic to insist upon exact etymology and fix upon the phrase '*punctum temporis*,' and make that the test of the construction of an English instrument of this character." In *Scott Chisholme* v. *Brown* (1893, 20 R. 575, 30 S.L.R. 558) the question was as to the meaning in an agreement of the expression "punctual payment of future rents." The Lord Ordinary (Low) said—"The expression 'punctually paid' must, I think, be construed in a reasonable sense. For example, if the trustees had continued to carry on the lease to the end, but had on one occasion paid the rent a day or two after the term, I do not think that the landlord could have claimed the £107. In short, I am of opinion that it would be a question of circumstances whether or not some delay in payment of a half-year's rent was failure in punctual payment within the meaning of the letter." Lord Kinnear in the First Division said—"As to the construction of the clause, I am disposed to agree with the Lord Ordinary for the reasons which he has stated." Lord M'Laren said on the construction of "punctually paid"—"I agree with what your Lordship has said that this in its primary meaning is a word relating to time. I think the difference between a stipulation that an abatement is to be given if the rent is punctually paid and a stipulation that an abatement shall be given if the rent is paid at the 'time' is only this, that the word 'punctually' is a little more elastic and would cover the case of rent paid within a few days after it is due, or as soon as it is demanded." The Lord President's view was this—"I hold that the word 'punctually' is in its proper and primary sense, occurring in this contract, a word of time, and therefore it is not a question of whether the rent was faithfully or honourably paid, but whether it was punctually paid—that is, paid at the time." The delay, however, in that case was from 2nd February to 20th July, a period of five months. In the *Nova Scotia Steel Company* v. *Sutherland Steam Shipping Company*, (1899) 5 Com. Cas. 106, Bigham, J., held that payment of hire two days late was not a breach of a stipulation in a charter-party for punctual and regular payment. These authorities show that the word "punctual" may be open to construction in certain cases, and had it been necessary in this case to do so I should have been prepared to take the same view as Lord Low and Lord Kinnear in *Scott Chisholme*.

For the reasons above stated I think there is enough in the conduct of parties to show that the pursuers meant there must be a substantial, not a technical, breach of contract before they were entitled to call up the loan, and that there was no substantial breach here. I am therefore for adhering to the judgment reclaimed against.

LORD SKERRINGTON — I am of opinion that there is no ambiguity as to the meaning of the clauses in the back-letter which provide that so long as the interest shall be punctually paid, 4 per cent. instead of 5 per cent. shall be accepted and that the capital shall not be called up. The expression "punctual payment" as used in the back-letter can only mean payment on the day and in the manner specified in the bond. It was argued, however, that there had been "substantial compliance" with the terms of the bond, but it was not explained how that can be true seeing that the bond mentions "1st August" while the tender of the interest was not made until six days later. As at present advised, I should have decided in the case before us that a tender made on 2nd August was not punctual. I express no opinion on the question whether a minute deviation from strict punctuality, *e.g.*, by being a minute or a second too late, might be regarded as negligible on the principle *de minimis*. It was suggested that time in this case was not "of the essence of the contract," but the parties themselves made it essential by mentioning definite days on which the quarterly interest was to be paid. Such a suggestion is relevant if a contract to pay or perform at a particular time has been broken, and if the question is whether the stipulation as to the time of payment or performance is so material that any violation of it will impliedly entitle the innocent party to throw up his bargain, but it is out of place if the question is whether a person who has expressly contracted to pay or perform on a certain day has or has not fulfilled his obligation.

The next question is one of fact, viz., whether the pursuers have by their actings precluded themselves from insisting on their strict rights as defined in the bond and back-letter. In one respect they have undoubtedly done so, because they represented to the defenders that they had conferred upon a firm of solicitors in Edinburgh a general authority to receive payment of the interest. The defenders acted upon this representation and never paid the interest to the bank named in the bond. I can figure a case where a heritable creditor represents to his debtor resident in the country that notwithstanding the terms of the bond his factor who usually visits the locality a week or two after the term day has received a general authority to accept payment of the interest at the modified rate if tendered to him at the time and place where he holds his "rent-court." The defenders' counsel argued that the admitted facts and correspondence supported their pleas of personal bar and of waiver as regards the time at which payment of the quarterly interest fell to be made. They did not, however, move for a proof, and in my opinion rightly so, because their averments are irrelevant. I can find nothing in the admitted facts and correspondence from which it appears that the pursuers did either by their words or by their conduct make a misrepresentation to the defenders in regard to some existing fact. Nor, so far as I can see, did they ever make any representation to the defenders to the effect that they did not intend to enforce with strictness their right to punc-

tual payment of the interest. Even if they had done so, an honest representation by a creditor in regard to his future intentions does not raise any question of personal bar, but it is satisfactory to note that nothing was said or done which might have misled the defenders. As regards the plea of waiver, that is a good defence if the debtor has been lax in the past and the creditor has condoned it, but such indulgence does not entitle the debtor to rely upon its continuation in the future.

The weight of legal authority both in this country and in England is in favour of the pursuers as to the meaning of an obligation to pay a sum of money punctually on a specified day. Even in the case of *Paterson* v. *Tod*, (1828) 6 S. 1062, which was much relied upon by the defenders, the opinions of the Judges give no support to the view that interest is "regularly" paid upon the term day if it is actually paid on a later day. The ground of judgment was, I think, personal bar. Lord Glenlee's opinion suggests that the supposed misrepresentation on the part of the creditor related to his future intentions rather than to any existing fact, but the point is of no importance. Possibly the law as to personal bar was not at that time so clearly understood in this country as it became after Lord Kinnear's exposition of it in the case of *Mitchell* v. *Heys & Sons*, 1894, 21 R. 600, at p. 610, 31 S.L.R. 485, and the judgment of the Privy Council in *Chadwick* v. *Manning*, [1896] A.C. 231. As regards the plea of waiver, there has been much discussion since 1828, and cases such as *Carron Company* v. *Henderson's Trustees*, (1896) 23 R. 1042, 33 S.L.R. 736, are in point.

LORD CULLEN—By the terms of the two bonds and dispositions in security here in question the interest is payable quarterly, on 1st February, 1st May, 1st August, and 1st November in each year, at the rate of 5 per cent. per annum. Under the second article in each of the two agreements or back-letters, the lenders agreed not to call in the loan for a period of fourteen years from Martinmas 1910 provided the interest was "punctually paid in terms of the bond and disposition in security as modified by article 3." The modification in article 3 provided, *inter alia*, that the rate of interest should be 4 per cent. "provided and so long as punctual payment should be made" at that rate.

This species of agreement relating to loans on heritable security is extremely common in this country, and there is nothing unreasonable about it. It is a matter of intelligible and legitimate interest to a lender to have a punctually-paying debtor. The defenders, accordingly, do not criticise the two agreements as giving rise to consequences of the nature of a penalty in the event of a breach of the above-mentioned conditions. They present an argument on the agreements as to what is meant by punctual payment. I have given my best attention to that argument, but I am unable to see that the meaning of the words in the agreements is attended with any doubt, and the pursuers are, in my opinion, clearly in the right.

The condition in article 2 is "provided the interest [as modified as to rate] be punctually paid in terms of the bond and disposition in security." In terms of the bond, as already mentioned, interest is payable on 1st February, 1st May, 1st August, and 1st November in each year. Accordingly the condition in article 2 means—provided the interest be punctually paid on these stipulated dates. This is perfectly definite. I am at a loss to understand how quarterly payments made later than the specified dates could satisfy the condition. The contention of the defenders that the words should be read with some "elasticity" is really, although not professedly, an appeal to the Court to re-form the contract, which we have no power to do. The condition in article 3 runs—"provided and so long as punctual payment shall be made of interest." The words "in terms of the bond and disposition in security" are not added, as in article 2, but the defenders did not found on this, nor could they reasonably do so, as importing any difference as to what was meant by punctual payment.

The defenders, however, seek to raise a separate point to the effect that the pursuers are barred by their actings from insisting in their present demands. I am unable to see any adequate foundation in fact for this contention. The only available facts are the admitted facts to be found in the record. The defenders did not move for any inquiry, and stated that they did not desire one.

It appears that for some years the interest was by mutual arrangement set off against the rent due by the pursuers, which exceeded the interest. When the lease came to an end, and this arrangement was no longer possible, the pursuers' agents wrote to the defenders' agents the letter of 29th April 1919, specially drawing their attention to the need for punctual payment of interest in the future if the 5 per cent. rate in the bond was to be avoided. It is true that they said nothing about calling up the capital in the event of failure. But the pursuers were under no obligation to admonish the defenders, who were as well aware as they were of the terms of the agreements. And the pursuers were not in any way called on to decide, still less to intimate, beforehand how they would exercise their powers under the agreements in the uncertain event of the defenders failing to make punctual payment of the interest. It is also true that the pursuers accepted the interest due on 1st May calculated at 4 per cent., although it was not paid till 13th May. But I fail to see how this indulgence on their part disabled them from enforcing their contract rights *quoad* the future. When the 1st of August was approaching the pursuers' agents wrote to the defenders' agents reminding them of the interest payable on the former date, and requesting that it be duly paid.

On the facts above mentioned the defenders advanced a contention which was not very definitely stated, but was generally to

the effect that they were under a belief that there had been a waiver by the pursuers of their contract rights, on which the defenders relied. But the admitted facts do not in any way verify that the defenders were under such belief or so relied, even if there had been any justification for this, which I do not think there was.

I accordingly concur with the majority of your Lordships in the view that the pursuers are entitled to the decree concluded for.

The Court recalled the interlocutor of the Lord Ordinary and decerned against the defenders in terms of the conclusions of the summons.

Counsel for the Pursuers (Reclaimers)—Brown, K.C.—A. M. Mackay. Agents—John C. Brodie & Sons, W.S.

Counsel for the Defender (Respondent), Maclaine — Chree, K.C. — Dykes. Agents —Martin, Milligan, & Macdonald, W.S.

Counsel for the Defenders (Respondents), the Lochbuie Trustees — Wilson, K.C. — D. P. Fleming. Agents—Hope, Todd, & Kirk, W.S.

HOUSE OF LORDS.

Monday, March 15.

(Before the Lord Chancellor (Birkenhead), Viscount Haldane, Viscount Finlay, Viscount Cave, Lord Dunedin.)

PENNEY *v.* CLYDE SHIPBUILDING AND ENGINEERING COMPANY, LIMITED.

(In the Court of Session, February 20, 1919, 56 S.L.R. 258, and 1919 S.C. 363.)

War—Contract—Ship—Sale—Payment by Instalments—Passing of Property in Ship under Construction on Payment of Instalments—Right to Instalments—Counter-Claims.

On the outbreak of war, a ship, being built to the order of an enemy firm, was in the builders' yard nearing completion. The contract provided that "the steamer as she is constructed . . . shall immediately as the work proceeds become the property of the purchasers," and the price was payable by instalments. On the ship being requisitioned and paid for by the Admiralty, *held* that the builders were bound to account to the Custodian of Enemy Property for Scotland under the Trading with the Enemy Amendment Acts 1914 and 1916 for the instalments paid, subject to any counter-claims arising out of the occupation of the berth beyond the period required for building.

This case is reported *ante ut supra.*

The defenders, the Clyde Shipbuilding and Engineering Company, Limited, appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—The question raised in this appeal is whether the respondent, the Custodian of Enemy Property for Scotland under the Trading with the Enemy Acts 1914 and 1916, was entitled to a decree against the appellants for the sum of £79,732, 16s. 4d., which sum was the total of certain instalments paid by an Austrian firm for the building of a ship by the appellants, which was nearing completion at the date when war broke out.

The course which the debate has taken and the arrangement which has been come to between the parties make it unnecessary for me to examine at length the contentions which were pursued in the Courts below and upon which those Courts pronounced.

It was contended by the appellants throughout that after the sale by them of the vessel which had been built for the Austrian company to the Admiralty, and after payment in full to them by the Admiralty of the agreed purchase money, they were none the less entitled to retain as their own property a sum of money which had been paid to the appellants from time to time as the vessel was in course of construction under the terms of the contract. The main controversy in the Courts below, as abundantly appears from the judgments which were given by the learned Judges, was concerned with this topic. When one reads the judgments given below one cannot but observe how much greater was the attention and how much more considerable was the time bestowed upon this question than upon any other. In fact a perfunctory paragraph is all the attention that is given to the secondary question in those judgments. I have no doubt that the course taken by the Bench reflected the attitude of the advocates.

Sir John Simon says with perfect accuracy that he had not fully developed his argument upon the main question which was before your Lordships. That claim is well founded, but it had at anyrate been sufficiently delivered for me at least, and I think for the rest of your Lordships, who were prepared to listen very attentively to any further argument Sir John might have afforded us, to feel the gravest doubt whether the impression then formed upon the merits was in the least likely to be disturbed. The position to-day is therefore under these circumstances that the principal contention urged throughout on behalf of the appellants is not persisted in by them, but their counsel in the course of argument called attention very cogently to a real grievance under which they would labour if the whole of the sum of money which has been paid to them by the Austrian company were handed over to the Custodian without any conditional arrangement in their favour. That grievance arises in these circumstances—They have a claim which they desire at the proper time to make against the Austrian company. Had official authority not intervened in this country — had, in other words, the vessel not been purchased from them under requisition by the Admiralty—they would at any moment when they were required to account, if they were required to account, for the moneys they received from the Austrian company, have been in a position to say, "We must account