was at heart fond of them all, and I cannot agree with the Lord Ordinary that his wife's bearing to him was markedly or unduly harsh or repellant. Nor would he have been deterred by the fact that she held a decree for aliment against him. That had proved no deterrent for several years prior to 1900. The inference to be drawn from the evidence is that there was no break off in his habits of dissipation.

If that be so, then according to the medical testimony in the case his prospect of life was of the poorest. As I read it, the evidence of both the doctors who were examined is to the same effect in regard to this. There may be cases of men as completely addicted to drink as David Greig was, pulling themselves together and living a considerable time, but they are very exceptional. Dr Chalmers Watson, founding on the history of David Greig as established by the evidence, puts his expectation of life in 1900 or rather earlier at from six to ten years.

Extensive inquiries for the missing man have been made in all the most likely quarters with no result. Twenty years have elapsed since he disappeared. His relatives and the friends who knew the man best have come to think that he is dead.

The difference drawn by the Lord Ordinary between the proof necessary to establish death in cases of succession and cases of contract was not very strenuously nor as I thought seriously insisted in. No authority was cited in support of it, and it does not appear to me to be well founded.

On the whole matter the true inference to be drawn from the facts in this case is, in my judgment, that there is no reasonable doubt that David Greig is dead—that he may be presumed not to have survived 31st December 1910.

I agree, for the reason stated by your Lordship, that the claim by the pursuer for interest cannot be sustained.

The Court pronounced this interlocutor—

". . . Recal the said interlocutor: Find, decern, and declare that David Greig designed in the summons must be presumed to have died as at 31st December 1910, and that the pursuer as his widow is entitled to an annuity out of the Widows' Fund of the defenders, to which the said David Greig had been a contributor, at the rates and for the periods after mentioned: Decern and ordain the defenders to make payment to the pursuer of the sum of four hundred and thirty pounds, ten shillings (£430, 10s.) in satisfaction of the said annuity to which she is entitled for the period from said 31st December 1910 to 11th November 1920, being at the rate of £42 per annum for the period to 11th November 1918 and at the rate of £50 thereafter, which rates respectively are admitted by the defenders at the bar to be correct for said periods: And decern and ordain the defenders to make payment to the pursuer of the said annuity at the said rate of fifty pounds (£50), and that half-yearly, termly, and proportionally during all the days of the pursuer's life as from and after the term of Martinmas 1920, . . . with interest at the rate of five per centum per annum upon such termly payments from the time of the same becoming due after the said term of Martinmas 1920. . . ."

Counsel for the Reclaimer (Pursuer)—Wilton, K.C.—Scott. Agents—Armstrong & Hay, S.S.C.

Counsel for the Respondents (Defenders)—Lord Advocate (Morison, K.C.)—W. J. Robertson. Agent—A. C. Drummond, Solicitor.

HOUSE OF LORDS.

Tuesday, November 30.

(Before the Lord Chancellor, Viscount Finlay, Lord Dunedin, Lord Atkinson, and Lord Shaw.)

GATTY *v.* MACLAINE AND OTHERS.

(In the Court of Session, March 12, 1920, 57 S.L.R. 334.)

Right in Security—Contract—Loan—Construction — "Punctual" — Proviso that Interest should be "Punctually" Paid—Bar.

A proprietor borrowed on the security of his estates certain sums. 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 4 per cent. A quarterly payment of interest in terms of the bond became payable on 1st August 1918. It was not paid till 8th August 1918. *Held* (*aff.* judgment of the First Division) that there had not been punctual payment in terms of the bond, and that in the circumstances the lenders had not barred themselves by their actings from insisting upon payment on the exact date.

The case is reported *ante ut supra.*

The defenders appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—This is an appeal against an interlocutor of the First Division of the Court of Session in Scotland, dated the 12th March 1920, recalling an interlocutor of Lord Sands of the 12th March 1919, and decerning against the defenders, the present appellants, in the terms of the conclusions of the summons. The facts giving rise to the present dispute are shortly as follows:—The appellant Maclaine borrowed on the 9th November 1910 a sum of £36,000 on the security of his estate in Lochbuie in the island of Mull. The transaction was carried out by means of two documents, namely, a registered bond and disposition in security,

by the provisions of which the sum advanced was to be repaid at the term of Whitsunday 1911, and interest was payable at the rate of 5 per cent. per annum, and also a minute of agreement whereby, on certain conditions which are immaterial to any issue arising here, the respondents agreed that they would not call in the loan for fourteen years from the term of Martinmas 1910, and that the interest should be payable at the rate of 4 per cent. per annum, and it was made an express condition that the interest should be punctually paid. The material words of the agreement are as follows:—"(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 14 years from and after the term of Martinmas (being 11th November) 1910"; and article 3 is in these terms—"Notwithstanding the said bond and disposition in security specifies five per cent. per annum as the rate of interest which the loan is to bear, the lenders agree to modify the rate to four per centum per annum provided and so long as punctual payment shall be made of interest at said lower rate."

On the 16th April 1911 Maclaine borrowed a further sum of £2000 on terms which so far as material are identical with those of the earlier loan.

At the date of the first advance, and for some years following, the respondent Sir Stephen Gatty was the tenant of Lochbuie at a rent which exceeded the amount of interest falling due in respect of the said loans, but he took advantage of the terms of his lease to terminate his tenancy on the 31st October 1917. That circumstance prevented any question of punctuality in the payment of interest arising until a date with which I will presently deal. In the meantime, in March 1912, the appellant Maclaine had made a trust deed in favour of the Lochbuie trust, the remaining appellants, who thereafter have been owners in fee of the estates in question. In October 1917, and for some considerable period afterwards, Maclaine was on duty with His Majesty's forces abroad, and the rent due in respect of the quarter ending the 1st November 1917 was not paid until April 1918, although two applications had been made by the agents of the Lochbuie trustees. I only advert to this circumstance because it was mentioned in argument, and some stress was laid upon it in the case. The interest on the loans falling due in 1918 could no longer be met out of the rent which formerly had accrued from the lenders, and consequently it became necessary to make some other arrangement to discharge the payments as they fell due. The first of such payments became due on the 1st February 1918, and a request for payment was made by the lenders' agents on the 11th April 1918, and on the 29th April of the same year they repeated their request in a letter which reads as follows:—"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 (of 5 per cent.) stipulated in the bonds will be exacted." Payments were in fact not made until the 13th May 1918, and were accepted without comment or protest at the lower rate of 4 per cent. On the 24th July 1918 the respondents' agents write to the trustees' agents sending a note of interest due at the 1st August 1918 and requesting a remittance in due course. That letter it is convenient that I should read. It was in these terms—"Sir Stephen and Lady Gatty. Interest on Loans.—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.—Yours faithfully, John C. Brodie & Sons." On the 7th August 1918 a cheque in payment was sent by the appellants' agents, but the cheque was returned on the ground that the tender was not timeous or sufficient, and payment was demanded at the rate of 5 per cent. At the same time an intimation was given that the respondents held themselves at liberty to exercise their rights and powers under their bonds free from any restrictions imposed by the back agreement which accompanied and modified the bonds.

Various explanations of the delay are given in the letter of the trustees' agents of the 14th August 1918. I do not think it necessary to dwell upon the various explanations which are put forward, because although they may aggravate the apparent harshness of which the appellants complain, they cannot in my judgment modify in any way the resultant legal situation. A claim was made that the interest had not been punctually paid within the meaning of the back agreements, which accordingly had ceased to apply, so that the rights of the parties, such is the pursuers' contention, were held to be governed by the bonds alone. This claim was not admitted by the appellants, and the respondents commenced the proceedings which have resulted in the appeal to your Lordships.

The questions which require decision now are two—in the first place, whether payment made under the circumstances indicated in the short statement of facts which I have thought it necessary to make is a payment punctually made on the 1st August, and the second question which has been argued at the bar is that if your Lordships do conclude that payment was not punctually made, was the conduct of the pursuer such as to preclude him, having regard to the familiar principles of estoppel or bar, from contending before your Lordships here that he is entitled to avail himself of his literal rights under the relevant instrument?

I will deal with those points in order. The first question is a short one—Where the party has contracted that he will make a payment punctually upon a day specified, can he be heard to say that that payment is a payment punctually made if in fact it is made at a later date? In a matter which would have seemed to me to be clear had there not been a difference of judicial opinion in the Courts below, I am of opinion that where an instrument clearly expresses that payment is to be made punctually on a day specified, such a payment is not so made unless it is made upon that day. Some authority was referred to by Mr Watson in the Scotch Courts, which certainly pointed in the opposite direction. He referred particularly to the case of *Scott Chisholme* v. *Brown* (1893, 20 R. 575), and the passage in that judgment in that case which assists his argument most is to be found in the judgment of Lord M'Laren, and in that part of the judgment which is to be found at page 580 of the volume containing the report. It is as follows: — "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—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." I must not, speaking for myself, be taken as an assentient to the distinction which the learned Judge draws between a stipulation that rent shall be punctually paid and a stipulation that an abatement is to be given if the rent is paid at the time, but I am bound expressly to dissociate myself, having regard to the view which I have formed, from the further expression of opinion that the word "punctually" in such a case would cover the case of rent paid within a few days after it is due, and I note (as I did during the argument) that the opinion expressed by this learned Judge in that sense was an opinion which must be treated as *obiter*, having regard to the fact that the period of delay in the case under consideration was notably longer than that with which we are concerned; and the decision in fact was that the actual payment in that case was not timeous.

The point is important, nor has this House hitherto pronounced upon it. It is therefore worth while to add a few further observations. Mr Watson was driven, and I think irresistibly driven, to the admission that had the words in the instrument which require construction been that the payment of interest was to be made upon the 1st August, without containing the word "punctually," the payment would necessarily have been made upon that day, and no such latitude could have been argued for as on the existing language he conceives himself at liberty to claim.

This admission involves its authors in a very strange and untenable position, because they are driven to contend that a man who has stipulated on his own behalf that a person who contracts with him is to pay him on the 1st August punctually, is actually in a worse position than he who has contracted that he shall be paid on the 1st August *simpliciter*. The suggestion that the cautious insertion of the word "punctually" is actually to be treated as importing an element of unpunctuality seems to me a paradox which on principle it would be extremely difficult to support, and when I address myself to the different authorities, which I will shortly do, which have been cited at the bar, I am confirmed rather than shaken in the impression which I have formed. I will refer in the first place to the decision in *Leeds* v. *Hanley Theatre* ([1898], 1 Chancery 343). This case, of all those cited at the bar, in its facts most closely resembles the matters now under consideration. The head-note in that case, which is extremely short, is as follows—"A mortgage deed contained an agreement that the payment of the principal money thereby secured should not be required by the mortgagees until the expiration of three years from the date of the deed, 'if in the meantime every half-yearly payment of interest shall be punctually paid.' Held by the Court of Appeal (reversing the judgment of Mr Justice Kekewich) that payment 'punctually' meant payment on the day fixed for payment, and that payment nine days after such fixed day was not good payment." I read this case, while the learned counsel was referring to it, with considerable care, and I am quite unable to assent to the suggested distinctions between it and the present case which Mr Watson attempted to draw. On the contrary, I desire to adopt and associate myself with the judgment that was given by the present Lord Lindley, then Master of the Rolls, in that case. He reads the words which so resemble the words which fall to be construed in the present case, and having read them continues at the top of page 349—"That surely means if in the meantime every half-yearly payment of interest is paid on the days specified in the covenant. I do not think you want authority to show that 'punctually' means punctually on the day fixed for payment, and I am not aware of any authority which shows it does not. According to the plain language the mortgagees are in the right. 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."

An authority was referred to by Mr Watson which is somewhat in his favour, and upon which therefore I make an observation. It was the case of the *Nova Scotia Steel Company* v. *The Sunderland Steel Shipping Company*, reported in the fifth volume of Commercial Cases. This case was concerned with the charter of a steamer for three months at a monthly hire, payment to be made monthly in advance, and failing the punctual and regular payment of the hire it was provided that the owners were to be at liberty to withdraw the vessel from the services of the charterers. The

second month's hire was payable on July 12th, the hire was in fact tendered on July 14th, and Mr Justice Bigham, as he then was, held that there had been a punctual and regular payment of the hire. The language used in the charter-party in that case was not as precise as that which is under consideration in the present case, and the learned judge did not give an extensive or elaborate consideration to the point which requires decision in the present case. I do not think it necessary to reach a conclusion as to whether, in the different language and under the different circumstances which it was necessary for the learned judge to construe and deal with, I should agree with him, but the view which he reached in the *Nova Scotia* case in no way affects the decision I have formed with regard to the first part of this case.

I have only to add that it would be a very singular circumstance if he who had been careful to stipulate that certain payments of interest under an instrument of this kind should be made to him punctually upon a certain specified day, were deprived by a decision of the law courts of the right of insisting upon the strict implement of that for which he stipulated. It would be both undesirable and dangerous that courts of law should set up an elastic and, from the nature of the case, an undefinable judicial discretion in substitution for the expressed agreement of the parties to the instrument. So much for the first point which has been argued at the bar.

It is then further contended that even if according to the terms of the bond, properly construed, the respondents were entitled to require that the payments of interest should be made punctually on the days specified, they have by their conduct in this matter precluded themselves from raising such a contention under the existing circumstances.

The learned counsel cited various authorities in which these doctrines have been discussed, but the rule of estoppel or bar, as I have always understood it, is capable of extremely simple statement. Where A has by his words or conduct justified B in believing that a certain state of facts exist, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time. Whether one reads the case of *Pickard* v. *Sears*, or the later classic authorities which have discussed this topic, one will not, I think, greatly vary or extend this simple definition of the doctrine.

Approaching, then, the facts of this case, I ask myself Where is the evidence of any such representation, either by words or by conduct, on the part of the pursuer as to preclude him in this case from reliance upon the strict letter of his contract? It is said that when an instalment was asked for in the letter of the 29th April 1918, a course of conduct was set in train which justifies the contention advanced. I will read that letter: — "Dear Sir, — 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 (of 5 per cent.) stipulated in the bonds will be exacted." Upon this letter two observations may conveniently be made. In the first place, the payments of interest under discussion in that letter are the first payments of interest which had been made at all having regard to the balance slightly in favour of Lochbuie upon an adjustment of the two accounts. We are then dealing from this date with a new state of things, and at this point of time the respondents in the clearest possible manner place on record their intention of insisting strictly on their legal rights under the instrument. The money was in fact paid on the 13th May, and upon its acceptance without protest of the appellants and upon the letter written on the 1st May, is founded a contention that the respondents were thereafter, till they recalled the impression created by that letter, precluded from insisting upon the letter of their contract. I am unable to agree that in such a case as this, where there has been a single acquiescence not unexplained in a single tardy payment, the party accepting it has thereafter rendered it impossible for him to require that payment should be made at the due date. Even if no express notice had been sent to the appellants, I should still think that there had been no conduct in this case which would have prevented the respondents from insisting upon their rights; but, in fact, on the 24th July 1918 we find the respondents' agents writing in these terms—"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."

I read that letter as amounting to a clear notification a week before the payment was due that the respondents intended to require that payment should be made the day it was due, and the unfortunate circumstances which have been described to us by the learned counsel, which are adverted to in the correspondence, do not, and cannot, do away with the rights of the respondents under the instrument. It was for the appellants, having regard to the obligation into which they had entered, diligently to prepare themselves to carry out their duty timeously, and they should not have left themselves at the mercy of the disabling circumstances which are described in the letter in question.

I do not in any way deal with the third point, which was ultimately abandoned by Mr Schwabe as it was abandoned in the Courts below. I have only to add that even if it be true that the attitude of the respondents has resulted in a harsh and difficult situation for the appellants, that cir-

cumstance cannot produce the slightest effect when once a clear view is reached as to the legal situation. In my view the pursuers here are entitled to succeed; the interlocutor delivered on appeal was right, and ought to be affirmed, and I move your Lordships accordingly.

VISCOUNT FINLAY — I am of the same opinion, and upon the same grounds. The bond provided for payment of interest at 5 per cent. by equal quarterly payments—on the 1st of February, the 1st of May, the 1st of August, and the 1st of November in each year. The back-letter provided by its third article that notwithstanding the specification of 5 per cent. as the rate of interest which the loan was to bear according to the bond, "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." The interest fell due on the 1st of August; it was not sent until the 7th of August. Various reasons are given for the delay, which I have no doubt are perfectly true. It appears that one of the trustees was travelling about, and there was some delay in the cheque getting her signature. These reasons afford no justification for not observing the terms of the contract between the parties; there was, indeed, nothing whatever to prevent the agents paying the money by their own cheque and then being recouped when the trustees were able to send the necessary signature.

It was contended that payment on the 7th of August might be considered punctual payment on the 1st of August. I am totally unable to take that view. If I rightly understood Mr Watson, he admitted that if the words had been that payment should be payment on the 1st of August, he would not contend—he could not contend—that they were satisfied, but that the words "*punctual* payment on the 1st of August" in some way qualified the provision for "payment on the 1st of August." "Punctual payment," he said, was not an expression really applicable in any strict sense to payment on a day; it was applicable only to payment at a particular point of time in the course of a day. It appears to me that the expression "punctual payment" is perfectly applicable to a provision for payment on a particular day, and that then it emphasises the necessity of payment being made on that day and not on a subsequent day. Instead of diluting the meaning of the provision for payment on that day, it emphasises it. It appears to me, therefore, that it is perfectly clear that there was not punctual payment on the 1st of August in terms of the provision in the contract as contained in the back-letter as well as in the bond.

The second point is a totally different point, and has given me more ground for consideration than I think was necessary with regard to so obvious a question of construction as arose on the first point. It is this—Whether there was anything in the nature and course of conduct which would prevent the creditors from insisting on their right to have payment at the higher rate of interest because the payment was not made for a few days after the day stipulated. The principle in such matters is most admirably laid down by Lord Glenlee in 1828 in a case which has been cited—the case of *Paterson* v. *Tod*. The passage I am going to read is in 6 Shaw, at page 1064 (1828). Lord Glenlee says this—"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's 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."

The question in the present case is whether there was such conduct on the part of the creditors as to bring the debtors within that principle. I have come to the conclusion that although there may be a great hardship in enforcing the strict rights of the parties in this particular case, it is much better that these rights should be enforced even although there is hardship in the individual case, than that the principle should be trenched upon, as infringement of it might lead to confusion in law and possible hardship and difficulty in other cases.

Now, do the defenders bring themselves within the principle of that case? The whole foundation for the argument on this part of the case is founded upon the letters in the appendix. The first is the letter of the 29th April, which has been read more than once already, and which concludes with the notice "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." That letter was written on the 29th April and certain interest fell due on the 1st of May, within two days after the date of that letter. On the 1st May this answer comes—"We are in receipt of your letter of 29th ulto. The delay in remitting has arisen, we understand, from the factor being away from home for the last fortnight, but he has now returned, and we hope to have cheque immediately." That was given by way of apology for delay, and a settlement took place by payment of the 1st of February interest and the 1st of May interest on the 13th of May. It appears to me that acceptance of one payment under these circumstances is a foundation altogether inadequate to sustain the inference of any course of dealing between the parties which the defenders would need to erect in order to bring themselves within the doctrine enunciated by Lord Glenlee.

Then comes the letter of the 24th July, which is a bald intimation that certain

interest will be due on the 1st August, and stating that the writers would "be glad to receive a remittance for the amount of the interest, less tax, in due course." Then occurred the delays, to which I have already referred. Under these circumstances it appears to me that there is no ground whatever for alleging any course of dealing, or that the defenders were in any way misled by the actings of the creditors in not paying with punctuality.

It follows that the consequences which the contract between the parties prescribed as ensuing on a failure to make punctual payment at the stipulated day must ensue.

LORD DUNEDIN—I concur with all that has been said by the noble and learned Lord on the Woolsack. I desire particularly to associate myself with that portion of his speech in which he pointed out that the use of the word "punctual" connoted an added stress, not a relaxation, of the duty of timeous payment.

As regards the second point, I think the case a hard one, but I think the pursuers are within their rights, and that they neither did nor said anything that was sufficient to found a plea at Bar.

LORD ATKINSON—I too concur with the observations that have been made by my noble and learned friend on the Woolsack.

It is not contended that the language used in the two documents with which this House is cognisant have any but the ordinary meaning, and it appears to me to be beyond doubt that when in an instrument two days are specifically fixed for payment of moneys, the provision that the payment shall be punctually made necessarily means that it should be made on those named days, and really gives every force and stringency to the provision fixing those days for payment.

As to the second point, it appears to me that whatever may have been the practice of these parties before the 29th April, upon that day there was, as it were, a new departure and an intimation by the writers that henceforth the persons on whose behalf the letter was written would stand upon their legal rights and insist upon punctual payment. They had a perfect right to do that. It is established by the cases which have been cited that whatever may have been their previous practice it was competent for them to change their method of dealing and to assert that henceforth they would act upon their strict rights.

Now the question is, Have they abandoned the position they took up upon the 29th April? The letter of July most certainly does not amount to an abandonment; on the contrary, it is rather an insistence on the right asserted by the previous letter, and therefore the only dealing that can be relied upon as abandoning the position they took up in April is the transaction which culminated on the 13th of May. Now what was that? They asked to be paid the sum legally due upon the 1st of May, and excuse is made on the 1st of May—the very day—that owing to the absence of the factor that demand could not be at once complied with, and the payment is ultimately made I presume when the factor returned on the 13th May.

It appears to me to be perfectly impossible to construe that transaction as a departure in any way from the assertion of their legal right so expressly made in the letter of the 29th April.

I do not think, if one is permitted to say it, that the conduct of Sir Stephen Gatty is very commendable, but at all events he cannot be deprived of his legal rights although one may not be disposed altogether to admire the course he has taken.

LORD SHAW—I concur.

Stated in a sentence this two-handed bargain, combining a back-letter with a bond and disposition in security, may be put thus—On condition that interest at 4 per cent. is punctually paid, then (1) that will be accepted in full satisfaction of interest at the larger rate of 5 per cent. in the bond; and (2) the loan shall be continued for the long period of 14 years.

On the first point, as regards the construction put by Mr Watson upon the words "punctually paid," I confess to your Lordships that I have a difficulty in understanding what the point is. He pled, and pled briefly but strenuously, in favour of the principle of elasticity—elasticity in the construction of a contract which provides for punctuality.

My mind cannot comprehend the elasticity of punctuality. I know of no method of construction of a contract by way of contradiction of it.

Further, once you introduce in a matter of construction questions of circumstances, of motive, of ability or inability to pay, or of shortness or length of delay—once you do that the terms of the bargain might vary with the view taken of these things by judges from time to time, and the whole solid contract relations of the parties might disappear. The ground of these relations may be hard, but that is better than that it should be slippery.

On the second point of argument, namely, that the conduct of the parties has barred the lenders from reverting to the term of the bond and enforcing the lenders' rights accordingly, I of course am not prepared to say that such a case which might in some aspects appear to be an uphill case is impossible—far from it. I venture to express my adoption of the view just expressed in this House by my noble and learned friend on my left, and to say that I agree with the view taken in the case of *Paterson* v. *Tod* in the judgment of Lord Glenlee. In order to make a change for all the future term of the written bargain I presume that such a change would have to be reduced to writing. But it was said, and in this the argument was supported by *Paterson* v. *Tod*, that the conduct of the lenders did mislead the borrower as to what was either expected or required as for a particular impending term. It was maintained that to change the written obligation as for a particular term all you required was a course of conduct antecedent to that term. That might

be so in a clear and continuous case. This was not such a case of clearness and continuity. The point just stated by my noble and learned friend Lord Atkinson makes that perfectly clear. In short, punctual payment was clearly as the day stated to be a condition which was not dispensed with but was insisted upon.

Their Lordships ordered that the interlocutor appealed from be affirmed and the appeal dismissed with costs.

Counsel for the Appellants — Schwabe, K.C. — Hon. Wm. Watson, K.C. — D. P. Fleming. Agents — Hope, Todd, & Kirk, W.S., Edinburgh — Grahames & Company, Westminster.

Counsel for the Respondents—Macmillan, K.C. — Mackay, K.C. Agents — John C. Brodie & Sons, W.S., Edinburgh — R. S. Taylor, Son, & Humbert, London.

Tuesday, November 30.

(Before the Lord Chancellor, Viscount Finlay, Lord Dunedin, Lord Atkinson, and Lord Shaw.)

CAMPBELL'S TRUSTEES *v.* CAMPBELL

(In the Court of Session, February 7, 1920, S.C. 297, 57 S.L.R. 243.)

Succession — Charitable Bequest — Uncertainty—"Charitable or Other Deserving Institutions in Connection with the City of Glasgow."

A testator directed his trustees in the event of there being any residue of his estate "to apply the same for behoof of such charitable or other deserving institutions in connection with the city of Glasgow as my said trustees shall think fit."

Held (*rev.* judgment of the Second Division, *diss.* Lord Dundas) that the bequest was void from uncertainty.

Symmers' Trustees v. *Symmers*, 1918 S.C. 337, 55 S.L.R. 280, *approved.*

This case is reported *ante ut supra.*

Mrs Agnes Millicent Anderson or Campbell, as executrix of her deceased husband William Frederick Mostyn Campbell, appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR — This is an appeal brought by Mrs Agnes Millicent Anderson or Campbell as executrix of her husband the deceased William Frederick Mostyn Campbell, acting under his will, dated the 27th of October 1895, as sole and residuary legatee under that will, against a judgment of the Second Division of the Court of Session in Scotland, pronounced upon a Special Case presented for the opinion and judgment of that Court, in which the appellant was the second party and the respondents were the first and third parties. I find myself in complete agreement with the opinion of Lord Dundas and therefore do not examine the matter at undue length.

The appeal is against the decision of the Second Division upon a direction to trustees, contained in the will which requires construction, to apply the residue "for behoof of such charitable or other deserving institutions in connection with the city of Glasgow as my trustees shall think fit." The case that is made for the appellant is that the direction to which I have just directed your Lordships' attention is void by reason of uncertainty.

There can, I think, be no question that the word "or" in the sentence under consideration is used disjunctively, and that the word "other" distinguishes that word so used very markedly from the language which has been the subject of discussion and decision in other cases. It is extremely difficult to think of a charitable institution which in the opinion of the users of the language contained in testaments would not also be deserving, and having regard to the use of the disjunctive "or" and the use of the word "other" it is inconceivable that the testator in adopting this language did not intend to add to his purely charitable disposition a power to his trustees to make benefactions to institutions other than charitable institutions which resembled charitable institutions in this respect, and in this respect only, that they were "deserving."

I do not propose to follow the learned counsel through the cases, because in my judgment the effect of the cases may now be regarded as clear. We have to assume — indeed I must assume — that we have here a distinct alternative between charitable institutions and deserving institutions. There being, as I have said, two distinct sets of objects here, the conclusion follows, when the House has read not only decisions in the Scotch Courts but also decisions in this House, that a bequest in favour of the one set is valid, and that a bequest in favour of the other set is so vague and indefinite that it cannot be treated as valid. I am unable to distinguish this case from the decision of the Scottish Court in *Symmers' Trustees*, 1918, S.C. 337, where the language used is not "charitable institutions" but "charitable agencies." In my opinion the variation of the phrase between "institutions" and "agencies" is unimportant, and I concur in the decision which was given by the Scotch Court in that case.

It is only necessary that I should point out in conclusion how extremely vague in fact is the phrase "deserving institutions." If such a disposition were tolerated it would enable a testator to appoint another, not indeed in a broad sense, to make his will for him, but according to his individual vagary and idiosyncrasy to make pecuniary benefactions to such an infinite variety of institutions that it would be impossible to conceive a greater breach of the doctrine, which has been laid down in so many familiar cases, that the objects of testamentary bounty must be indicated with a reasonable degree of certainty and precision.

For these reasons I move your Lordships that the interlocutor of the Court below be reversed.