Wednesday, June 17.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

CASTANEDA *v.* CLYDEBANK ENGINEERING AND SHIPBUILDING COMPANY, LIMITED.

(*Ante*, December 10, 1901, 39 S.L.R. 231, and 4 F. 319; and July 28, 1902, 39 S.L.R. 855, and 4 F. (H.L.) 31.)

Contract—Breach of Contract — Damages —Penalty or Liquidate Damages.

While endeavouring to suppress, and for the purpose of suppressing, the insurrection in Cuba, the Spanish Government in June 1896 contracted with A & B, a Clyde shipbuilding firm, to build four torpedo boat destroyers at a certain sum each respectively, to be delivered within certain times specified. There was a clause in the contracts providing that "the penalty for later delivery shall be at the rate of £500 per week for each vessel." Offers by two other firms to supply two of the vessels for sums which were respectively £12,000 and £7000 less than the sum in the offer of A & B, were not accepted, the time for delivery in these offers being nine and three months later than in the offer of A & B. The vessels were delivered forty-six weeks, forty-one weeks, twenty-eight weeks, and twenty weeks late respectively.

In an action for damages for late delivery brought in 1900 by the Spanish Government against A & B, *held* that as the sum stipulated to be paid in the event of late delivery applied to one particular term of the contract only and not to the contract as a whole, and as it was proportioned in amount according to the extent of the breach, it was *prima facie* pactional damages and not penalty, and that as in the circumstances it was not exorbitant or unreasonable it was not subject to modification.

Personal Objection—Waiver—Payment of Price without Reservation of Claim for Damages for Late Delivery.

Circumstances in which *held* that the payment of the last instalment of the price of a ship, and the acceptance of delivery by the purchaser without express reservation of a claim of damages for delay in delivery, did not imply waiver of the purchaser's right to insist on a clause in the contract providing for payment of certain liquidate damages in the event of such delay.

This case is reported *ante ut supra.*

It was an action brought in December 1900 by the Spanish Minister of Marine, and others, being members of the Royal Naval Commission in London, and the said Commission, against the Clydebank Engineering and Shipbuilding Company, Limited (to which name the firm name of J. & G. Thomson, Limited, had been altered in 1896), and against the liquidators of the said company. The conclusions of the action were that the defenders should be ordained to make payment to the pursuers of (1) £25,000, (2) £23,000, (3) £12,500, and (4) £15,000, or alternatively to make payment to the pursuers of £75,500.

The pursuers maintained that the first four sums concluded for were due to them by the defenders as liquidate damages in respect of the defenders' failure to deliver to the pursuers four torpedo boats named the "Audaz," the "Osado," the "Pluton," and the "Proserpina," which the defenders had undertaken to build for the Spanish Government, within the time stipulated in the contracts.

By the first of these contracts, which was dated 4th June 1896, and related to the "Audaz" and the "Osado," the defenders undertook to build the first vessel in six and three-quarter months, and the second vessel in seven and three-quarter months from the date of the contract, at a price of £67,180 for each vessel. By the second contract, which was dated 24th November 1896, and related to the "Pluton" and the "Proserpina," the defenders undertook to build the first vessel in six and a-half months and the second vessel in seven and a-half months from the date of the contract, at a price of £65,650 for each vessel.

The third article of each contract was in the following terms:—"The penalty for later delivery shall be at the rate of £500 per week for each vessel not delivered by the contractors in the contract time."

It was admitted that the vessels had not been delivered within the time specified in the contracts, the "Audaz" being forty-six weeks late, the "Osado" forty-one weeks late, the "Pluton" twenty weeks late, and the "Proserpina" twenty-eight weeks late.

The vessels in question were ordered by the Spanish Government while they were endeavouring to suppress the insurrection in Cuba, and for the purpose of suppressing that insurrection.

The form of conditions of tender contained the following clause:—"The time for delivery is to be considered a very essential point, and consistent with the price—that is to say, without increasing the cost of the vessels by the quick delivery demanded as an important condition, builders are requested to state the shortest time for building the ships and delivering same ready for sea, and also stipulate clearly what penalties are they willing to pay for non-fulfilment of speed, and for every week's delay beyond the date that may be agreed upon for the delivery."

The builders' tender contained the following clause:—"The penalty for delay in delivery to be £500 for each completed week beyond the contract time.

The pursuers maintained (1) that the sums stipulated in the contracts for delay were pactional or liquidate damages, and were not subject to modification; and (2) that they had done nothing to waive their right to demand payment.

The defenders maintained (1) that the sums stipulated in the contracts for delay in delivery were penalties, and that they were subject to modification by the Court as being exorbitant and unconscionable; and (2) that the pursuers had waived their right to claim payment of them.

Proof was led in the action.

The facts with regard to the first point were summarised as follows by the Lord Ordinary (KYLLACHY):—

"I do not propose to refer in detail to the evidence, particularly the evidence with respect to the insurrection in Cuba and the apprehended intervention by the United States Government, and the connection which the pursuers allege between the situation thus induced and the making of the two contracts which have given rise to this question. All I need say is, that I see no reason to doubt the general correctness of the testimony adduced by the pursuers on that subject. It may well have been that the efforts made in the year 1896 by the Spanish Government—of which efforts the building of these four torpedo boat destroyers formed a part—were somewhat belated, and perhaps also inadequate. But I think it quite probable, and perhaps more than probable, that if the Spanish Government had even in the spring of 1897, been in a position to establish around the coast of Cuba, or even certain parts of that coast, a really effective blockade—I mean effective as against the landing of munitions of war—the Cuban insurrection might have been crushed and American intervention avoided. In such circumstances it would, as it seems to me, be very difficult to assign any limit to the value, even as estimated in money, which the Spanish Government—face to face with such an emergency, and making contracts for the addition to their navy of vessels of war of exceptional speed—may have honestly and reasonably placed on the matter of early delivery. But be that as it may, there is one test which, as it happens, can be here applied, and to which the defenders can hardly object. I refer to the additional price which the pursuers were ready to pay, and in fact did pay, for the early delivery offered by the defenders as compared with the later deliveries offered by others firms of equal position. It is a fact not in controversy that when in June 1896 the pursuers ultimately agreed to pay to the defenders for each of the first two vessels a price of £67,180, they had before them (amongst others) an offer from the Messrs Thorneycroft to supply the same vessels for £55,000 each, and from the Thames Iron Company to supply them for £60,000. It is also, I think, a fact established, *inter alia*, by the report (No. 352 of process) made by the Naval Commission upon the various tenders, that the only reason why the defenders' offer, so much larger in amount, was accepted, was that their time for delivery was nine months earlier than that of Messrs Thorneycroft, and three months earlier than that of the Thames Company. These figures, it appears to me, speak for themselves. They work out so as to show in effect an additional price paid to the defenders for 'quick delivery' of, on the one comparison of about £340 per week, and on the other of about £490 per week. It is hardly, I think, possible in such circumstances to suggest that the £500 per week (*prima facie* stipulated as liquidate damage) was truly a mere random sum stipulated as penalty and without reference to any reasonable pre-estimate of actual loss."

The facts with regard to the plea of waiver were as follows:—"The Spanish Commission in London upon more than one occasion communicated to the defenders Royal Orders which referred to the delay in delivery of the vessels and asked for explanations. In answer to these communications the defenders more than once gave explanations. The Spanish Government never expressly intimated their satisfaction with these explanations. The Commission in London had no power to deal with the question of remitting penalties or damages incurred, which had to be referred to the Spanish Government for decision, and the defenders knew this. The vessels were ultimately delivered as follows:—the 'Pluton' before the end of 1897, the 'Proserpina' on 8th February 1898, the 'Audaz' and the 'Osado' on 7th March 1898. The final instalments were paid on 23rd February, 14th March and 16th March (2) 1898 respectively. On 28th January 1898 the Commission wrote to the defenders intimating a decision of the Spanish Government with regard to accepting two of the vessels even if slightly deficient in speed. The Spanish Minister's letter concluded as follows:—'The penalties incurred for the delay in delivery shall subsist as heretofore.' On 3rd March 1898 the defenders wrote stating that the 'Audaz' and 'Osado' were now ready for delivery, but asking that the final instalments should be paid before delivery, 'leaving extras to be settled when the matter of delay in delivery is arranged.' The funds had not then arrived in London. The Spanish Commission replied that part of the money was advised, that they had wired urging remittance of the remainder, and that 'it would be most sensitive to' the chief of the Commission 'having to acquaint my Government your decision.' On 7th March 1898 the defenders withdrew their letter of 3rd March. On 9th March 1898 the Commission wrote that instructions had been received from Madrid 'to pay you in full instalments due on the "Proserpina," "Audaz," and "Osado."' In the correspondence passing at this time there was no express reservation of claims of damages for delay in delivery. In an interview which took place on 5th March the subject was not mentioned. The receipt for the final instalment on the 'Pluton,' dated 23rd February 1898, was as follows:—'£16,412, 10s.

'Received from His Excellency Commodore Trigueros, Chief of the Spanish Royal Naval Commission in London, the sum of sixteen thousand four hundred and twelve pounds ten shillings sterling (by draft on

London) in payment of the final instalment of the contract price of the Spanish torpedo boat destroyer 'Pluton.'" The receipt for the final instalment on the "Proserpina," dated 14th March 1898, was in the same terms.

The receipts for the final instalment on the "Audaz" and "Osado," dated 16th March 1898, were practically in the same terms, with the following addition:—"Less the sum of £500 (five hundred pounds) deducted for deficiency in speed in accordance with the Royal Order conveyed in His Excellency's letter of 28th January 1898."

The pursuers subsequently paid all but a small part of the sum claimed by the defenders for extras without making any express reservation of any counter claim.

Between the end of March and 27th October 1898, no correspondence or other communication on the subject of the delay in delivery passed between the parties, On the latter date the Commission intimated to the defenders a Royal Order directing that an Administrative Inquiry into the matter should be opened. Thereafter the present claim was made and repudiated by the defenders, and the present action was raised.

On 18th February 1903 the Lord Ordinary pronounced the following interlocutor:—"Decerns against the defenders for payment to the pursuers of the sum of £67,000 sterling, with interest thereon at the rate of 5 per centum per annum from the date of citation until payment in full of the conclusions of the action," &c.

Note.—"In this action there has been a proof, as ordered by Lord Low's interlocutor of 31st July 1901—an interlocutor which was sometime ago affirmed by the House of Lords. The cause is therefore in the position of a concluded cause, and I have now to deal with the various questions which it involves.

"The first question is as to the pursuers' title to sue, but that point may be very shortly disposed of. The proof has established beyond controversy the pursuers' averments as to the position and functions of the Spanish Minister of Marine, and that being so the House of Lords have decided that, assuming the truth of those averments, there is no ground for doubting the title—at all events of the leading pursuer.

"The next question, which from the legal standpoint is the most important in the case, is whether the sums claimed as due by the defenders in respect of their failure to deliver the four vessels within the contract period are to be considered as penalties, and therefore only recoverable so far as the actual damage is proved, or, on the other hand, as pactional damages pre-estimated and fixed by the parties, and not therefore capable of being modified by the Court.

"On this question I agree with the views expressed by Lord Low.* I agree with him that it is of little consequence what the stipulated payment is called. And I agree also, for the reasons which he assigns, that *prima facie* this is a case of pactional damage and not of penalty. Further, such being the *prima facie* conclusion, I am of opinion upon the proof, oral and documentary, which has now been led, that the defenders have failed to show either (1) that the sums stipulated were truly of the nature of penalties, or what would come to the same thing (2) that although not properly penalties, they were yet subject to modification by the Court as being exorbitant and unconscionable.

"It was to this last point that the defenders' argument was in the end directed, and the argument was mainly rested on the decision, or I should say rather upon certain of the opinions in the case of *Forrest & Barr* v. *Henderson & Company*, 8 M. 187, a case to which Lord Low refers. It may therefore be proper that I should state in a word how far, as it seems to me, that case bears upon the present. I may say in passing that the case has not—so far as I know—been followed by any subsequent case; but at the same time I am not aware that its authority has as yet been displaced.

"As I read it, the decision in *Forrest & Barr*—disregarding certain passages in the opinions which were not necessary to the decision—was quite in accordance, if not with previous decisions, at least with principle. For what it came to was only this—that in determining the true character of something called penalty, or something called liquidate damage, it was an important, and perhaps conclusive, consideration that the amount of the so-called penalty, or of the so-called liquidated damage, was on the one hand reasonable and moderate, or on the other hand exorbitant and unconscionable. *Prima facie* of course the parties were the best judges of that matter. Still the amount stipulated might be such as to make it plain that it was merely stipulated *in terrorem*, and could not possibly have formed a genuine pre-estimate of probable or possible damage; or to speak perhaps more correctly, a genuine

* The following was the portion of Lord Low's note to his interlocutor of 31st July 1901, to which the Lord Ordinary referred:—"The fact that the word 'penalty' is used is of no importance if the substance of the stipulation is that the amount named is pactional damages. The clause appears to me to be of the nature of a stipulation fixing the amount of damages to be paid in the event of a breach of a particular term of the contract. It is not a general clause providing a penalty in the event of any breach of the contract, but it applies to the stipulation as to the time within which the work is to be completed, and to nothing else, and the amount varies according to the extent to which the defenders fail to implement their obligations; *prima facie* therefore the amount named is pactional damages which the Court cannot modify, unless, indeed, it is shown to be exorbitant and unconscionable—*Forrest and Barr* v. *Henderson*, 8 Macph. 187; *Johnston* v. *Robertson*, 23 D. 646; *Lord Elphinstone*, 13 R. (H.L.) 98."

pre-estimate of the creditors' probable or possible interest in the due performance of the principal obligation.

"In this view the decision in question may have been a step in advance, but it is quite intelligible. It did not decide—as has been represented — that a payment truly stipulated as liquidate damage may be modified by the Court. But it did decide that what might in terms be so stipulated, or even what *prima facie* might have that character, was nevertheless open —in respect of exorbitancy of amount—to be relegated to the position of penalty, and to be dealt with as such. If, therefore, I had in this case been able to hold that the sum of £500 per week which the defenders undertook to pay as penalty or compensation for delay in delivery, was—to use the words of some of the judges—exorbitant and unconscionable, I should have allowed the pursuers nothing more than the actual damage which they have proved. I should not merely have reduced the amount to what I myself considered a reasonable pre-estimate. Speaking with deference, I should have thought that rather illogical. On the other hand, speaking again with deference, I should not have seen the relevancy of such considerations as (for instance) that the defenders did their best; or that they were unfortunate in their sub-contracts; or that they undertook and warranted more than they could perform. That is a kind of doctrine which would not, in my judgment, be legitimate or consistent with the security of commercial contracts. In the event supposed I should, as I have said, have felt bound to allow the pursuers only the actual damage proved and estimable in money—a kind of damage which (apart from certain outlays and interest on instalments to be afterwards noticed) might in the present case have been very difficult to establish by evidence.

"But in point of fact I am not able to affirm that, as matters stood in July and November 1896, the stipulated £500 per week was more than a quite fair and reasonable pre-estimate of the loss, so far as estimable in money, which, probably or possibly, directly or indirectly, might be expected to result to the pursuers from the defenders' default.

[*His Lordship then narrated the facts ut supra.*]

"For these reasons I am of opinion that, giving the utmost effect to the doctrine of *Forrest & Barr* v. *Henderson & Company*, the defenders have failed to show that the £500 per week stipulated was exorbitant and unconscionable. I may add that I do not myself see that the question is really different from what it would have been if the stipulation had taken the form of a variation in price depending on the date of delivery — the price being a certain sum if delivery was made by a day named, and diminishing by £500 per week if delivery was delayed Nor again am I able to distinguish the case in principle from that of a stipulated deduction for defective speed—a deduction which is very common, and which, apart from proof of actual damage, has never, so far as I know, been refused effect.

"It remains to consider whether the pursuers' claim is barred by the alleged interposition of *force majeure*, or by the waiver or discharge which the defenders allege.

"As to the first of these matters I do not require to say anything, because at the discussion it was candidly conceded by the defenders' counsel that neither the alleged difficulty of procuring material, nor the strike or rather 'lock-out' which occurred on the Clyde in July 1897, came at all up to what is in the contract described as *force majeure*. There was no doubt a great deal of evidence on both points. But the object of that evidence was, it was explained, only this—to lay a foundation for an argument founded on certain *dicta* in the case of *Forrest and Barr*—an argument to the effect that the difficulties which the defenders met, and the efforts, anxious but unsuccessful, which they made to cope with those difficulties, formed a good ground for modification, even of proper liquidate damages. I have already referred to that argument and the *dicta* which are said to support it, and I do not think it necessary to add anything to what I have already said.

"The second point, however, is in a different position. It was anxiously argued, and it requires and has had my most careful consideration. It turns mainly on the correspondence, and in substance the suggestion is this—(1) that the Spanish Government—whatever its legal rights—never really intended to enforce the so-called penalties for delay, provided only that the shipbuilders were able to offer reasonable explanations of the delay; (2) that on this footing explanations were in fact asked and given, and were accepted as satisfactory; and (3) that on the same footing delivery was in the end taken and full payment of the price made without reservation of counter-claims, and with the result in law of all such claims being waived and discharged.

"Now, I think the correspondence does show that the Spanish Government, or at all events the Naval Commission in London, were quite disposed to be indulgent to the contractors. I incline to believe that if fairly met they would even to the last have not improbably been prepared to consider the whole circumstances and to adjust their claims in a liberal spirit. I am not, however, able to deduce from the correspondence (what the defenders allege) that the Spanish Government, or even the Naval Commission, were in fact satisfied with their (the defenders') explanations. Such satisfaction was certainly not expressed; and I should say the inference rather is that the authorities in Madrid were not satisfied, but considered it necessary that, as preliminary to any arrangement, the whole facts should be ascertained by an administrative commission. These, however are matters which are only important as leading up to the main question, which is this —What (if any) are the inferences to be drawn in the whole circumstances from the

pursuers making full payment of the last instalments of the contract price, and doing so, as it is said, without protest or reservation? That is the main question, and in answering it there are several considerations which make it in my opinion difficult to accept the defenders' conclusion.

"In the first place, the defenders' contention goes very far. It involves the proposition that the Spanish Government waived, or are to be held as having waived, not only what may be called their general claim, but even their claim for actual loss, namely, (1) the sum of about £6000 odds for interest on instalments; and (2) the two sums of about £3000 each, representing the pay and extra pay and expenses disbursed to or for officers and sailors detained in London, as explained in the evidence.

"In the second place, it cannot possibly be affirmed that the mere fact of the payment of the last instalments of price or even its payment without reservation, was, as matter of legal inference, an implied discharge of the pursuers' claims for delay. In point of fact, the receipts granted by the defenders for the last instalments were not absolutely without reservation. For, at least in the case of the last instalments paid on the two vessels last delivered, the receipts contained an express reference to the terms of a communicated royal order of a date shortly previous; and that royal order, while dealing specially with the matter of compensation for shortness of speed, yet adds (no doubt incidentally) that the penalties incurred for delays in delivery shall subsist as heretofore. But apart from that point, the important consideration is this, that the pursuers, unless they paid these last instalments, could not have claimed delivery of the two vessels—vessels for which they had already in part paid; while, on the other hand, the defenders could not have refused delivery on tender of those instalments even if the pursuers in making that tender had insisted on making an express reservation of all their counter-claims. In such circumstances, immediate delivery being the pursuers' right and being of great importance, it is, in my opinion, vain to contend that by making payment, or even by making payment without protest, the pursuers waived by implication all claims against the defenders. Such an inference would not be reasonable; and I know of no ground on which it can be implied in law. The cases upon game damage, or miscropping, as between landlord and tenant, which were cited in argument, have, I think, plainly no application. On the other hand, the case of the *Montrose Shipbuilding Company*, 22 D. 665, referred to by the pursuers, is, it seems to me, considerably in point.

"Lastly, it was, as I have already noticed, the fact, and the defenders knew it, that any remission or modification of the penalties or claims in question was a matter which had to be referred to Madrid, and with which the Naval Commission in London had no power to deal. I do not say that this would be conclusive if mere payment of the last instalment implied in law a waiver of the claims. But when the question is a to the inferences to be drawn from passage in the correspondence, or from acts and conduct of the Naval Commission, the fact is of importance, and requires to be kept in view.

"Having all this in view, what is it in the correspondence which is said to instruct the alleged waiver or discharge? Two things are clear—the one is that there is certainly no express remission. That is not suggested. The other is that, at all events up to the 3rd of March 1898—a date subsequent to the delivery of the 'Pluton' and 'Proserpina' and payment of the final instalments of their price—it was well understood and acknowledged that the pursuers' claims for delay still subsisted. The defenders had been expressly so told in the pursuers' letter of 28th January, and in their own letter of the 3rd of March they expressly refer to the claims for delay as having still to be arranged. What the defenders therefore have to establish is that between the 3rd of March 1898 and 27th October 1898—when beyond doubt the pursuers' position was reasserted—something had happened which extinguished these claims or barred their further enforcement. The question is whether anything of that kind appears.

"Now between those dates there was certainly nothing said on the subject. The correspondence contains nothing, and at the only meeting which took place (in London about 5th March) it is admitted that the subject was not mentioned. But the suggestion of the defenders' counsel was—if I understood it—something of this sort. In their letter of 3rd March the defenders took up the position that although the 'Audaz' and the 'Osado' were now ready for delivery, they would not be delivered without previous payment of the last instalments of the price. In other words, the defenders were quite willing that the extras should stand over to be settled afterwards with the claims for delay, but they insisted for payment, before delivery, of the last instalments. This, it is said, put the pursuers in a difficulty. They were urgently in need of the two vessels, and the money for the last instalments had not come forward although it was shortly expected. In these circumstances the defenders say they were induced by the pursuers' remonstrances to withdraw their letter of 3rd March and to give immediate delivery without payment, and that they did so on the footing not expressed, but as they say implied, that they should hear no more about the pursuers' claims for delay. That, the defenders say, is the fair inference from the transaction, followed as it shortly was by payment of the last instalments in full, and subsequently by payment also of all but a small part of the sum due for extras.

"As to all this, however, I can only say that I have failed to discover in the correspondence or proof any ground for the suggested inference. I have already said what occurs to me as to the effect to be given *per se* to the pursuers' payment in full of the last instalments. All that I need add on that subject is that, in the

case of the 'Pluton' and 'Proserpina' there had been the same payment in full while yet the whole claims for delay admittedly subsisted. And as to the concession made by the defenders with respect to delivery—the concession which is said to have been purchased at so large a price—I can only say that I see no grounds for holding that in connection with that concession any counter-concession as to the claims for delay entered into the mind of either party. I do not doubt that by the 3rd of November, when the defenders for the first time repudiated those claims, they (the defenders) had in fact come to suppose that the claims had been allowed to drop. But my impression is that this belief or hope was based on nothing else than the circumstance that owing to the supineness or pre-occupation of the Spanish authorities the matter had remained dormant from 3rd March till the 27th October. Now I need hardly say that an interval of that duration, however caused, falls far short of what would be required to substantiate the defenders' plea.

"I am therefore of opinion that the pursuers are entitled to the payment of £500 per week stipulated in the contracts. As to the exact sum due there is, however, some difficulty. According to both contracts the period allowed for completion ran from the date of signing the contracts and the accompanying specifications and plans, but the dates of signing the plans and specifications are not precisely ascertained. There is some evidence that the plans were signed along with the contracts, and that seems likely enough. But the documents themselves are said to be in Spain—at all events they have not been produced. There is also some confusion in the evidence as to the precise date of delivery of the 'Pluton.' And having all this in view, I have come to the conclusion that it would not be safe to assume periods of delay longer than those admitted by the defenders on record. Taking the dates so admitted, the 'Audaz' was 46 weeks late, the 'Osado' was 41 weeks late, the 'Pluton' was 20 weeks late, and the 'Proserpina' was 28 weeks late. The result is that the pursuers appear to be entitled to £500 per week for 135 weeks, making in all £67,500, for which sum I propose to give decree, with interest as concluded for from the date of citation."

The defenders reclaimed, and argued—(1) *On the question of waiver.*—By their having paid in full the price of the vessels without reservation of any claims for damages for late delivery the pursuers had waived their right to enforce the penalties for delay. It was not sufficient for the pursuers to make a half-hearted protest during the course of correspondence. They required in order to preserve their right to make a specific claim and a reservation of that claim when they finally settled accounts and paid the last instalment of the price of the vessels—*Ayr Road Trustees* v. *Adams*, December 14, 1883, 11 R. 326, 21 S.L.R. 224; *Emslie* v. *Young's Trustees*, March 16, 1894, 21 R. 710, 31 S.L.R. 559; *Thomson* v. *Thomson & Company*, May 30, 1900, 2 F. 912 37 S.L.R. 723. (2) *On the question of penalty or pactional damages.*—The sum bargained for in the penalty clause of the contracts for late delivery was in point of fact a penalty and not liquidate damages. No doubt the use of the term "penalty" or "liquidate damages" was not conclusive as to whether the sum stipulated for was penalty or liquidate damages. But the sum in order to be liquidate damages must have been estimated as having a direct relation to the loss suffered. The sum stipulated for must be clearly in proportion to that loss. Here there was no relation between the damage suffered and the amount stipulated for. The boats were kept at Spanish ports for months after delivery. Only one of them crossed the Atlantic, and that one was sunk by the American fleet and was lost to Spain. If the others had been sent across they also would have gone to the bottom, as the efforts put forth by the Spanish Government for the defence of their rights in Cuba were belated and inadequate. No damage was therefore occasioned by the delay in delivery. The defenders had also done their best to deliver the vessels within the periods agreed on. The penalties asked for were in the circumstances exorbitant, and the Court were entitled and ought to modify them—Bankton, i., 23, 7; Stair, iv. 3, 2, and iv. 18, 3; Bell's Com., 7th ed., i. 655 and 699; *Johnston* v. *Robertson*, March 1, 1861, 23 D. 646, opinion of L.J.-C. Inglis, 655; *Craig* v. *M'Beath*, July 3, 1863, 1 Macph. 1020, opinion of L.J.-C. Inglis, 1022; *Forrest & Barr* v. *Henderson & Company*, November 26, 1869, 8 Macph. 187, 42 S.J. 89; *Elphinstone* v. *Monkland Iron Company*, June 29, 1886, 13 R. (H.L.) 98, 23 S.L.R. 870; *Wilson* v. *Love*, 1896, 1 Q.B. 626.

No answer was called for on the question of waiver.

Argued for the pursuers—*On the question of penalty or pactional damages*—The sum stipulated for in the contracts as penalty for delay was really liquidate damages. Whether the sum stipulated for was called in the contract "penalty" or "liquidate damages" was of no moment—Bell's Com., 7th ed., i., 699. It was for the Court to decide whether the parties intended that liquidate damages or penalties were intended. Here the evidence conclusively showed (1) that this was not a random penalty but pactional damages affixed deliberately to a specific obligation, and (2) that all through the negotiations the importance of timeous delivery was kept by the Spanish officials before the defenders as one of the essentials of the contract.

At advising—

LORD JUSTICE-CLERK—There can be no doubt that the pursuers, in entering into contracts for the building of the warships, the delay in the delivery of which has given rise to the present action, considered the question of time of delivery to be of the utmost importance. The Government of Spain were in the position that very great interests might be jeopardised if their

maritime strength was not adequate to meet the contingencies with which they were threatened. Accordingly they took the course of entering into contracts with a short time limit, undertaking to pay prices largely in excess of those contained in tenders by high-class firms of equal repute with the defenders, these latter tenders being for delivery at a much later period than that offered by the defenders. And time being of such importance the pursuers negotiated with the defenders to ascertain from them what compensation should be inserted in the contract for failure to deliver by the time stipulated. The defenders themselves named a sum of £500 per week, and the bargain was closed on these terms, the defenders being thus placed in the position that whatever the actual damage might be only £500 a-week could be claimed from them. They thus agreed that in the event of breach of contract in the matter of time the damage was adjusted beforehand, and formed part of the contract between the parties. Although called a penalty, I hold with the Lord Ordinary that it was liquidate damages, being in regard not to the contract generally but to a detail, viz., time of delivery. That being so, and the fact being that delivery did not take place till long after the stipulated time, the only remaining question is whether the defenders have any good answer to the claim. The defenders have maintained that the claim of the pursuers under this clause was waived by them. Of that I can find no evidence; on the contrary, I find that in the correspondence there is nothing pointing to any waiver, and that the question of damage for delay was kept prominently in view. The only thing which suggests it is that the pursuers paid the last instalment of the price when the vessels were delivered. But it is plain that their anxiety being to get delivery they were not going to have the risk of delay and litigation if the defenders declined to deliver until the final instalment was paid. But that certainly did not constitute waiver. The defence of *force majeure*, which was also pleaded at first, has not in any way been substantiated by the evidence. Upon both these points I do not dilate, being in entire accord with the opinion which the Lord Ordinary has expressed.

His Lordship has accordingly awarded damages on the footing of the agreement for £500 a-week during the time of failure. The sum is very large, but like him I am unable to see any ground for diminishing it. And there is some ground for saying that though large the evidence might have substantiated it even had there been no special damage agreement. It was pointed out in the course of the debate that the difference between the price payable to the defenders on the footing of early delivery was £45,000, as compared with the tender of Messrs Thornycroft, and this price the pursuers paid, although they did not receive the vessels after as much time and more had expired than was stipulated for in the tender of the unsuccessful offerers. Thus they paid the extra price without getting the advantage, and so made a very serious loss. Indeed it would appear that a calculation of price on the other tenders as compared with the time named, and adding the actual damages proved by expense of detention of crew and other detail items, a sum very nearly corresponding to the damages claimed would be brought out. But whether this was so or not, the ratio of damage was deliberately agreed on.

Being unable to see any substantial ground on which the Lord Ordinary's award can be impugned, I would move your Lordships to affirm his judgment.

LORD YOUNG concurred.

LORD TRAYNER—The defenders in this case undertook by a very precise and explicit contract to supply the pursuers with certain torpedo boat destroyers within a certain time. They failed to deliver the destroyers within the stipulated period, and therefore were in breach of this contract. This breach is not denied. It follows that the defenders are liable in damages unless they can show that the pursuers have waived or discharged their claim. The defenders maintained that the pursuers had waived their claim, but this I think they have failed to establish. On the contrary, it appears to me to be shown on the correspondence produced that the pursuers kept their claim for damages before the minds of the defenders from the time, or nearly the time, when the defenders were in breach down to the raising of this action. The circumstance chiefly relied on by the defenders as establishing a waiver of their claim for damages on the part of the pursuers was that after said claim had been incurred the pursuers paid the defenders the contract price of the destroyers without making any reservation of their claim. The defenders especially referred to the letter dated 9th March 1898, in which Admiral Trigueros wrote to the defenders that he had received instructions from Madrid "to pay you in full" the instalments then due. The pursuers might perhaps at that date have declined to pay in full, and risked further delay in the delivery of the destroyers. But to pay the instalments in full was their contract obligation, and it is out of the question to say that by fulfilling their obligation they lost their rights. They might perhaps, I repeat, have been entitled to withhold payment of the instalments until their claim for damages had been adjusted or settled, but that was a matter in which they were entitled to exercise their own discretion. I cannot infer a waiver or abandonment of their claim from the fact that they were pleased to pay the defenders what they might have withheld.

If the pursuers' claim for damages has not been waived, the question remains, What is the amount for which the defenders are liable? The sum awarded by the Lord Ordinary is a large one, but I see no reason for interfering with what the Lord Ordinary has done, in view of the terms of the contract between the parties. When the defenders were invited to tender for

the destroyers they were told that "the time for delivery is to be considered a very essential point," and they were requested "to stipulate clearly what penalty they were willing to pay for non-fulfilment . . . for every week's delay beyond the date that may be agreed upon for the delivery." The defenders in reply said—"The penalty for delay in delivery to be £500 for each completed week beyond the contract time." The defenders thus themselves fixed the penalty, although, in my opinion, it would have made no difference in the result if that penalty had been proposed by the pursuers. Nor do I think it material (in the present case) that the £500 per week is called penalty and not liquidate damage. It was a penalty, not generally for non-performance of the contract, but a penalty attached to the non-performance of a special and essential provision of the contract, and was made (in the language of Lord Watson in *Elphinstone's* case) "proportionate to the extent to which the defenders may fail to implement their obligation." The Lord Ordinary has shown that the stipulated sum of £500 per week was just such a proportion, because the price asked by the defenders and agreed to was an additional price beyond what other contractors asked who were not prepared to bind themselves to delivery at so early a date as the defenders did.

On the whole matter I agree with the Lord Ordinary, and think his judgment should be affirmed.

LORD MONCREIFF—I am also for affirming the Lord Ordinary's interlocutor. Much of the argument which was addressed to us was directed to show that the pursuers waived all right to penalties, the point mainly relied upon being that they paid all the instalments in full without expressly reserving right to claim penalties for delay in delivery. I do not, however, think that this is established by the correspondence in the appendix upon which the defenders' counsel commented at considerable length. On the contrary, it sufficiently appears from that correspondence (first) that the Spanish Government attached great importance to the stipulation for delivery within the time mentioned and the penalty for delay, and (secondly) that at so late a date as 28th January 1898, Admiral Trigueros wrote—"The penalties incurred for delay in delivery shall subsist as heretofore." In the receipts for the final instalments of the "Osado" and "Audaz," dated 16th March 1898, express reference is made to Admiral Trigueros' letter of 28th January 1898. The Lord Ordinary has dwelt in his note at great length on this question of waiver, and I adopt his views.

It remains to consider whether the penalties are subject to modification. There is no doubt that the penalties or damages awarded by the Lord Ordinary are heavy, but he could not well have done otherwise if he intended to decide in favour of the pursuers. It is true that the pursuers have incidentally proved or tried to prove some comparatively trifling items of damage. But their real case is that the penalties are not subject to any modification; and that is the contention which the Lord Ordinary has substantially sustained.

The pursuers' case is supported by the consideration that the penalties are attached to one term of the contract and not to the contract as a whole. The subject-matter of the contracts and the purposes for which the torpedo boat destroyers were required make it extremely improbable that the Spanish Government ever intended or would have agreed that there should be inquiry into and detailed proof of damage resulting from delay in delivery. The loss sustained by a belligerent or an intending belligerent owing to a contractor's failure to furnish timeously warships or munitions of war does not admit of precise proof or calculation; and it would be preposterous to expect that conflicting evidence of naval or military experts should be taken as to the probable effect on the suppression of the rebellion in Cuba or on the war with America of the defenders' delay in completing and delivering those torpedo boat destroyers.

The only other question is, whether, assuming that what is called penalty is really pactional damage, any case has been made out for modification on the ground that the penalties are unconscionable in amount. I think that the Lord Ordinary has demonstrated that they are not, by the simple view that £500 a-week really represents a deduction from the price, and that if there had been a delay of, say, six months in the delivery of the vessels the amount to be deducted at the rate of £500 a-week from the price would just have brought the sum payable to the defenders to the sum, £55,000, for which other contractors were willing to construct the vessels. The defenders' price was £67,000, and no doubt they got the contracts simply in respect of their undertaking to deliver the vessels in half the time or less than half the time which other contractors were willing to undertake. The rate of the penalty (£500 a-week) was proposed by the defenders themselves; and considering all the circumstances I am of opinion that although it was sufficiently large to induce the defenders to use every effort to complete the vessels within the time stipulated (which was the pursuers' object in agreeing to it) it is not unconscionable for the pursuers to demand payment of the penalties without modification.

I can find no sufficient evidence of *force majeure.*

The Lord Ordinary has not given decree for the full sum sued for for reasons which he explains in his note; and I think that the pursuers are entitled to the sum for which he has given decree.

The Court adhered.

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