

Thursday, July 10.

FIRST DIVISION.

[Lord Hunter, Ordinary.]

CAMERON-HEAD v. CAMERON.

*Contract—Construction—Process—Penalty
or Liquidate Damages—Accumulation of
Actions.*

A contract for the sale of standing timber provided—"The wood to be cleared away by 1st April 1918, under a penalty of 10s. a-day until such is done." The price was duly paid, but a considerable quantity of the wood was left lying on the ground for a year after 1st April 1918. On 2nd April 1919 the seller sued the purchaser of the wood, concluding for £182, 10s., *i.e.*, 10s. a-day for the year the wood had lain on the ground, for declarator that the defenders were liable at a like rate for the future until such time as the wood was completely removed. The pursuer reserved further claims against the defender under other clauses in the contract, as those could be more conveniently dealt with on the conclusion of the operations, and made a general averment of damages. *Held* (1) that the clause in question stipulated for liquidate damages and not for a penalty, and consequently there was no need for an averment of damages; (2) that as the liquidate damages accrued *de die in diem* the action was competently brought though the contract had not been completely executed.

Mrs Christian Cameron-Head of Inverailort, with consent, *pursuer*, brought an action against John Cameron & Company, timber merchants, Govan, and John Cameron, the sole partner thereof, *defenders*, concluding, *inter alia*, for decree for payment of £182, 10s., "being the amount of the penalty incurred by the defenders to the pursuer under and in virtue of an agreement between them, dated 18th June 1917, so far as effecting to the period from 1st April 1918 to 1st April 1919," with interest from the date of citation, and for declarator that the defenders were liable to the pursuer in additional penalties at the rate of 10s. per day for such further period as might elapse from and after 1st April 1919 until the complete removal by them from the pursuer's lands of all the timber purchased under the agreement.

The *contract* between the pursuer and defenders was as follows:—"It is agreed between Mr John Cameron and Mr and Mrs Cameron-Head that he shall buy the 1300 (thirteen hundred) trees—standing timber—as pointed out, and pay for them a sum of £1750 (seventeen hundred and fifty pounds), payment to be made—£500 (five hundred pounds) on acceptance and the balance in two instalments at three and six months. The wood to be cleared away by 1st April 1918, under a penalty of 10s. (ten shillings) a-day until such is done. The purchaser must undertake to make good all damage of

any sort and description caused to Mr and Mrs Cameron-Head's possessions by his operations. The purchaser must hold himself liable for any damage to the public road or bridge which he may do, and arrange this with the road authorities, as the proprietor will not be held responsible for this. The purchaser must make good to the farmer any damage which he may do in taking the wood across the fields, as the proprietor will not be responsible for this. The cutting of the wood can begin in August, but is not to be cut beyond the deer fence with the gate on the path till 15th October, after that cut any trees round the castle. Mrs Cameron-Head will give stabling for three horses at Glenshian, and Mr Cameron undertakes to let her have the manure of these horses. Mr Cameron undertakes to leave the stable in the good order in which he gets it. The deer fence to be closed every evening after the wood carting for the day is finished.

6d.

STAMP

JOHN CAMERON & Co.
J. CAMERON-HEAD,
C. H. CAMERON-HEAD.

"18th June 1917."

The *averments* of parties in so far as those relate to the subject of this report were—" (Cond. 8) A formal agreement embodying [the terms agreed upon between the parties] and dated 18th June, was accordingly made out by the pursuer, typed off in duplicate, and posted by her to the defenders on 21st June, with the request that they should return one of the duplicates after signing, and at the same time send their cheque for the first instalment of the price. In reply the defenders on 26th June returned one of the duplicates duly signed, and at the same time enclosed their cheque for the amount of the first instalment, £500, thus showing that they accepted the written agreement in all its clauses as the measure of their right and liabilities. Under the said agreement the price to be paid for the trees by the defenders was fixed at £1750, payable in three instalments as therein mentioned, and all these instalments have been duly paid. (Cond. 9) The said agreement also contained the following clause—"The wood to be cleared away by 1st April 1918, under a penalty of 10s. (ten shillings) a-day until such is done," and various other clauses by which the purchasers undertook 'to make good all damage of any sort or description' caused to the pursuer's possessions by their operations, and to make good to the farmer any damage done in taking the wood across the fields, on the express ground that the proprietor 'would not be responsible for this.' The pursuer's further claims against the defenders under the clauses last referred to are hereby reserved, and may more conveniently be dealt with at the conclusion of their operations. The explanation in answer is denied. (Ans. 8 and 9) The agreement condescended on is referred to for its terms. Admitted that the three instalments of the price therein mentioned have been duly paid. Admitted further that any claims the pursuer may have against the defenders arising out of their operations may more

conveniently be dealt with at the conclusion of their operations. *Quoad ultra* denied in so far as not coinciding herewith. In particular it is denied that it was the intention of the parties that the pursuer should be free of obligations in connection with the contract. Explained that the stipulation providing that the defenders should make good to the farmer any damage done in taking the wood across the fields does not refer to the wayleaves. (Cond. 11) Notwithstanding the terms of the contract between the parties, approximately two-thirds of the felled trees are still upon the ground. The defenders have never had a sufficient number of men employed on the work to enable it to be completed within the specified time, and even since it expired, and they became aware that the penalty of 10s. per day was to be exacted, they have made no serious effort to increase their staff of woodmen and accelerate the work. On the contrary, very shortly before the expiry of the appointed time, viz., on 27th March 1918, the defenders took on another important contract for the cutting and removal of a large number of trees on the Arisaig estate in the same district, necessitating the employment on that contract of skilled woodmen and carters who otherwise might have been available to them for the acceleration of their operations at Inverailort. The operations conducted by the defenders under and in terms of the said contract have occasioned considerable loss of privacy and amenity and disturbance of the regular working of the estate as well as interference with fences, drains, and the occupation of certain parts of the pursuer's estate in respect of the wayleave aforesaid. The time bargain contained in the said contract was entered into by the parties for the purpose of limiting the aforesaid injury and inconvenience, and the defenders' prolongation of their operations in breach of the said time bargain has occasioned loss, injury, and damage to the pursuer. Further and in particular it has delayed the pursuer's planting of trees in place of those cut down under the said agreement. The loss, injury, and damage due to the defenders' delay as aforesaid is moderately assessed at the sum of 10s. per day. The averments and explanations in answer are denied. (Ans. 11) Admitted that a considerable part of the timber still requires to be removed. Admitted further that the defenders have purchased timber at Arisaig. *Quoad ultra* denied in so far as not coinciding herewith. Explained that the delay in removing the timber has been caused by the failure of the pursuer to provide suitable wayleaves and suitable stabling as already stated. Moreover, as and when it became possible for the defenders to remove timber from the ground under the conditions, as regards wayleaves and stabling, by which they were handicapped, they encountered difficulties in obtaining railway waggons and facilities for storing timber at the railway station, and this contributed to the delay. In the same way the delay occasioned by the pursuer's failure as aforesaid was accentuated by the fact that

in the later stages of the war some of the men upon whose services the defenders were relying were taken from their work for military service. They have now as many men at work on the ground as can be accommodated in the premises available. Explained further that the purchase of timber at Arisaig has not in any way interfered and does not now interfere with the defenders' operations on the pursuer's lands. Explained further that no damage has been occasioned to the pursuer through the delay which has occurred in the removal of the timber. (Cond. 12) It is believed and averred that the defenders took on the fresh contract with the proprietor of the Arisaig estate in the full knowledge that they were thereby increasing their liability to the pursuer for the penalties now sued for, but they regarded a penalty of 10s. per day as negligible when set off against the further profit likely to accrue to them from securing another and important contract in the same neighbourhood. Payment of the penalty moneys incurred has already been applied for several times and refused. (Ans. 12) Admitted that payment of the penalty money has been applied for and refused. *Quoad ultra* denied in so far as not coinciding herewith."

The defenders pleaded—"1. The pursuer's averments being irrelevant, the action should be dismissed. 2. The action being incompetent should be dismissed. 3. The action being premature should be dismissed, *et separatim* should be sisted. 5. The penalties sued for not being pactional and liquidate, and the pursuer not having suffered damage for which the defenders are responsible, the defenders should be assoilzied."

On 11th June 1919 the Lord Ordinary (HUNTER) repelled the first, second, and fifth pleas-in-law for the defenders, allowed the parties a proof of their respective averments on the question of the causes for the defenders' delay in removing the timber, and appointed the defenders to lead in the proof.

Opinion.—"This is an action by the proprietrix of Inverailort against a firm of timber merchants carrying on business in Govan. The pursuer sold a certain amount of timber growing upon her estate to the defenders for a certain price. It was a condition of the contract that the timber should be removed by the defenders within a specified period of time. The defenders have not in fact removed the timber within that period of time. Under the contract it is provided that there shall be payable to the pursuer a penalty of ten shillings a day for every day's delay beyond the specified period.

"There has been delay, I understand, for more than a year, and the action takes this form—the pursuer sues, first, for payment of a year's penalty, or a year's liquidate damages in respect of the delay; then for a declarator that there is a liability upon the defenders to pay at the rate of ten shillings a day for all delay beyond the year that has expired. There is a third conclusion with which I cannot deal—I do not think the pursuer insisted in it before me—at all

events it is not a conclusion that I can give any remedy upon.

"The position of the defenders is this—they say the action is premature, because the claim for damages in respect of delay is a claim that only emerges when the contract has been completed. Alternatively they contend in the first place that the stipulated payment under the contract in respect of delay was in the nature of penalty—a sum which the Court might modify according to the circumstances under which the claim was made, and depending for its insistence in by the pursuer upon her establishing that she had actually suffered damage. In the second place, they contended that the delay that has taken place here beyond the contract period has arisen from circumstances for which they were not responsible, and in reality because of the fault of the pursuer in not fulfilling conditions, expressed and implied, imposed upon her by the terms of the contract. In particular, they allege that it was an implied condition in such a contract as they had entered into with the pursuer that reasonable facilities should be provided to them for the removal of the timber, and they say that they did not get such reasonable facilities. To this the pursuer makes answer that it was arranged between the parties that one road should be provided, and that that road was in fact provided. The contract does not give one any guidance in the matter, and where no guidance is given upon a matter such as this I think the question of the pursuer's right to recover must depend upon whether or not reasonable facilities had been given.

"The defenders have also alleged that it was really part of the contract that although one road alone should be provided for a certain time, after that limited period of time three roads should be made available, and they suggest that without such facilities it was an impossibility for them to complete the contract within the stipulated period of time. On that matter it appears to me that I cannot form an opinion without knowing the facts; and although perhaps the defenders have not very clearly averred when the arrangement was made as regards the receiving the three roads, I take it that it was at the interviews that are referred to by the pursuer in her condescendence.

"There is another small matter which will also require to be proved, that is, as regards the question of whether accommodation was provided for the defenders' horses as agreed to by the pursuer in the contract. On that there is a dispute between the parties.

"Having indicated the defenders' position, I come to their third plea that the action is premature. I have some doubts as to whether the action is not premature, and I indicated my doubts to the pursuer so that the pursuer might have an opportunity of amending her record by putting in a declarator that the payment under the contract was really a payment of the nature of liquidate damages and not a penalty. But the pursuer has not considered it necessary to amend, and although I have doubts about the matter, I am not prepared to say in this case that the action should

be thrown out. I think the real question between the parties, viz., as to whether the pursuer can insist in her claim at all, will arise upon proof upon the points I have already indicated as arising upon the defence to the action.

"So far as concerns the defenders' contention that the sum is a sum payable as penalty that the Court can modify, my opinion is against the defenders. It appears to me that the parties here have arranged for a moderate payment of so much per day when delay occurs, and when delay has occurred in such circumstances I do not think it is for the Court to revise the amount the parties have agreed upon. I think if there may be damage—and it is clear that there may be damage—although it is difficult to say what it may be or to prove the amount of damage consequent upon delay, and parties fix beforehand upon a reasonable sum, then the Court will take that sum as a pre-estimate of damage and will not interfere with what has been arranged.

"I propose to repel the first, second, and fifth pleas-in-law for the defenders and allow parties a proof of their averments upon the question as to the causes for the delay, the defenders to lead. I think the defenders are *prima facie* bound to establish that the reason for their delay beyond the time stipulated in the contract arose from causes for which the pursuer is responsible, and therefore on that part of the case they are really pursuers in the issue."

The defenders reclaimed, and argued—The action was irrelevant. The clause of the contract founded on stipulated for a penalty and not for liquidated damages, for there was no relative proportion between the sum to be paid and the various items of damages penalised. The value of the occupation of the land would vary at different times. That disproportion indicated that the clause was as it itself stated a penalty clause—Mayne on Damages (8th ed.), p. 173; *Clydebank Engineering and Shipbuilding Company, Limited v. Don Jose Ramos Yeguierto y Castanada*, 1904, 7 F. (H.L.) 77, per Lord Davey at p. 82, and Lord Robertson at p. 84, 42 S.L.R. 74. *Dingwall v. Burnett*, 1912 S.C. 1097, 49 S.L.R. 882, was referred to. If so, the pursuer must aver she had suffered damage to the extent of the sum sued for. There was no such averment. Further, the action was premature and incompetent. The pursuer should wait until the completion of the contract, and then sue for general damages for breach or sue upon the penalty clause, or she should treat the contract as discharged by the alleged breach. But she was not entitled, as she was doing in the present action, to hold the contract as subsisting and uncompleted and to sue upon the clause in question. The clause in question gave no right of action until the contract was completed. Under it the defenders might never have to make a payment. Consequently the action was premature—*British Glanzstoff Manufacturing Company, Limited v. The General Accident, Fire, and Life Assurance Company, Limited*, 1913 S.C. (H.L.) 1, 50 S.L.R. 13. As the sum sued for was not yet due the action should be

dismissed and not merely sisted—*Crear v. Morrison*, 1882, 9 R. 890, 19 S.L.R. 639. Further, the action was incompetent in respect that the pursuer was founding upon a cause of action, but was not stating her claim for the whole consequences thereof. She had reserved her claims for damage due to the same breach. That applied whether the clause was a penalty or a liquidate damages clause, and it rendered the present action incompetent—*Duke of Abercorn v. Merry & Cuninghame, Limited*, 1909 S.C. 750, per Lord Mackenzie at p. 751, and Lord M'Laren at p. 753, 46 S.L.R. 574; *Stevenson v. Pontifex & Wood*, 1887, 15 R. 125, 25 S.L.R. 120. That also showed that the action should have been delayed until the completion of the contract, but if the action was to be competent now the damages for the future should have been estimated for. *Jackson v. Cowie*, 1872, 9 S.L.R. 617, was not in point, for there the contract was one for instalments. The 10s. a-day was not of the nature of rent for the occupation of the lands, for the purchase price was paid to cover, *inter alia*, the period of occupation, however long that was.

Argued for the pursuer—The Lord Ordinary was right. The clause in question stipulated for liquidate damages, not for a penalty. There was a strict proportion between the penalty and the breach. Time was always most important in such contracts as those, and though the actual breach of the contract might be infinitesimal as where one tree remained, yet the damage caused by the presence of woodcutters, &c., was not much less than at the beginning of the contract. If so, then the clause stipulated for liquidate damages—*Clydebank* case (*cit.*), and 1903, 5 F. 1016, per Lord Trayner at p. 1020, 40 S.L.R. 713. Further, the action was neither premature nor incompetent. The purpose of such a clause as the present was to ensure that the completion of the contract should not be delayed, and if action could not be brought until the completion of the contract that object would be frustrated—*Clydebank* case (*cit.*), per Lord Robertson at p. 84; *Johnston v. Robertson*, 1861, 23 D. 646, per Lord Cowan at pp. 653-4, which also showed that the clause was really one of liquidated damages of the nature of pactional rent. The clause in question did stipulate for what was in substance an equivalent of rent in addition to the contract price. The 10s. accrued *de die in diem*, and strictly speaking a fresh action could be brought daily. The rule requiring that the whole consequences of an act should be sued for at once only applied in case of delict or quasi-delict where the Court had to assess the damages, and did not apply where, as here, the parties had agreed on the amount of damages *ub ante*. In such circumstances such an action as the present was competent—*Jackson v. Cowie* (*cit.*). The opinions in the *Glanzstoff* case must be read in the light of the facts of the case, which were very special and quite different from the present—*Muir's Executors v. Craig's Trustees*, 1913 S.C. 349, per Lord President Dunedin at p. 355, 50 S.L.R. 284.

LORD SALVESEN—In this case I confess that I was much impressed with the ingenious and vigorous argument which was presented on behalf of the reclaimers, but having now fully considered the case in all its aspects I am prepared to adhere to the Lord Ordinary's judgment.

The decision really depends upon the construction which we put upon this simple contract between the pursuer and the defenders. It was agreed that some 1300 standing trees were to be purchased by the defenders, who bound themselves to take away the whole timber so purchased by a given date. The purchase price was payable by instalments at various intervals which are now all past, and we are told that the whole purchase price has been duly paid. Accordingly the property in the trees, so far as they have been cut down at all events, has passed to the purchasers, but they are situated upon the land belonging to the seller. In these circumstances it was natural and necessary that some provision should be made for the restoration of the woods to the owner's occupation after a reasonable time had been allowed for the removal of the timber. Parties applied their minds, before the contract was made, to the question of what was to happen if there was delay in removing the timber, and they came to an agreement that there was to be what is called a "penalty" of ten shillings a day paid until the timber had all been removed.

In my opinion this so called "penalty" is really in the nature of a pre-estimate of damage. Nothing is said against the reasonableness of the sum that parties have fixed, having in view the kind of damage which it was anticipated the proprietrix would suffer from a breach of this contractual obligation. The main damage, I take it, was the loss of privacy or amenity, which might conceivably equally affect the subjects over the whole period when operations were going on. Under a large contract such as this the contractors might have had the same staff on the ground during the whole period and yet have found that that staff was inadequate to cope with the removal of the timber. But I see nothing to suggest that this is to be treated as a penalty in respect that the loss at one time might be utterly different and even infinitesimal as compared with an earlier period. It seems to me that as regards the main subject of damage—loss of amenity—it might be substantially the same so long as any of this wood remained unremoved from the premises of the owner of the land. Accordingly I have come to the conclusion that we must treat this agreement for a penalty as if the words "liquidate damages" had been used instead.

The only other question is—Can the pursuer bring the action now for payment of the sum contracted to be paid for each day's delay, or must she wait until the contractor in his own time thinks fit to remove the last trees that he has purchased?

The Court can always prevent any improper multiplication of proceedings, but I cannot hold that the proprietrix here is

acting improperly in bringing an action after the expiry of a year for a sum calculated at ten shillings a day for that year. According to the true intention of the contract, I think the ten shillings were to become immediately exigible, and that the contract is to be construed as if it had contained an express clause to that effect. The other construction—that while there was a stipulation as to the payment of this sum per day, the amount was not to be exigible until the contract was completed—does not seem to me to be according to the true intention of the parties.

I agree with the argument that was presented by Mr MacRobert, that this being a contract drawn up by a layman it meant that the contractor could go on violating this condition with no other consequence than that he should have to pay 10s. a-day so long as he allowed his property, to wit, the felled trees, to remain on the lands of the pursuer. I do not think that in so deciding we are in the least degree modifying or altering anything that has been laid down in previous cases. This is an unusual contract in this sense, that there was to be no adjustment of accounts at the end of the day, as there is in most building contracts and contracts for the construction of vessels and the like, where such penalty clauses are very familiar. The seller has received all the money that she was entitled to get from the contractors had they fulfilled the contract by the stipulated date, and all that remains is the liquidation of the sum to be paid for the continued presence of this timber on her ground.

The defence on the merits is that the pursuer by her own acts prevented the timber being removed with the dispatch with which it would otherwise have been taken away. That defence can be most appropriately tried now when the witnesses are available, and it is a defence which is applicable to this particular period, and not necessarily to the subsequent period during which the contractors may still be in breach of their obligation to clear away his wood.

I accept the statement of the law as laid down by the Lord Ordinary at the end of his note, and on the whole matter I am of opinion that he has reached the right conclusion and that we should affirm the judgment.

LORD MACKENZIE—I am of the same opinion.

The question argued to us was a question of law depending upon the construction to be put upon the agreement entered into between the parties. In my opinion the clause which provides for a payment of 10s. a-day provides not for a penalty but for liquidated damages. I think the second paragraph would convey to the ordinary layman only one meaning, namely, that what the contractor was to get for his payment of £1750 under the first paragraph was the wood and the right to occupy the policies down to 1st April 1918 and nothing more, and that if he required a longer period, then that he had to make a further payment of 10s. per day.

The subject-matter of the contract requires to be borne in mind as it is described in condescence 2—that is, “about 1300 standing larch trees in the immediate vicinity of her residence, Inverailort Castle, and comprising practically the whole of the mature wood then surrounding the castle.” The defenders admit that that is a correct description of the subjects sold. The averment in condescence 11 in regard to the effect of the operations is just what one would have expected—“The operations conducted by the defenders under and in terms of the said contract have occasioned considerable loss of privacy and amenity and disturbance of the regular working of the estate as well as interference with fences, drains, and the occupation of certain parts of the pursuer’s estate in respect of the wayleave aforesaid.”

The purpose of inserting this stipulation in the contract was to stimulate the defenders in carrying on the work with all due dispatch. There is a total absence of averment on the part of the defenders to support the plea that this is of the nature of a penalty. The mere fact that the word “penalty” occurs in the instrument does not by itself carry one very far, and there is no averment that the 10s. a-day was exorbitant—that it was not proportionate to the loss that would be suffered by the proprietrix. One can well understand why there should be an absence of these averments, because the 10s. a-day seems to be a moderate figure; and I am unable to follow the argument that as the work proceeded so the consequent loss of privacy and amenity and the disturbance to the regular working of the estate would diminish. It seems to me that on a fair view of the situation of matters the disadvantages to the proprietrix would remain until the wood had been entirely cleared away.

That being so, the right to a substantial sum has already vested in the proprietrix as due in respect of the period of time which has elapsed since 1st April 1918, and I am unable to see that the defenders can take any advantage from such cases as that of *Crear v. Morrison* (9 R. 890, 19 S.L.R. 639), where it was held that you cannot sue for a debt prior to the date when it becomes due. In the present case a considerable amount has already become due under the contract, and accordingly I think that the course proposed by the Lord Ordinary is correct.

A great deal was made of a case decided in this Division—the *British Glanzstoff Manufacturing Company*, 1912 S.C. 591, 49 S.L.R. 477, 1913 S.C. (H.L.) 1, 50 S.L.R. 13—and it was maintained that no action would lie on such a clause as this unless and until the contract had been completed. The contract there was of a complicated character. The judgment turned upon the point that there were two options given to the owner—the one was to take the matter out of the hands of the contractor; the other was to allow the contractor to go on, and then enforce his right under the contract. He chose the former of the two alternatives, and it was pointed out that having elected to abide by one group of provisions in the

contract he could not resort at the same time to another. Accordingly I think that that case affords no support to the argument advanced by the defenders in the present case.

LORD SKERRINGTON—Although this contract was not drawn by a lawyer, I should be slow to say that the parties did not mean what they said when they described the 10s. a-day as a “penalty.” I think that they intended to protect the interests of the seller by providing the purchaser with a strong motive for punctually fulfilling his contract. But that consideration by itself does not make this stipulation unenforceable. The question still remains, as Lord Robertson pointed out in the *Clydebank* case (7 F. (H.L.) 77, at p. 84, 42 S.L.R. 74), whether the one party had no interest to protect by that clause, or whether that interest was palpably incommensurate with the sum agreed on. In other words, if this 10s. a-day is a random sum the Court will not enforce payment. On the other hand, if it represent a reasonable pre-estimate of the loss which the pursuer might suffer by delay in having her ground cleared, then the stipulation ought to be enforced. In my view it was a stipulation not merely in the interests of the seller but also in the interests of the purchasers, because one object was to protect the purchasers against possible claims of an exorbitant kind which they might find it difficult to meet.

As has been pointed out, the subject-matter of this contract is one which made it peculiarly appropriate that the parties should in their several and separate interests assess the damages in advance. The injury which the seller of the trees might suffer through her ground being for an undue time occupied by trees either standing or cut down would probably arise under three heads—injury to amenity or to sport or to estate management. The damage under each of these heads is obviously difficult to translate into pounds, shillings, and pence. Accordingly it was reasonable on the part of the contractors to fix a specific sum as the damages which should be recoverable in respect of a breach of this particular stipulation.

There is nothing in the circumstances so far as we know to suggest that 10s. a-day was at all exorbitant, and I think it right to note that the Dean of Faculty pointedly declined to ask for a proof of facts and circumstances to elucidate this question. The fact that the agreed-on sum is so much per day goes far to show that what the parties had in mind was not a random sum but a true estimate of conventional damages.

I was at first unfavourably impressed by the fact that no attempt had been made to fix some proportion between the number of trees left standing or lying or the acreage occupied by them on the one hand, and the penalty on the other hand. On further consideration it becomes clear that it would be difficult, if not impossible, to assess the damages on any such basis, because a group of trees left standing or felled in any one place might cause much more injury to

amenity, sport, or estate management than a larger group in another part, and accordingly if the parties were to assess the damages in advance the only practical way was to take an average figure.

The only other question is whether this penalty was intended to become due from day to day, or whether it was not to accrue as a debt until the contract had been completely executed by the purchaser. Counsel for the contractors argued that the purchaser had it in his power to reduce this stipulation to a mere nullity, because they had only to be bold enough to throw up the contract and say that they would not fulfil it in order to relieve themselves of it. For my part I do not understand how a contract which has been entirely executed with the exception of the removal of felled timber which is the property of the purchaser could be rescinded in the manner suggested. Even if that could be done, a right already vested would not be thereby divested. The purpose which the parties had in view would be defeated if the penalty could not be exacted immediately, but was to be payable only if and when the purchasers thought fit to complete their contract. Accordingly I agree that the Lord Ordinary has come to a sound conclusion.

The LORD PRESIDENT and LORD CULLEN were absent.

The Court adhered.

Counsel for the Pursuer (Respondent) — MacRobert--Aitchison. Agents--Mackintosh & Boyd, W.S.

Counsel for the Defenders (Reclaimers) — Dean of Faculty (Murray, K.C.)—T. Graham Robertson. Agents—J. Douglas Gardiner & Mill, S.S.C.

Thursday, June 12.

SECOND DIVISION.

THE HAMILTON TRUSTEES, PETITIONERS.

Trust — Sale — Special Powers — Nobile Officium — Trusts (Scotland) Act 1867 (30 and 31 Vict. cap. 97), sec. 3.

Testamentary trustees, upon whom powers of sale had been conferred by the testator, proposed to sell the materials of a residence together with certain pictures and pieces of plate which were in the nature of heirlooms. They had, however, doubt as to the powers of sale covering their proposed action. There being no contradictor, procedure by way of an action of declarator or by a special case was not open to the trustees, who accordingly presented a petition to the Court for authority. *Held* that, as the petitioners already possessed the special powers they craved, the petition was unnecessary and fell to be dismissed.

Sir John Arbuthnot Fisher, Baron Fisher of Kilverstone, and others, the Hamilton trustees in the sense of the Hamilton Estates