defender. The building is sufficient: and though the stones are from a different quarry, they are as good, and also consent to their use was given by the defender's uncle.

SHAND and ORPHOOT, for the defender, replied—Contract price is asked for what is not contract work. Though the defender is successful, there will still be an action against him for payment *quantum meruit.*

The Court held that the reference exhausted all the points in dispute; that the arbiter's award shewed he had considered the whole question; and that the assertion made at the bar against the trustworthiness of the award would not justify the Court in interfering with it.

Agents for Pursuer—G. & H. Cairns, W.S.
Agent for Defender—Henry Buchan, S.S.C.

Friday, November 26.

FORREST & BARR *v.* HENDERSON, COULBORN & CO.

Damages — Expenses — Interest — Charge—Delay—Jury—Liquidated Damages—Verdict. Circumstances in which it was *held* that it had been rightly left to the jury to say (1) whether a sum of £20 per day, stipulated for as "liquidated damages" in the event of delay in the construction of a large derrick crane, was, at the time when the agreement was made, exorbitant and unconscionable; and (2) whether any, or how much, should be paid as damages therefor.

Payment for the crane having been refused, and the jury having given interest on the price from the time it was due, though it was not stipulated for in the agreement, the Court *refused* to disturb the verdict.

Interest from the date of the verdict was *allowed* to the purchasers on the sum awarded to them as damages for the delay.

Only three fourths of their expenses were allowed to the pursuers, as the litigation was partly due to their having rashly signed an exorbitant agreement.

On 13th July 1863 Messrs Forrest & Barr, engineers, Glasgow, entered into an agreement to construct a large derrick crane for Messrs Henderson, Coulborn & Co., shipbuilders in Renfrew. The price was to be £2000, and the crane to be ready and erected in four months; and, by letter of 15th July 1863, various specifications in regard to the crane and payment for it were made. A considerable amount of correspondence as to the construction of the crane, and the delay in its construction, followed; and eventually, on 13th January, the following two letters passed between the parties.

"*Glasgow, 13th Jany.* 1864.

"Messrs Henderson, Coulborn & Co.

"Gentlemen—We hereby agree to have your crane ready for work by hand by the 16th of March (you giving us all necessary facility for erection at your place, as well as transit of same down the river), under a penalty of £20 sterling per day.

"FORREST & BARR."

"*Slip-Dock, Renfrew, 13th January* 1864.

"Messrs Forrest & Barr.

"Gentlemen—Having this day received from you a letter of guarantee that the new crane you are constructing for us will be ready by the 16th March, under a penalty of £20 per day, to be deducted by us from the price if delay occurs, we at the same time promise to give every facility for the erection and transit of same from Glasgow Harbour. Owing to the great delay incurred, these agreements have been entered into with the view of granting a tangible security to us of the fulfilment of the contract entered into for the construction of the crane, dated the month of July 1863, and are granted in the shape of liquidated and ascertained damages, exigible in the case of default. We therefore, on these conditions, have granted this extended time for completion.—We are, Gentlemen, yours, &c. "HENDERSON, COULBORN & Co."

On 16th March 1864 Henderson, Coulborn & Co. wrote to Forrest & Barr, stating that as the crane had not been delivered they would hold Forrest & Barr bound to the terms of their letter of 13th January. The crane was delivered on 30th May 1864; and during the four succeeding years an incessant correspondence was carried on between the parties; and a series of complaints and alterations were made by and at the instance of Henderson, Coulborn & Co. But as payment was not made by them of the £2000, Forrest & Barr brought an action, concluding for payment of the money, and of various outlays incurred by the orders of the defenders, under the two following issues:—

"1. Whether, in terms of the letters of 13th and 15th July 1863, and relative specification, Nos. 7 and 18 and 23 of process, the pursuers contracted to construct and did construct for the defenders a machine known as a derrick crane; and whether the defenders are indebted and resting-owing to the pursuers in the sum of £1400, or any part thereof, with interest thereon from 30th September 1864, as the balance of the price of the crane constructed as aforesaid?

"2. Whether, on the employment of the defenders, the pursuers made the furnishings, did the work, and performed the services embraced in the schedule hereto annexed; and whether, in respect thereof, the defenders are resting-owing to the pursuers in the sum of £127, 16s. 8d., or any part thereof?"

And to these they appended a schedule of the said outlays and services, and a claim of interest.

The defenders met these with two counter issues:—

"1. Whether, by letters dated 13th January 1864, copies of which are contained in the annexed schedule, the pursuers agreed to have the said derrick crane ready for work by hand by the 16th of March 1864? Whether the pursuers failed to have said crane ready for work by hand by the said 16th of March 1864? and whether, in respect of said failure, the pursuers are resting-owing to the defenders the sum of £1500 sterling, or any part thereof, as the amount of liquidated damages at the rate of £20 sterling per day, as agreed on in said letters?

"2. Whether, by letters dated 13th January 1864, copies of which are contained in the annexed schedule, the pursuers agreed to have the said Derrick crane ready for work by hand by the 16th of March 1864? and whether the pursuers failed to have said crane ready for work by hand by the said 16th of March 1864, to the loss, injury, and damage of the defenders?

"Damages laid at £1500."

To these were appended copies of the two letters above quoted.

The case was tried before Lord Neaves at Glas-

gow October Circuit. A great number of letters were produced, and parole evidence was adduced on the part of the pursuers to establish that the sum of £20 a-day mentioned in the said letters was, in the circumstances, an exorbitant and unconscionable amount as payable for the delay therein referred to; and, on the other hand, evidence was adduced on the part of the defenders to establish that the said sum of £20 a-day was not, at the time when the said letters passed, an unreasonable or exorbitant sum for the parties to fix and agree upon as the ascertained and liquidated damages to be paid by the pursuers to the defenders in the event of delay occurring, as mentioned in the said letters, and also that the parties had themselves fixed the amount after discussion.

In the course of Lord Neaves' charge to the jury he left it to them to say "whether the £20 a-day mentioned in the letters of 13th January 1864 was, in the circumstances, an exorbitant and unconscionable amount, as payable for the delay referred to, and asked the jury, in that event, to find what was the utmost amount of actual damage that may have been incurred."

To this the counsel for the defenders excepted, and asked for a direction to the jury—"That if the jury are satisfied that both the letters of 13th January 1864, contained in the schedule annexed to the issues, passed at that time between the pursuers and defenders, then in law the parties must be held to have liquidated and ascertained the damage, and that the defenders are entitled to a verdict under their first counter-issue for damages, calculated at £20 per day for the period of failure." But Lord Neaves refused to give this direction, and also "that the legal construction of the pursuers' letter of 13th January 1864, annexed to the issues, is that the sum of £20 per day is to be paid as liquidated and ascertained damages in case of default, without the necessity of proving actual damage."

The jury found for the pursuers on their first and second issues, with the exception of the sum of £17, 17s., to be deducted from the sum of £97, 17s., claimed as mechanics' time or wages, with interest on the sum of £80, being the balance of said £97, 17s. charged for time or wages, as per the schedule annexed to said second issue. They also found for the pursuers on the first issue of the defenders, and for the defenders on their second issue, with damages of £100.

The defenders having obtained a rule to have the pursuers ordained to show cause why the verdict should not be set aside, preferred the three exceptions to Lord Neaves' charge above specified.

From the evidence, it appeared that the crane was delivered at Renfrew in the end of May 1864; and Mr Forrest stated that the crane was ready to work by hand in the first week of June. He said he had never made so large a crane before; and that the defenders knew its construction would be a work of great difficulty. On the 13th of January 1864 he happened to be in Renfrew, and went to the defenders' office. He said "we had some talk about a guarantee for finishing crane in time. The defenders threatened that they would go elsewhere and get another crane made at my expense. I at last gave a letter, of which I am ashamed. Henderson followed me, and assured me he would not put the penalty in force if I would push on with the crane, and it was upon that footing that I gave the letter. Mr Henderson dictated, and I wrote the letter, being the first letter in defender's schedule."

He further said "Mr Henderson then dictated to Mr Coulborn a letter which Mr Coulborn wrote. I heard what he dictated. I was much agitated; I did not understand all the letter. They showed it to me, and I glanced over it. I did not take it away. I did not take possession of it, and never saw it off the table. Mr Henderson did not intimate to me that the second letter was in any way different from the first, nor did I think there was any difference." But it was clearly proved that the last letter was written by Mr Henderson. The defenders' account was that they pressed Forrest for the crane, and threatened to go to Liverpool for one if he did not supply it at once. They had many orders for steamers, as they were then greatly needed, owing to the American war; but that, through not having the crane, they were unable to lift into the steamers the heavy beams, and boilers and machinery. Consequently they lost custom, and had steamers thrown on their hands; they had also to pile the machinery in their stores; and had eventually to use shears instead of the crane, and to make the workmen work in night shifts, and thus to pay more in wages. They also complained that the crane was very defective. They considered they had lost much more than £20 a-day—probably about £2500 of direct loss, and £10,000 to £12,000 otherwise. By the account of Mr Lobnitz, one of the partners, all the partners were present at the interview on the 13th January. They pressed Forrest to give up the contract; but as he was averse to this, they bade him reduce to writing what he said, and told him they would fix the damages if the crane was not finished. Mr Lobnitz said, "Forest said he was quite sure he could finish the crane early in March. We told him the least amount of damages that would be at all adequate would be £50 a-day, as our whole work would be suspended unless we had the crane. We had six or seven ships to be finished within a month of that time, either new ships, or ships getting new machinery. Ultimately Mr Forrest wrote a letter. He objected to £50 as out of the question, but agreed to £20 a-day. We told him to give us the guarantee. Mr Forrest sat down and wrote a letter. He wrote it himself without anybody dictating it. It was his own expression of what was meant. We read the letter. We were all present. This was in the private room, where we had gone soon after we met. Mr Henderson said, 'this does not imply all we mean.' He said to Forrest, 'you had better write it out more fully.' Forrest said he was not a good hand at a pen, 'you had better write it.' Mr Henderson then sat down and wrote the second letter of 13th January. When he had written it he read it aloud to us all, Forrest being still present. He then gave the letter to Forrest to look at. It was, I suppose, approved of by them all, and was sent down stairs to get copied. It was returned and handed to Mr Forrest, who took it. And it was proved by the defenders' letter-book, and the clerk who had charge of it, that the letter was written by Mr Henderson."

On 16th March 1864 the defenders wrote to the pursuers as follows:—"Dear Sirs,—The time named and agreed upon for the crane you are making for us, being delivered and ready to work by hand, having this day expired, we have to inform you that we shall hold you bound to the terms of your letter of the 13th January.—We are, &c., HENDERSON, COULBORN, & Co."

And to this, the pursuers replied, on 19th

March :—"Dear Sirs,—We duly received yours of 16th, and regret to say that we have not yet completed the large crane, the most part owing to parts of it, of very difficult construction, which you are *well aware of*, and partly owing to having some of it done out of our own work, and of which we have but little control, but every exertion is being made to have it done as soon as possible. As to the condition you name, we cannot allow. FORREST & BARR."

DEAN OF FACULTY and GIFFORD, for the defenders, argued,—It should not have been left to the jury to say whether the damages claimed were "unconscionable." "Liquidated damages" may be intended to limit the damages; or to cover, or to exclude consequential damages. The words of the contract exclude decision by the jury as to the amount of damages. It is for the Court to say whether this is too unconscionable a sum to be "liquidated damages." The moment the facts were decided it was for the Court to interpose on this point. The jury should not have been allowed to hear evidence on whether or no the damages were unconscionable. The first point is, whether the letters fixed the time when it was to be decided whether the damages were unconscionable? And the second point is, whether the Judge should have directed the jury as he did? The verdict gives interest for four years, but the contract does not give interest. On a review of the evidence, the defenders are justified in maintaining that the verdict should be set aside. Authorities—*Johnston* v. *Robertson*, March 1, 1861; *Craig* v. *Macbeath*, July 3, 1863; Addison on Contracts, 1072–8; *Sainter* v. *Ferguson*, 7 M. G. & S. Reports, C. B. 716.

SOLICITOR-GENERAL and DEAS, for the pursuers, replied,—The amount of the damages was properly a jury question. If the utmost damage sustained by the defenders was £100, the Judge was justified in directing the jury that £20 a day was the limit of the penalty. The judge was entitled to direct the jury, if they thought £20 a day an unconscionable sum, to fix on what they thought a fair sum for damages.

At advising—

LORD PRESIDENT—This is an action raised to recover a sum of £1400, as the price of a derrick crane furnished by the pursuers to the defenders, in terms of a contract dated the 13th and 15th of July 1863; and also to recover a sum of £127, 16s. 8d. as the amount of certain additional furnishings made in connection with the said contract. The crane, in terms of that contract, was to be delivered in about three months from the date, but it was not so delivered, and the defence founded on by the defenders chiefly rested upon an additional contract embraced in two letters of the 13th of January 1864, by which it was arranged between the parties that the completion of the contract should be delayed for a certain specified time, viz., to the 16th of March 1864; but the crane was then made deliverable, as it is expressed in one letter, under a penalty of £20 sterling per day, that is to say, a penalty of £20 for every day after the 16th of March that the crane was not delivered; or, as it is expressed in the other letter, the £20 per day to be paid after the 16th of March is to be given as liquidated and ascertained damages exigible in case of default. The Lord Ordinary (Lord Barcaple), when this case came before him, disposed of the defences by an interlocutor, dated the first of June 1869, in this way —he determined that the sum of £20 a-day stipulated in the letters of the 13th of January was, properly speaking, a penalty, and not liquidated damages, and therefore he refused to sustain the claims of the defenders for payment of that sum as a debt due by the pursuers to the defenders, calculated upon the number of days after the 16th of March that the crane remained undelivered, and he appointed the cause to be tried upon an ordinary issue of contract for the pursuers, and upon an issue of damages for the defenders. That interlocutor of his Lordship was brought under the review of this Division of the Court, and we had a very serious and lengthy consideration of the case at that time, the result of which was that we adjusted the issues for the trial of the cause in the form in which they now appear upon the face of this bill of exceptions. The pursuers' issues raise no difficulty at all, and never did. The 1st issue is laid upon the contract for the price of the crane, and the 2d issue upon the making of the furnishings in connection with the same subject. But, as regards the defenders' case, we found considerable difficulty in adopting the view which had been taken by the Lord Ordinary, and that for two reasons. There were two letters of the 13th of January which were set out in the defences as having passed between the parties; but the pursuer only admitted one of these letters, and denied that the second letter had ever passed at all; and as the question raised upon the construction and legal effect of what was done on the 13th of January 1864 depended very much upon whether the second letter had actually passed between the parties, we found that we were not in a condition to dispose of the defence, for that reason. But we were also further induced to take the course which we did, of sending the whole cause to be tried by a jury, by this consideration,—that the question which had been determined by the Lord Ordinary, whether the sum of £20 a-day mentioned in these letters was to be viewed as a penalty or as liquidated damages, might depend very much upon the circumstances which would be disclosed by the evidence. Of course the Court had no knowledge, or, at least, were not entitled to assume that they had any knowledge, of even what was meant by a derrick crane, much less of its working, or of the way in which it was to be erected in a shipbuilding yard, and, indeed, they had not judicially any knowledge whatever of the exigencies of a shipbuilding yard, or of the business there carried on; and it appeared to us that the question whether this was penalty or liquidated damages might depend very much upon light to be obtained from the evidence led in the course of the trial. We therefore thought that the proper course to take was to give the defender two issues, one of which claimed £20 a-day as liquidated damages, and as debt, and the other issue claimed the actual loss and damage sustained, upon the footing and assumption that they were not entitled absolutely to payment of £20 a-day. The consequence was that the issues were adjusted in that form. The cause was tried by my brother Lord Neaves, at Glasgow, in October last, and the result was that the jury found a verdict for the pursuers on their 1st issue, that is, for the balance of the contract price of the crane, £1400. They also found for the pursuers on their 2d issue to a certain extent, not for the whole amount claimed; and as regards the defenders' issues, they negatived the 1st issue; and on the 2d issue of damages they found for the defenders to the extent of £100. The

question is, Whether this verdict is to stand, or whether it has been produced by misdirection, or miscarriage, on the part of the learned Judge? The main question, and the only one of real importance which was raised between the parties at the trial, was Whether the £20 a-day was to be considered as penalty, or whether, even assuming that it must be held in the language of the parties to be liquidated damages, there was not in the circumstances of the case room for a modification of this liquidate damage, upon the ground that, in the circumstances in which the arrangement of the 13th of January 1864 was made, the sum stipulated was exorbitant and unconscionable; for I hold it to be part of our law on this subject that, even where parties stipulate that a sum of this kind shall not be regarded as a penalty, but shall be taken as an estimate and ascertainment of the amount of damage to be sustained in a certain event, equity will interfere to prevent the claim being maintained to an exorbitant and unconscionable amount. But of course the question whether it is exorbitant or unconscionable is to be considered with reference to the point of time at which the stipulation is made between the parties. Now the contention of the defenders at the trial is exhibited in the directions which they asked the learned Judge to give to the jury. The second of these directions which they asked for may be dismissed in a single word. It is this, "that the legal construction of the pursuers' letter of 13th January 1864, annexed to the issues, is that the sum of £20 per day is to be paid as liquidated and ascertained damages, in case of default, without the necessity of proving actual damage."

Now, there are several objections to that direction. In the first place, it deals with one of the letters of the 13th of January only. But both of the letters of the 13th of January had been proved and put in evidence; and I must say this much more, that if the single letter of the pursuers of that date had been to be construed by itself, it would have been in the highest degree doubtful whether this could have been dealt with as liquidated and ascertained damages in any sense. But still further, the direction sought here was objectionable, because it asked the learned Judge to state to the jury what is the legal construction of that letter, and to say that its legal construction is that the sum of £20 a-day is to be paid as liquidated and ascertained damages. Now, I don't think that is its legal construction. But I don't think that the question which the learned Judge had to direct the jury about was a question of legal construction at all. I think it was a question as to the legal effect of the letters that passed on the 13th of January. So that altogether this second direction which was asked from the learned Judge, and which forms the subject of the third exception before us, appears to me to be quite objectionable, and that his Lordship did right in refusing to give it; and, therefore, that the third exception must be disallowed.

But the direction which was asked, and which forms the subject of the second exception, was this, "that if the jury are satisfied that both the letters of 13th January 1864, contained in the schedule annexed to the issues, passed at that time between the pursuers and defenders, then, in law, the parties must be held to have liquidated and ascertained the rate of damage, and that the defenders are entitled to a verdict under their first counter-issue for damages, calculated at £20 per day for the period of failure." Now, I think this direction, as asked by the defenders, states very fairly what their contention was; and it amounts to this, that if these letters passed between the parties, then, upon the terms of the letters, quite independently of any evidence which was laid before the jury,—quite independently of any circumstances beyond the letters,—they are entitled, upon the occurrence of the failure beyond the 16th of March 1864, to £20 per day, and nothing else. The question is, whether that is a sound contention in point of law, looking not only to the terms of the letters, but to the nature of the case generally, as disclosed in the evidence with which the presiding Judge had then to deal. He refused that direction, and he gave this direction to the jury: he "left it to the jury to say whether the £20 a-day, mentioned in the letters of 13th January 1864, was, in the circumstances, an exorbitant and unconscionable amount, as payable for the delay referred to, and asked the jury in that event to find what was the utmost amount of actual damage that may have been incurred." I think the learned Judge was justified in refusing to give the direction asked by the defenders, for this reason, among others, that if he had done so he would have been practically reversing what we did when we settled these issues for the trial of the cause. He would have been telling the jury that in dealing with this matter they could not look beyond the two letters of the 13th of January; and that, whatever might be disclosed in the evidence,—however unfair and unreasonable, or, in other words, however exorbitant and unconscionable they might think the amount stipulated on the 13th of January,—they were bound to give a verdict for £20 a-day in favour of the defenders if they were satisfied that the delay had actually occurred subsequent to the 16th of March. The objection to this direction, however, does not entirely depend upon what we did in adjusting the issues, because I think that these letters, although they are expressed in such a way as to make this £20 a-day liquidated and ascertained damage, are not beyond the reach of that equitable control which restrains a party from urging under such a contract an exorbitant and unreasonable claim. And, therefore, in no point of view could I sustain the legal proposition which is embodied in this direction sought of the Judge. But then there remains another very important and very delicate question upon the terms of the direction actually given by the learned Judge to the jury. The complaint which is made of the direction is, that he has left it to the jury to say whether this contract of the 13th of January 1864 regarding damages is to be enforced in its terms, or is to be modified as exorbitant and unconscionable, and the defenders contend that that is not a question for a jury, but a question for the Court. Now there is no doubt that in many cases, and I think one may say in most cases, this will be a question for the Court. In the great majority of cases of this description which are reported in our books, the question has occurred upon the face of the instrument in which the stipulation is made, and the Court have generally had no difficulty, dealing with the instrument itself, in saying whether the penalty or liquidated damages, whichever it might be called, was to be enforced in terms, or was to be modified. Stipulations regarding penal rent in contracts of leases are of this nature, and the Court have generally no difficulty, without taking any evidence or receiving any information except what appears up-

on the face of the contract of lease itself, in coming to a conclusion whether the additional rent stipulated can be enforced as pactional or must be regarded as penal. In like manner, in mercantile contracts, and in building contracts, cases of this kind have occurred, and have been decided by the Court, either upon a mere consideration of the instrument embodying the stipulations or upon such light as was afforded by the circumstances of the case, without the necessity of any formal trial. But I believe that this is the first case in which this delicate question has arisen where the instrument requires to be considered, or rather where the informal missive, for it is not a regular instrument, required to be considered in connection with all the surrounding circumstances — whether the question which then arises as to the enforcement of this claim of liquidated damages is a question for the Court or for the jury, and that is the question that we have now to determine. In dealing with this matter I think it desirable, in the first place, to make quite sure that we all understand the direction of the learned Judge in the same sense. I understand it as meaning that the defenders are not entitled to recover under their first issue if the pursuers have in the jury's opinion succeeded in proving that £20 a-day was an exorbitant and unconscionable amount to stipulate for on the 13th of January 1864. The question therefore resolves itself into this, whether, in place of so directing the jury, the learned Judge should himself have formed his opinion that this was, or was not, an exorbitant and unconscionable amount to stipulate for on the 13th of January 1864, and, according as he formed his opinion one way or the other, to direct the jury to find a verdict for the pursuers or the defenders. This is a course which might have been followed by the learned judge. If the facts were substantially not disputed between the parties, and there was no doubt about them— I mean the facts bearing upon this question—he was probably entitled to form his opinion without formally consultiug the jury about it. But if it was necessary to consult the jury about it, he could have done that also. Still the question remains, whether that was the right course to follow, or whether he did right in leaving this question of exorbitant and unconscionable to the jury. Now, looking to the nature of this case as being purely a mercantile contract, and requiring mercantile knowledge in order to understand precisely the relation of the parties to one another, and the subject matter of their contract, my opinion is that that question was properly left to the jury. But in saying so I am not expressing an opinion that in every case that question will be properly left to the jury; because there are many cases in which it may not depend upon the evidence led at the trial—in which the evidence led at the trial may throw no light on the question; and if that were so, I am not prepared to say that it would be right then to leave the question to the jury. But we have it stated upon the face of this bill of exceptions that parole evidence was adduced on the part of the pursuer "to establish that the sum of £20 a-day, mentioned in the said letters, was, in the circumstances, an exorbitant and unconscionable amount as payable for the delay therein referred to; and, on the other hand, evidence was adduced on the part of the defenders to establish that the said sum of £20 a-day was not, at the time when the said letters passed, an unreasonable or exorbitant sum for the parties to fix and agree upon as the ascertained and liquidated damages to be paid by the pursuers to the defenders in the event of delay occurring." And so we have it before us in this bill of exceptions, as matter of undoubted fact, that there was evidence led upon both sides; and we see upon the notes of the evidence that a good deal of evidence was led upon both sides upon this very question of whether the stipulation was, in the position in which the parties were placed on the 13th of January 1864, an exorbitant and unreasonable amount. I take for granted, and I am sure I am not wrong in doing so, that the terms exorbitant and unconscionable were fully explained to the jury by the learned Judge. If one were always to read a direction of this kind as if the very words of the direction were not only addressed to the jury, but that nothing more was said to them, we should be led into very strange and most unjust results. We must always suppose that when a direction is expressed in terms of this kind, which are to a certain extent in this branch of the law of technical signification, that these terms have been fully and clearly explained to the jury by the presiding Judge. Now, when the question came to be, under a contract of this description, whether the amount stipulated on the 13th of January 1864 was exorbitant and unreasonable, I must say that I think the jury was the best tribunal to determine that question; and that goes a considerable way in leading one to a conclusion upon this, which I have represented as being in our law a novel question, viz., whether this ought to be left to the jury or not? We have been pressed a good deal in argument by the practice of the English Courts of Common Law on the trial of questions of this kind; and I see, upon looking into the English books, that the ordinary course with them is to reserve a question of this kind for the determination of the Court. I do not see that it is matter of ordinary practice to determine the question at the trial in the form of a direction to the jury; but, even if that were so, I should hesitate to follow that practice. Our jurisdiction is entirely different from that of the courts of Common Law in England. We administer an equitable as well as a common law jurisdiction; and we are in the exercise of that mixed jurisdiction of law and equity when we try a cause before a jury just as much as when we are sitting here. It is quite competent to a Judge presiding at a trial of issues in this Court to address to the jury principles of equity as well as rules of law. Now that is so entirely different from the position of a Judge at Nisi Prius in England that it would be most dangerous to take the practice of the one court as any guide for the other. It was not until the statute of 8 and 9 Will. III. that the common law courts in England had the power in any way, either through the intervention of a jury or by the power of the court itself, to modify a sum of this kind, whether it was a penalty or no. They were bound to enforce the contract in its terms, or to refuse to enforce it at all; and although a certain relaxation of that strict rule of the common law was introduced by statute, still the power of the common law courts in this matter falls very far short of that which is exercised by this Court in questions of the kind. And, therefore, in forming my opinion upon what I think to be the delicate and important question raised by this bill of exceptions, I have not been at all moved by a reference to the English practice. The result of my opinion upon the bill of exceptions is, that the whole of these exceptions must be disallowed.

With regard to the rule which has been granted for a new trial, I have only to say, in a single word, that, assuming the direction of the learned Judge to be sound, I think the verdict of the jury is well founded. I am not moved by any of the grounds suggested on the part of the defenders for disturbing the verdict. The only matter that at first sight involved a little difficulty was the question of interest under the pursuers' first issue. It certainly does seem to have been contemplated by the contract between the parties that interest should not run on the contract price of the crane until four months after the crane had been proved and accepted. But one sees quite well by a perusal of the evidence that what actually occurred in the execution of the contract was not in the least degree what was anticipated by the parties in making that stipulation. The crane, although not proved and accepted formally by the defenders, was actually in their works, and employed in their business; and the jury, I have no doubt, thought, and I think thought very fairly, that in these circumstances interest was due, although that was not the position of matters that was contemplated by contract. And I cannot say that I think they went against the words of the contract in such a way as to justify us in interfering with their verdict, considering that it is in the circumstances of the case, I think, quite a fair verdict in respect of the interest as well as of the principal. And I am therefore for discharging the rule for a new trial.

Lord Deas—The first question which occurs here, if it be a question, is, Whether, where liquidated damages are stipulated in a contract of this kind, the amount can be equitably modified in one way or another,—whether it can be interfered with and modified? Assuming that to be answered in the affirmative, the second question is, Whether it is sufficient to authorise that modification that the liquidated damages stipulated are to be regarded as exorbitant and unreasonable as at the date when they were stipulated? If that likewise is answered in the affirmative, the third question is, In what way is it to be determined whether these liquidated damages were exorbitant and unreasonable or not? Is it to be done entirely by the Court, or entirely by the jury? Is it to be done by the Court, or by the jury?

Upon the first of these questions I cannot entertain any doubt,—I mean that a stipulation for liquidated damages in such a contract as this may be modified upon certain grounds; and I do not think it is necessary to refer to any authority upon that subject.

The second question is, Is it a sufficient ground for modification that the amount is exorbitant and unreasonable as at the time when it is stipulated? I answer that question also in the affirmative, with as little hesitation as I answered the first. If its being exorbitant and unreasonable as at the time the stipulation was made be not sufficient to authorise modification of the amount, I do not know what else could possibly be sufficient for that purpose.

If that be so, the whole question seems to come to turn upon whether this matter of being exorbitant and unreasonable was ascertained in a right and proper way. If it had not been right to send a question of this kind to a jury at all, of course we would not have granted the issue which we did grant. The point about whether one of the letters was or was not delivered, might have been otherwise ascertained, if that had been the only question in dispute between the parties; and there can be no doubt that, when we granted the issue to which I refer, we did consider the more important question, whether we ought to determine the question ourselves, or whether it ought to go to a jury.

But I do not rest upon that, because I am humbly of opinion that what we did in that respect was right in itself. It is quite true, as your Lordship has said, that there may be many contracts that stipulate for penalties or liquidated damages upon the face of them in connection with the admissions of the parties. On the admitted circumstances the Court can see whether the stipulation was exorbitant and unreasonable or not; and in that case undoubtedly we would determine the question without sending it to a jury at all. There may be cases in which we would authorise the ascertainment of two or three circumstances before we came to that conclusion. That may be so. But I think we must always look to what the case really is. Perhaps the most numerous class of cases in our books is that class which your Lordship has mentioned, of stipulations for additional rent in agricultural leases, if the tenant does certain things in the way of cropping which he is prohibited from doing. Now, there is one very palpable difference between a case of that kind and a case of this kind, viz., that there the tenant is prohibited from doing something that he can perfectly well refrain from doing. That is very different from a case in which he undertakes to do something and fails to do it; probably finding himself totally unable to do it. The case we are now dealing with is a case of this last kind. It is a case in which the pursuer undertook to do something, and made great exertions to do it. Whether he made all the exertions he could I do not know; but it is quite plain that he made great exertions to do it, and failed to do it. That of itself requires a knowledge of the circumstances in order to form an opinion in regard to it. You require to know what was the nature of the thing he undertook to do, and how it was that he came to fail to do it, whether it was wilful, or so grossly unjustifiable as to be equivalent to wilful; or whether it arose from circumstances to some extent altogether beyond his own control. With a view to that, the first thing you require to know is what it was that he undertook. Now without evidence we were not in a position to know really what it was that he undertook. We were not in a position to know what this derrick crane was, what was the nature of its construction, or what difficulties there were in the way of its being constructed within a certain time—whether they were quite easy to surmount, or whether they were very difficult or impossible to surmount. And we see the light that is thrown upon that from the evidence, in which it appears distinctly enough that the undertaking was a very serious one and a very difficult one. It was undertaking to make a machine, one similar to which had not only never been made in Glasgow before, but, as far as the evidence goes, there was not one existing in Glasgow before of the size and weight and nature of this one. And, accordingly, when the pursuer failed to furnish it within the time first stipulated, what the defenders threatened him with was, not that they would get it from somebody else in Glasgow, but that they would go to Liverpool for it, where alone they could expect to get it within the time. All that required to be known and ascertained before judging anything about this. Not only so, but although I quite agree with what

I understand to be laid down by your Lordship, and what was laid down by the Judge at the trial, that although the thing to be considered is whether the stipulation was exorbitant and unreasonable at the time it was made, in order to judge of that, a part, at least, of the evidence required is what followed after,—what the consequences were, which go most materially to throw *light* upon the other question, whether it was exorbitant and unconscionable to make the stipulations at the time. And, accordingly, we see very great light thrown upon that by the proof as to what the actual damage was, as to what the trade was in which the defenders were engaged, as to the kind of damages which might be expected to result to them, and what actually did result to them, throwing light upon the question how that was to be reasonably viewed as at the time when this stipulation was made. All these are matters upon which a jury of mercantile men or men of business engaged in some of the industries of this country, and still more engaged in some of the industries of a city like Glasgow, where the trial was,—these are all things upon which the jury may be supposed to have far better means of knowledge than the Court could possibly have. And accordingly, if there be any case in which the question whether the stipulation was exorbitant and unconscionable at the time it was made is to be considered, it appears to me that this was a case of that kind. Therefore I have no doubt that what we did in sending this to a jury was quite right; and, as I have indicated already, the only question is, whether, when it did go to the jury, it was or was not rightly dealt with by the Judge. I agree with your Lordship that in a question of this kind—the mode of procedure at a jury trial here—it would be very unsafe to follow blindly the practice in England. There are many differences that would make that a very unsafe course for us to follow. I do not say that it would have been incompetent in this country for the Judge at the trial to have taken a verdict from the jury on certain facts which he pointed out to them, and given his opinion as to what the verdict of the jury should be. I can only say it is not usually done; and whether it can be done or no, I think in this case it would have been a very perilous thing to do; because you must get all the elements, for without them you have not the proper materials to go upon. It seems to me that the elements here were the whole proof, and the only thing would have been reserving that question to himself on the whole evidence. The way in which that is generally done in our practice is not to reserve it and dispose of it after the trial, but to take a special verdict, and reserve the question for the Court. And so it rather appears to me that that would have been the only other alternative that could with safety have been adopted in a case like this. Now, it humbly appears to me that in a case such as I have described, and which appears on the face of the evidence here, the question whether the stipulations were exorbitant and unreasonable was much more of the nature of a jury question than of a question for the Court. I take for granted that the meaning of the terms was explained to the jury; but they do not require much explanation, for it is difficult to put it more plainly than whether a thing is exorbitant and unconscionable. These are words not very difficult to understand. Any explanation would rather be in the way of stating the extent to which it must go. At all events, it is not said that there was any misunderstanding on the part of the jury, and the verdict is properly made to depend on their opinion on that point. I think that is the turning point of the case. If the stipulation at the time it was made was exorbitant and unconscionable, there can be no question that the law is that the full amount was not exigible. The Judge told the jury that if they were of opinion that it was exorbitant and unconscionable, they would not give £20 a-day *per aversionem*, but the utmost amount of damages that they could reasonably suppose to have been sustained. I think he was right in telling them that because I think the defenders were entitled under this stipulation of liquidated damages to the utmost amount that could be reasonably supposed to have been incurred. They were entitled to some reasonable extent to rely on the stipulation, and perhaps not to preserve so carefully the evidence of all the damages they had sustained. The jury were told to take that into account. They were told—there is here a stipulation for liquidated damages, you will therefore not be very strict in requiring the defenders to prove every item of that kind; you will give them all they prove, and make an allowance for what they may have failed to prove, relying on the stipulation as covering more than they might otherwise have been entitled to exact. All that is quite right, and if so, I do not see where there is any failure or misdirection on the part of the Judge at the trial; because the whole exceptions really come to depend upon one thing, viz., whether he was right in telling the jury—"if you think it is exorbitant and unreasonable, you will return a verdict so and so;" or whether he should have told the jury—"you are not to look to that, but you are to give the full amount in the instrument." I think he was quite right in the choice he made between these two, and in the direction he gave. If so, I agree with your Lordship that there is no ground for touching the verdict as respects the amount of the damages.

I should have said, with regard to this being a case in which it was right to inquire into the circumstances, that it is a failure to do something which was undertaken, but which was obviously very difficult to perform. The evidence shows the difficulties. Moreover, it was not at the outset, when the original bargain was made, that the stipulation for liquidated damages was entered into. The original bargain was in July 1863, and up to January 1864 the pursuer was making efforts. There is no reason to suppose that he was not making all the efforts he could to perform the contract, and it was after he had been at great expense in proceeding with the contract that the defenders step in and say "we will hold you liable for heavy damages in consequence of your not having done this in the time stipulated;" it is under that threat, and with this hold over him, that he is led to agree to the stipulation of £20 a-day if he do not finish it within the time specified. Now that appears to me to be a sort of case in which it is easier to interfere equitably to modify the amount of damages than if it had been in the original contract, when he might have shaken himself clear, and said "I will not undertake it." He has undertaken it, and incurred large expense in endeavouring to perform it, and then advantage is taken of the position into which he had got to get him to agree to a thing that, if he had not been in that position, he never would have agreed to at all. That, I think, is a position of matters peculiarly favourable for equitable interference to modify the

amount which he had undertaken to pay. So far as we can judge from the evidence, he was not only in that position, but he had undertaken a most unreasonable contract; for the evidence goes to this, that in place of a price of £2000 for the crane, it ought to have been £2800 or £3000 in order to be remunerative to him; and there is no counter evidence on the part of the defenders; so that, altogether, I think it is a favourable case for the equitable interference of the law to modify the penalty. Then as to the amount, I do not see that there is any specific damage proved beyond the £40; so that it is quite plain the jury did take into consideration the direction to give the utmost damages that could reasonably be supposed to have been sustained. They gave a considerable sum in addition to the actual damage proved. Now, I do not see that they went so extravagantly wrong there as to entitle us to set aside this verdict and have the whole case tried over again, resulting most likely in a verdict on that point more objectionable than the present. On the whole matter, I agree with your Lordship in refusing to sustain the exceptions or set aside the verdict as contrary to evidence.

Lord Ardmillan—I do not think that the question, whether the £20 a-day stipulated in the letter as due in the event of delay is a proper penalty or is liquidated damages, depends upon the use of the word penalty or damages; but that the nature and meaning of the transaction under all the circumstances of the case must be considered. I do not think that the case must turn entirely upon the question whether the stipulation is for a penalty or for liquidated damages. The question rather appears to me to be this, whether, reading both of the letters of 13th January 1864, the sum of £20 a-day, being a sum of damage for delay, is so fixed and liquidated by agreement of parties as to exclude the equity arising on ascertainment of the fact that such a sum is exorbitant and unconscionable. If the defenders mean that, in a case on a mercantile contract, the Judge should have decided that question on the legal construction of the letter, apart from the surrounding circumstances, then I think the defenders are too late. The mere question of construction might have been raised I think, and indeed was raised, before Lord Barcaple, and in the reclaiming note against Lord Barcaple's interlocutor. As a question of construction, I think that modification of the damages is not excluded, and that the exorbitant and unconscionable nature and amount of the stipulation, if duly ascertained, is a good ground for modification. Accordingly the case was sent to the jury, as I think upon that footing, because the mere necessity for proving certain letters was not a sufficient ground alone for sending the case to the jury. And when it went to trial before the jury, after evidence led on both sides in regard to the reasonableness or unreasonableness, the exorbitant and unreasonable character, or the opposite, of this amount of damage stipulated, the presiding Judge refused to direct the jury that the amount was liquidated and fixed beyond the reach of equitable adjustment, and then he left it to the jury to say whether the £20 a-day mentioned in the letters of 13th January 1864 was in the circumstances—by which I understand in the circumstances under which the letters were interchanged—an exorbitant and unconscionable amount as payable for the delay referred to, and asked the jury in that event to find what was the utmost amount of actual damage that may have been incurred. Now I think with all your Lordships that the question, whether this stipulation excludes or does not exclude equitable interposition to alter it, is a question which may be purely legal under certain circumstances, and when it is so it is for the Court, or it may occur under an admitted state of facts, and then it is for the Court. But when it occurs with reference to a state of facts that is not admitted, but must be ascertained with reference to surrounding circumstances, about which the parties do not agree but differ, when it is sent to a jury for trial, I really cannot see how the Judge could dispose of the question himself on his own judgment, without taking that aid from the jury which I think was really the effect of sending the case to be tried by the jury. I think the Judge might have taken two modes of doing this: he might have requested from the jury a deliverance upon the specific question whether they thought the amount exorbitant and unconscionable in the circumstances under which the letters were exchanged, taking into view all the evidence prior to, at the same time, or subsequently, which legitimately bore upon that question; and having got that answered, if the answer was that they considered it not exorbitant or unconscionable, he might have directed the jury to find on the first of the defender's issues for them. If, on the other hand, the jury replied that they considered it was exorbitant or unreasonable, then his Lordship would have directed the jury to find the utmost amount of actual damage sustained by the defenders. He might have taken that course. It is not a very usual course, but his Lordship might have taken that course. I think that he took substantially the same course; because I read his direction to be simply this—If you, the jury, think that this was not an exorbitant and unconscionable amount under the circumstances you will find for that amount, and you need not give a verdict for the defenders on the second issue; but if you think it was an exorbitant and unconscionable amount, then you will find for the defenders on the second issue of damages,—which is what they did. My opinion is, that his Lordship took the best and safest mode of disposing of it; and I see no ground for the first exception, that his Lordship "should have directed the jury"—(*reads*); or the exception to the manner in which he left it to the jury to say whether, under the circumstances, it was an exorbitant and unconscionable amount. Having come to that conclusion on the bill of exceptions, I have no difficulty on the other part of the case. If the case was rightly left by the presiding Judge to the jury, I see no ground for disturbing the verdict of the jury.

Lord Kinloch—I have found the question raised by the bill of exceptions in this case to be a question of some difficulty and delicacy.

Of one thing I entertain no doubt, viz., that the sum of £20 per day, stipulated for in the letters of 13th January 1864, must, so far as concerns the terms of the contract, be considered to have the legal character of liquidated damages, and not of penalty, properly so called. By the terms of the second of these letters it is expressly declared to be granted "in the shape of liquidated and ascertained damages exigible in the case of default." About the meaning of these words there can be no dispute, and they fix the nature of the contract in such a way as to raise no question of construction. The stipulation in the contract is, in its

own nature, one appropriate to a case of liquidated damages. For the sum is not embodied in the contract as general penalty for non-performance, applicable to any breach of the contract, large or small, and therefore calling for investigation to fix its true scope. It is the commuted amount of the damages arising out of one breach only, viz., the single breach of delay in furnishing; and there is no incompetency or inappropriateness in the parties to such a contract fixing this commutation beforehand in such a way as shall be mutually binding. There may be great difficulty in estimating aright these damages; which may fairly comprehend, by force of compact, consequential as well as direct damages; and this difficulty the parties may most fitly avoid by fixing beforehand a sum of liquidated damages, to be paid without further questioning, by the party in fault.

But to hold—as I very clearly hold—the contract to be on its face one for liquidated damages, by no means terminates the controversy. For there is both principle and authority for maintaining that even a contract for liquidated damages is not beyond an equitable control and modification. If the amount stated is so utterly extravagant and unreasonable as to infer that, if awarded, it would not be proper damages, though so called, but would really amount to a penalty or punishment, there is strong ground for holding that the Court may, and ought, to interfere to deny effect to the mere words of the instrument, and to restrict the sum payable to the utmost amount of actual damages.

I consider the general rule to be, that it belongs to the Court, and not a jury, to exercise this power of equitable control. It is not with a view to construction of the contract that the Court interferes (in the present case I think no necessity of construction exists); it is in order to control the contract; but this office, I think, belongs to the Court just as much as that of construction.

But in exercising this function of control it may be necessary for the Court, just as it often is on a question of construction, to take the aid of a jury in the ascertainment of the grounds on which it is to proceed. The contract may not on its face disclose a case of exorbitance; I think does not do so in the present case. It may depend largely on facts and circumstances whether there is exorbitance or not. And as to these the Court may rightly require the finding of a jury as indispensable to the discharge of its own office.

With these general principles in view, the question arises, what the presiding Judge did in the present case, and whether he was right or wrong in so doing?

We must deal with the direction in this case with the fairness of construction to which all directions given in the course, often in the hurry, of a trial are justly entitled. A Judge is not then adjusting nicely framed axioms for a legal textbook. He is giving, on the spur of the moment, a practical judgment for the guidance of all concerned; and in reviewing the direction we are not critically to carp at its terms, but fairly to estimate its true meaning and intent. We must also, I think, in considering the direction given, take into view the terms of the counter directions which were proposed to be substituted.

What the presiding Judge substantially did in the present case, as I have gathered from the bill of exceptions, was to put it to the jury whether in the circumstances, that is, the circumstances in which the contract was made, the sum of £20 a-day was "an exorbitant and unconscionable amount as payable for the delay referred to;" and if they answered this in the affirmative, to hold that the contract was one to be controlled; that a verdict should be in consequence returned for the pursuers on the first counter issue; and that the jury should go on to inquire under the second counter issue what was the utmost amount of actual damage. This was not done in so many words; but I think it is what in substance was done. The proceedings may be described not unreasonably by saying that what the Judge did was to consult the jury whether, in their estimation, the sum was at the date of the contract exorbitant and unconscionable, and to declare that if they answered affirmatively he exercised the judicial function of controlling the contract, and laid down that nothing more than the utmost amount of actual damage could be recovered.

I am not prepared to say that it is incompetent in such a case to reach the judicial conclusion as to whether the sum claimed should be restricted to actual damage or not, by asking the jury whether in their estimation, as practical men of business, the sum stipulated for was at the time exorbitant and unconscionable. It may happen in many cases that to take the opinion of practical men of good sense on this point is the only possible mode of reaching a satisfactory conclusion. In other cases it may be proper to direct the inquiry of the jury to specific facts; and, according as they may find on these facts, to restrict the claim or not. But the facts may be often so difficult of extrication, and so complicated by the intermingling opinions of rival experts, that the only judicious mode of reaching a satisfactory result is to put the matter to the judgment of men of plain common sense, acquainted with everyday business. I am not prepared to say that in the present case this was other than the most judicious course.

I do not therefore dissent from the judgment that the exceptions ought to be disallowed. But I desire to add, before concluding, that I think it ought not to be inferred from the judgment that in every case whatever in which such a question goes to jury trial the matter is to take the stereotyped course of the jury being asked whether in their opinion the sum stipulated was exorbitant and unconscionable. I conceive the true legal course in such a case is not for the Judge simply to roll over the whole question on the jury, but himself to decide, with the benefit of the jury's assistance, whether the contract sum is or is not to be restricted to actual damage. The question proper to be put to the jury may vary with the circumstances of the case; and I do not think that any absolute rule, fettering the Judge's discretion as to the question he is to put, can be expediently laid down beforehand.

With regard to the motion for a new trial, I think the points raised were all of them, without exception, points proper for the determination of the jury on the evidence; and I do not consider the jury to have gone so far wrong as to warrant their verdict being disturbed.

Lord Neaves—I need not say that in trying this case in Glasgow, and in considering it since, I have regarded the questions raised as attended with very great nicety in some respects, and requiring very great delicacy in handling. It is an equitable power united with the functions of inquiry into special facts, and we have not had many such cases. The principles by which I was actu-

ated were these,—that whether this is called a penalty or liquidated and ascertained damages—whatever you may christen it—it is a question that the parties themselves cannot altogether place beyond the reach of equity. There is no doubt about the legal construction of either of these documents. Their construction in strict law is that the party promises to pay £20 a-day. But that is not the question that is to be tried. That would be a very imperfect view of the question to be tried. The question is, whether it is out of the power of a Court of Equity, in certain circumstances, to get round the legal effect and construction of the mere writing, and to do justice to the parties by some mitigation of what is there stipulated. I take it to be part of the law of Scotland that in such stipulations it is possible to do so. That is not the law of Scotland only, but it is the law of other countries. There is a passage quoted in Mr Addison's book from Pothier, to the effect that where parties by anticipation set about to say what shall be the consequence of a breach of contract, if that is iniquitous it shall not be sustained to its full effect. There are great differences in the stipulations themselves, and, in particular, there is a great difference in breaches of contract in *faciendo* and in *non faciendo*. If a man wilfully goes against what he has promised not to do, that is a very unfavourable case for restriction. Take the case suggested in one of the authorities referred to:—I let my house and grounds to a tenant, with a prohibition against cutting any of the trees, and I put a sum on every tree that he may cut; if he cuts these trees I should be very loath, as an equitable question, to restrict it, unless it was something perfectly fabulous and beyond all bounds; because that is a wilful wrong, and I am entitled to put my own price on that which he wilfully does. But, as is well stated in Pothier's observations, the cases of delay and failure *non faciendo* belong to a very different consideration of equity. Because that may not be wilful; that is to say, it may not be wilful at the time the delay takes place. It may be the result of a *damnum fatale*. In many contracts the failure arises from causes over which the party has no control. Circumstances may occur which were not contemplated, and there may be fault in the contractor, but the fault may not be in the failure. The fault may be in an over sanguine estimation originally, or in a miscalculation of what time was required, or of what efforts were required in order to accomplish the contract. That is a matter in which equity will interfere to modify the stipulation if, in a mutual contract, advantage is taken of failure in order not to indemnify, but to enrich the one party to the absolute loss of the other. We know quite well that parties, from sanguine expectations that things will all go right, will submit to almost any stipulation at that time, not being able to realise the difficulties and the consequences. I daresay this party did not anticipate that he was putting his name to a document that involved, if there should be a year's delay, £6000 for not furnishing this crane. In one of the most illustrious examples we have of a very penal exaction, the party agrees to it from being so perfectly certain that his ships will arrive that he anticipates no difficulty in paying the money: and therefore he thinks it a mere jest that he should agree to so sanguinary a penalty,—not indeed sanguinary, for it was flesh and not blood! That example is given by one well acquainted with human nature; but, practically speaking, it goes on every day on a different scale and in different circumstances; and it is just a protection against that which equity interposes. Not that these *damna fatalia*, or unforeseen accidents, will liberate a man who makes a bargain from the actual damage that he occasions, but in such rash engagements it will temper the strictness of the law by its equitable interposition.

These are the circumstances in which this case was sent to be tried. I do not wish to defend either the course that was taken or the verdict, so far as we have to do with it, by mere reference to the procedure that took place. I think the procedure was right. The Lord Ordinary, I think, prematurely found that this could be restricted; because, although it is quite true that in some circumstances we may see at once that it ought not to be restricted, while on the other hand we may see at once that it is not restrictable, there are and must be cases in which a court of law cannot know whether it is an unreasonable and iniquitous exaction or not. This appears to me to be one of those cases. A derrick crane is not a *nomen juris*, so that we should know what the value of it or of the want of it is; nor do we know all the modes in which the shipbuilding trade may be affected by the want of it or the having it. The defenders were prepared with evidence to show that it was a most reasonable stipulation; and if that had been proved to the satisfaction of any person who was the judge of it, the Lord Ordinary's view must at once have gone. Both parties were allowed an opportunity of entering into that, and did so.

What was the Judge to do in these circumstances? If the defenders' contention implied that considerations of equity and iniquity were altogether to be disregarded, I think that was wrong. On the other hand, if it was that the Judge was to take into consideration the evidence of reasonable and unreasonable on both sides, and was himself to decide that, I should certainly have felt that a very difficult task; and the general rule is, that the Judge should leave these questions to the jury. The Judge is not to judge of credibility or of veracity, or of the weight of witnesses. He is to judge whether the amount of evidence is sufficient to go to a jury, but he is not the judge of which shall be believed and which not. That is for the jury, and therefore I cannot see how the Judge could exercise the function of answering the question of whether this was exorbitant and unreasonable or not, *i.e.*, unreasonable so that a man with a good conscience towards his neighbour, and seeking to do to others as he would be done by, would not impose or exact. That is the sort of question I left to the jury. It is quite true the Court will restrict this. But if the Court requires data, the act is still their restriction, but dependent and contingent on these elements, which, in the circumstances of the case, are dark to them till they are enlightened by evidence of those who are the best judges of the facts. These are the grounds upon which I endeavoured to conduct the case, and I cannot say that I am convinced they were not the right grounds. It is a difficult thing to adjust a special verdict; and the question is, whether it has been so erroneously done as to justify the Court in setting aside the result at which the jury arrived. Endeavouring to apply my mind to that question impartially, I cannot say that I think so.

LORD PRESIDENT—Then we disallow the exceptions and discharge the rule.

Interest was allowed to the pursuers from 30th September 1864, and to the defenders from the date of the verdict, on the sums found due to the respective parties by the jury.

The pursuers were only allowed three-fourths of the taxed amount of their expenses, as the litigation was in some measure due to their rashly signing the letter of 13th January 1864.

Agents for Pursuers—Duncan, Dewar & Black, W.S.

Agents for Defenders—J. W. & J. Mackenzie, W.S.

Friday, November 26.

SMITH (THOMSON'S FACTOR) *v.* WALLACE.

Title to Sue—Accretion—Jus actionis—*Reduction—Titles to Land Act* 1858. A party having made up a title, under section 12 of the Titles to Land Act, by notarial instrument, one of the links connecting him with the general disposition being a marriage contract containing only a general conveyance to the subjects in question, *held* (*diss.* Lord Deas) that this was not sufficient to comply with the section of the statute, which required all such links to be special conveyances. Therefore objection to title sustained. *Held* also, that the general disposition of the subjects to Mrs Thomson in 1858 validated by accretion her conveyance of them in her marriage-contract some years previous.

Opinion, per Lord President, that a general disposition gives only a *jus actionis*.

The late Lewis Chalmers of Fraserburgh died in 1850, leaving a trust disposition and settlement and codicils conveying all his heritable and moveable estate to trustees. By minute of meeting, dated 3d November 1852, his trustees allocated to his daughter Jessie Chalmers certain portions of his heritable and moveable estate.

By antenuptial contract of marriage, dated 15th November 1852, the said Jessie Chalmers conveyed to trustees "all and sundry lands and heritages, goods, gear, debts and sums of money, and generally the whole estate, heritable and moveable, now belonging and resting owing to her, or that shall pertain and be owing to her during the subsistence of said marriage, and without prejudice to the said generality, especially the whole estate, sums of money, and effects heritable and moveable to which she, the said Jessie Chalmers, is just now or may become entitled to by or through the deed of settlement of her father, and calculated so far as at present ascertained to be of the value of £2600 or thereby, and which £2600 includes the house properties situated in Castle Street of Fraserburgh, at present occupied by David Carle, &c.; and the said Jessie Chalmers hereby binds and obliges herself, her heirs, executors and successors, to execute and deliver all necessary deeds for conveying the said whole estate, &c., to the said trustees."

In 1858 a formal disposition was granted to Mrs Jessie Chalmers or Thomson, by her father's testamentary trustees, of the subjects allocated to her in the aforesaid minute of 1852, containing an obligation to infeft and assignation to writs. And thereupon an instrument of sasine was expede in her favour under 8 and 9 Vict., c. 35.

Thereafter, also in the year 1858, Mrs Chalmers or Thomson disponed in favour of the defender, George Wallace, the heritable subjects contained in the said disposition by her father's trustees to her, but that in security only of a sum of £1000 advanced to her husband. Upon this bond and disposition in security infeftment was immediately taken by Wallace.

In the year 1865 the marriage-contract trustees of Mrs Chalmers or Thomson were removed by the Court, and the pursuer John Smith was appointed judicial factor in their stead; with power to make up titles to Mrs Thomson's heritable property, in terms of the Titles to Land (Scotland) Acts 1858 and 1860.

The pursuer accordingly completed a title to the said two subjects in question, conform to notarial instrument in his favour, recorded in the County Register of Sasines at Aberdeen on 28th June 1867, proceeding on the following writs, viz., (1) An instrument of sasine in these subjects in favour of the said deceased Lewis Chalmers; (2) His deed of settlement, and the general conveyance therein contained; (3 and 4) His two codicils, before mentioned; (5) The minute of his trustees on 3d November 1852, allocating said heritable subjects to Mrs Thomson; (6) The foresaid contract of marriage, and conveyance therein contained; (7) The trustee's disposition and assignation in her favour, in so far as it conveys the two subjects in question; and (8 and 9) The two extract decrees in the pursuer's favour, appointing him judicial factor, and authorising him to complete a feudal title to said subjects.

The object of the present action was to reduce the instrument of sasine recorded on 18th June 1858, following upon the disposition by Mr Chalmers' trustees to his daughter Mrs Chalmers or Thomson, as informal, and not in accordance with the Act, and, as a consequence thereof, to reduce the bond and disposition in security, and infeftment following thereon granted by Mrs Thomson to the defender, and to have it declared that the pursuer, as factor, had a good and valid title to the subject in question, unburdened with the foresaid bond and disposition in security.

The defender pleaded, as a preliminary defence, that "the pursuer has no title to sue this action." The Lord Ordinary (BARCAPLE) reserved this defence to be disposed of with the merits; and on 22d June 1869, pronounced an interlocutor in which he found that the pursuer had not at present in his person a completed feudal title to the subjects in question, and therefore sustained the defence that the pursuer had no title to sue the action. His Lordship also dismissed the action, but reserved a right to the pursuer to challenge the defender's title of new, if he established a good title in his own person on which to sue.

The pursuer reclaimed.

SOLICITOR-GENERAL and MONRO for him.

DEAN OF FACULTY and WEBSTER in reply.

At advising—

LORD KINLOCH—The question before us is whether the pursuer Mr Smith, who is vested with all the rights of the trustees under the marriage-contract of Mr and Mrs Thomson, has a title to sue a reduction of Mrs Thomson's infeftment in certain subjects, and an heritable bond granted by her over these subjects.

I agree with the Lord Ordinary in thinking that the pursuer has not completed a valid feudal title to the subjects in question; though I do not entirely concur in some of his Lordship's views. If a feudal title in his favour be necessary as a title to sue (as to which a controversy has been raised