

and done, but that the contractor fails to implement his obligation to do it in the time stipulated.

“In this view the only question comes to be, Whether the pursuer has established as a matter of fact that any delay which occurred was caused by circumstances for which the defender is responsible? The alleged delay in sending the plan the Lord Ordinary has already dealt with. He holds that in the circumstances it goes to the date of receiving the acceptance, and cannot exclude the defender from enforcing the contract. The case of *M'Elroy v. Tharsis Co.*, 17th Nov. 1877, 5 R. 161 (H. of L. 171), was different, and the judgment in that case has no application to this cause of delay; for in that case the Court proceeded upon fault during the time allowed for executing the contract. Here the delay was in concluding the contract, and thus fixing the time for its commencement.”

The pursuer reclaimed.

At advising—

LORD JUSTICE-CLERK—That the parties to this meant to make a time bargain there can, I think, be no doubt. That the period which the work occupied was somewhat protracted is manifest, and I am not sure that it might not have been rendered shorter if activity had been shown in prosecuting the work. But when we come to the penal clause, and look at the stipulation upon which it rests, I do not think we can tie the defender down to the position in which he is placed by the conclusion of the Lord Ordinary. In that conclusion I cannot concur. The stipulation as to the oriel windows is, that the roofs of them are to be “ready for the slates within two days after the time specified for the completion of the mason-work, and the portions of rooms requiring to be plastered to be made ready for the first coat of plaster within two days thereafter, and the internal finishings proceeded with as soon as possible.” That would never lay a foundation for exacting a penalty. I am willing to give the defender the benefit of reading the contract, as he contends, that the date specified is to be seven weeks. But if that be so, what he undertook was impossible; for it is proved that the plaster-work could not be ready for the joiner-work for a fortnight afterwards. The Court cannot enforce a penalty where the work undertaken could not possibly have been done in the time.

LORD YOUNG—I am of the same opinion. I agree with your Lordship that this is not a case in which the penal clause is, having regard to the evidence, capable of being enforced. Where we have a distinct time bargain and a stipulation by the parties that in case of failure of one to perform his part within the time distinctly limited, that then a certain sum shall be paid per day or week so long as the failure shall continue, we should in the ordinary case give effect to such a stipulation if it were not unreasonable in itself.

If, again, the sum to be paid is a penalty, properly speaking, *i.e.*, the one party punishing the other, we do not allow of that, for the law does not allow people to contract that one shall be entitled to punish the other. What is in the nature of indemnification the Court will give effect to, but anything beyond compensation for breach of contract, and which is properly penalty,

cannot be contracted for, and will not be awarded by the Court. That is the principle of the decisions. They do not regard the names penalty or damages, for often what is called penalty means damages, and what is called liquidated damages is really penalty. In this case I do not know whether the £2 penalty would be held, if we had to decide upon it, penalty or liquidate damage, but whatever it is I do not think that in the circumstances it is enforceable at all.

LORD CRAIGHILL—I concur. If the stipulation here were clear and express the defender would prevail, whether we held that the claim he makes were damages or penalty. If I were to hold it a penalty I should agree with the Lord Ordinary, for where the parties have fixed a sum it is a strong thing for the Court to allow it to be altered. But it is unnecessary to consider that, because the contract did not require to be finished by any particular day. It is possible that the parties meant that six weeks and four days should be allowed for a part of the work, and everything else was to be done in the other three days, though there is no evidence of that. The evidence is the other way. On this ground it is unnecessary to enforce the penalty.

The Court altered the judgment reclaimed against and refused to allow the deduction claimed by the defender.

Counsel for Pursuer—J. A. Reid. Agent—J. B. M'Intosh, S.S.C.

Counsel for Defender—Macdonald, Q.C.—Rhind. Agent—R. Menzies, S.S.C.

Friday, March 4.

FIRST DIVISION.

[Sheriff-Substitute of Lanarkshire.

ALLAN v. SANDEMAN.

Process—A.S. 10th March 1870, sec. 3, sub-secs. 1 and 3—Competency.

Held that an application presented after the expiry of eight days, but within fourteen days from the date on which an appeal was received by the clerk, praying the Court to extend the time for printing in respect that the process was before the reporters on the *probabilis causa litigandi*, was incompetent and fell to be refused.

The Act of Sederunt of 10th March 1870 provides as follows with regard to appeals from Inferior Courts:—

Section 3, sub-section 1—“The appellant shall, during session, within fourteen days after the process has been received by the Clerk of Court, print and box the note of appeal, record, interlocutors, and proof, if any, unless within eight days after the process has been received by the Clerk he shall have obtained an interlocutor dispensing with printing in whole or in part; in which case the appellant shall only print and box as aforesaid those papers the printing whereof has not been dispensed with . . . and if the appellant shall fail within the said period of fourteen days to print and box . . . the papers re-

quired as aforesaid he shall be held to have abandoned his appeal, and shall not be entitled to insist therein except upon being reponed as hereinafter provided."

Sub-section 3 of the same section provides—
"It shall be lawful for the appellant, within eight days after the appeal has been held to be abandoned as aforesaid, to move the Court . . . to repon him to the effect of entitling him to insist in the appeal, which motion shall not be granted . . . except upon cause shown, and upon such conditions as to printing and payment of expenses to the respondent or otherwise as to the Court shall seem just."

On 21st February 1881 Elizabeth Goudie or Allan appealed to the First Division against an interlocutor of the Sheriff-Substitute of Lanarkshire in an action at her instance against Richard Sandeman. Thereafter the appellant having applied for admission to the poor's roll in the Court of Session, the Court on 25th February remitted the application to the reporters on *probabilis causa litigandi*. On 4th March the appellant presented a note to the Lord President setting forth that she was without funds wherewith to print the record, interlocutors, and proof, and that the period of fourteen days within which under the provision of the Act of Sederunt above quoted she was required to print and box the same would expire on 7th March, before which date the application for the benefit of the poor's roll would not be disposed of by the reporters. She therefore prayed the Court "to dispense *hoc statu* with printing, or otherwise to extend the time for printing until the application for the benefit of the poor's roll should be disposed of.

The respondent opposed the motion, on the ground that it had not been made within eight days of the process having been received by the Clerk.

The Court refused the motion, holding it to be incompetent because not presented within eight days of the process having been received by the Clerk, but *observed* that the appellant might still, under sub-section 3, move the Court, within eight days after the appeal should be held to have been abandoned under sub-section 1, to repon her to the effect of entitling her to insist in the appeal.

Counsel for Appellant—Sym. Agent—W. T. Sutherland, S.S.C.

Counsel for Respondent—J. P. B. Robertson. Agent—M. Macgregor, S.S.C.

Friday, March 4.

SECOND DIVISION.

[Lord Lee, Ordinary.]

DUNCANSON v. DANIELS (JEFFERIS' TRUSTEE).

Security over Moveables—Hiring—Bankruptcy.

On the completion of a new hotel the proprietor arranged with a tenant that each should expend £10,000 in furniture to stock it, and the furniture provided by the proprietor should be let to the tenant along with

the hotel, he undertaking to purchase it by instalments. Of even date with the lease of the hotel there were therefore executed (1) a lease of the proprietor's share of the furniture, which was appropriated to special rooms and entered in an inventory appended to the lease; (2) a deed of agreement whereby the parties agreed each to provide £10,000 of furniture for the hotel, and the tenant bound himself to purchase the landlord's furniture yearly in lots of the value of £1000 each, the rent of £500 paid for the furniture being to be diminished by £50 for each £1000 thus paid to the proprietor. The tenant having become bankrupt, his trustee claimed the furniture on the ground that it all belonged to the bankrupt, and that the arrangement contained in the deeds was only an arrangement intended to create a security for the proprietor, who was only a creditor for the price of that which he had purchased. *Held* that the relation was truly that which the deeds bore to constitute between the parties, viz., a contract of hiring, and that therefore the trustee was not entitled to the furniture set apart for the proprietor in the inventory annexed to the lease of furniture.

By lease dated 1st and 16th August 1878 John Duncanson, builder in Glasgow, and proprietor of the Grand Hotel there, let to Lewis Jefferis of London that hotel for twenty-one years from Whitsunday 1878. The rent was to be for the first year £1500, and to rise gradually till in the fourteen later years of the lease it should be £2500. The furnishings of the hotel would, it was estimated, cost £20,000. The tenant was unable to provide the whole sum required for this purpose on entering into possession. It was therefore agreed that he should provide £10,000 worth, and that Duncanson also should provide furniture to the amount of £10,000, conform to an inventory to be subscribed as relative to the lease, and should let to his tenant the furniture so purchased by him. It was also agreed that the tenant should purchase this furniture and pay for it by instalments of £1000 each in accordance with the agreement hereinafter quoted. The nature of the arrangement will appear from the extract hereafter given from the deeds in which it was embodied. In addition to the lease of the hotel above narrated the parties entered into a lease of the same date as that lease entitled "Lease of Furniture in the Grand Hotel," which bore to let Jefferis "All and Whole the furniture enumerated in the inventory and subscribed as relative hereto to be purchased by the first party (Duncanson) . . . and that for the period of ten years from and after the term of Whitsunday 1878, which is hereby declared to be the commencement of this lease—"Declaring also that should the second party or his foresaids become notour bankrupt during the currency of this lease, then and in that event it shall be in the power of the first party or his foresaids to declare this lease null and void, by giving notice in writing addressed to the said second party or his foresaids, and delivered at the said hotel; and the said first party and his foresaids shall thereupon have full power and authority, without any declarator or other process of law, to bring this lease to an end, and to take possession of or relet the furniture hereby let; and declaring that it