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IVANHOE GOLD CORPORATION LTD. v. SYMONDS.

missed with costs. Order of McMillan J. restored. Cause remitted to Supreme Court.

Solicitors, for appellants, *Martin & Phillips.*
Solicitors, for respondent, *Ewing, Penny & Hill.*

N. G. P.

Disapp *O'Dea* v *Allstates Leasing System (WA) Pty Ltd* 152 CLR 359

Cons/ Questioned *O'Dea* v *Allstates Leasing System (WA)* 57 ALJR 172

Dbtd *Zenith Engineering* v *Old Crane & Machinery Pty Ltd* [2001] 2 QdR 114

[HIGH COURT OF AUSTRALIA.]

LAMSON STORE SERVICE CO. LTD. . APPELLANTS;

AND

RUSSELL WILKINS & SONS LTD. . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *Oct.* 4, 5; *Dec.* 21.

Griffith C.J., Barton and O'Connor JJ.

Winding-up—Proof of debt—Hiring agreement—Acceleration of rent on breach—Liquidated damages or penalty.

The question whether a certain sum fixed in a contract to be paid by the person committing a breach of its provisions is to be treated as a penalty or liquidated damages depends upon whether the sum stipulated for can or cannot be regarded as "a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation."

Public Works Commissioner v. *Hills*, (1906) A.C., 368, applied.

In an agreement for the leasing of a patented system the duration of the term was for ten years; the lessees agreed to pay rent annually in advance, and to operate the system continuously upon their premises, and that they would not remove or detach the system or any part of it or make changes in it or use it unreasonably or improperly; the lessors on their part were to instal the system with suitable operating machinery, and keep it in repair, and bear the risk of damage by fire. The system was to remain the property of the lessors, and in case of any breach of the agreed conditions by the lessees, or in the event of the lessees' bankruptcy, the whole of the rent for the rest of the term was immediately to become due, and the lessees might also enter forthwith on the premises and remove the system. The lessees, a Joint Stock Company, being wound up, the lessees claimed to prove in the liquidation for the whole amount of the ten years' rent. *Held* (*O'Connor* J.

dissenting), that by the agreement an absolute obligation was imposed on the lessees to pay a sum equal to the whole ten years' rent in any event, with a provision that it might be paid in annual instalments so long as certain conditions were observed.

Per O'Connor J.—The contract could not be construed as making the whole amount of the rent payable in advance, subject to a condition for deferred payments. The principle of acceleration of payments was therefore not applicable.

Decision of the Supreme Court (*Cooper* C.J.) reversed. *Lamson Store Service Co.* v. *Weidenbach & Co.'s Trustees*, 7 W.A.L.R., 166, approved.

APPEAL from the Supreme Court of Queensland.

The appellants furnished the respondents' store premises with a patented cash cable tramway system, for conveyance of money and dockets in their store, under a hiring agreement. The appellants were to instal the system with its motive power, and to bear the cost of repairs and risk of damage or loss by fire. The respondents were to lease the system for 10 years at £91 a year payable in advance; to pay for cost of alterations; to keep the system continuously operating during the term of the lease, and only on their premises, without detaching or removing any part of the system. Upon breach of any of the conditions of the agreement on the part of the respondents, or if the system became liable to attachment for debt or bankruptcy of the respondents, the appellants might forthwith enter without notice and take possession of the system, and the whole of the rent for the remainder of the term should immediately become due. The system was to remain the property of the appellants, unless purchased by the respondents within thirty days of installation for £560 less rental already paid. Upon the installation of the system, the respondents paid £25, but were ordered to be wound up two months later. The appellants sought to prove in the winding-up for a debt of £885, being the whole 10 years' rent less the £25 paid. *Cooper* C.J. rejected this claim, without prejudice to the right to prove for rent actually due and for damages. From this decision an appeal was brought to the High Court.

Power, for the appellant. The question is whether the sum claimed was a penalty or liquidated damages. The cases show a

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strong tendency towards enforcing the agreement between the parties if they could reasonably be taken to have contemplated the consequences of its terms. In *Kemble* v. *Farren* (1) the amount was held a penal sum despite express words to the contrary. But in *Wallis* v. *Smith* (2) a sum of £5,000 was held not penal because it was fixed for a substantial breach. Apart from the covenant for rent, there was, in the breaches provided against, nothing ascertainable in value except by the finding of a jury. In *Atkyns* v. *Kinnear* (3), and *Reynolds* v. *Bridge* (4), there were a great many positive and negative covenants, all of uncertain and varying value. *Public Works Commissioner* v. *Hills* (5) rejects the test formulated in *Kemble* v. *Farren* (1), and states it in the question: Was the amount fixed a "genuine pre-estimate" of the loss? See also *Clydebank Engineering and Shipbuilding Co.* v. *Don José Ramos Yzquierdo y Castaneda* (6). The agreement between the appellants and the respondents was a deliberate estimate of the loss if the agreement were materially broken. The rent was an item which was ascertainable if not paid; so that that is exactly what the agreement did, by stating the damages in terms of the rent that remained to be paid, and not any fancy sum. This was merely a provision for the "acceleration" of the rent, which is undoubtedly valid on authority: *Protector Endowment Loan and Annuity Co.* v. *Grice* (7); *Lamson Store Service Co.* v. *Weidenbach and Co.'s Trustees* (8). The sum agreed on was "not incommensurate with the breach contemplated": *Clydebank Engineering and Shipbuilding Co.* v. *Don José Ramos Yzquierdo y Castaneda* (6); commenting on *Elphinstone* v. *Monkland Iron and Coal Co.* (9). The equitable rule in *Thompson* v. *Hudson* (10), on penal rates of interest, is not to be extended to this class of agreement: *Protector Endowment Loan and Annuity Co.* v. *Grice* (7).

The conditions of the agreement were not intended to refer to trivial breaches. The covenant to continuously operate the

(1) 6 Bing., 141.
(2) 21 Ch. D., 243.
(3) 4 Ex., 776; 19 L.J. Ex., 132.
(4) 6 El. & Bl., 528; 26 L J.Q.B., 12.
(5) (1906) A.C., 368.
(6) (1905) A.C., 6.
(7) 5 Q.B.B., 121, 592.
(8) 7 W.A.L.R., 166.
(9) 11 App. Cas., 332.
(10) L.R. 4 H.L, 1.

system, and not to remove or detach any part of it, and others, were all designed to secure the proper working of the system before the public. The sum fixed was not an incommensurable estimate for breaches that would expose the system to the public as unsuccessful or discredited. The contract was to lease for ten years, at a rent payable annually in advance, but the whole to become due at once upon breach of covenants. This was merely a realization of a series of payments which would in any case have had to be paid at some time or other, and no extortionate sum was charged, but just the same sum, payable at an earlier date.

O'Sullivan, for the respondents. It is a settled rule that the Court will modify the undue rigour of a penal agreement between the parties, going behind the expressed intention of the parties to inquire whether the sum named was a genuine pre-estimate of damage.

The doctrine of acceleration of rent should not be extended or adopted; it is only a way of getting round the rule of *Kemble* v. *Farren* (1), and will open the way to colourable evasions of the law, *e.g.* by giving such leases for terms of twenty or fifty years. *Proctor Endowment Loan and Annuity Co.* v. *Grice* (2) is distinguishable; it was a case of *past* consideration, a loan; the present is a case of continuing present and future consideration.

Some of the covenants for which £910 could be exacted were susceptible of trivial breaches, *e.g.* the covenant not to detach any part of the system would be broken by taking out a screw; also if the lessees refused to allow the lessors to enter and inspect the system.

If a breach of any condition of the contract would involve such unreasonable damages, the sum fixed was not a genuine pre-estimate of damages. The respondents' right to buy in thirty days for £560 shows that the £910 was a fancy sum, because if a breach were to occur within the thirty days he had a right to buy the system for £560, and also be sued for £910 and the return of the system to the appellants.

(1) 6 Bing., 141. (2) 5 Q.B.D., 121, 592.

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Lamson Store Service Co. v. *Weidenbach and Co.'s Trustees* (1) is distinguishable; the right to purchase was not there referred to, and the penalty there was £250 against a purchasing option of £320.

There is no consideration for the acceleration of rent in this case; it is not a hire-purchase agreement, but a mere letting agreement, in which the whole subject matter passes back to the lessors upon breach.

Where the breaches may be trivial and variable, the Court will review the sum fixed as penalty: *Willson* v. *Love* (2); *Pye* v. *British Automobile Syndicate Ltd.* (3); *Clydebank Engineering and Shipbuilding Co.* v. *Don José Ramos Yzquierdo y Castaneda* (4). All the circumstances must be considered; if a number of large and small stipulations are grouped under an incommensurable sum, it is a penalty.

[GRIFFITH C.J.—Must one show that the damage is identical for every possible breach of conditions, or else the amount fixed is penal? That seems rather a scrutiny *ut res magis pereat quam valeat.*]

There is no authority that a covenant is valid that all the rent reserved in a lease shall at once become due on default.

Power, in reply. In *Willson* v. *Love* (2) the actual damage was easily ascertainable. It is beside the point to say that allowance of the rule of acceleration would open the way to using this sort of agreement as an instrument of fraud. The agreement must not be construed *de minimis*; it only contemplated material breaches, which in the peculiar circumstances of the appellants' patent appliance would do substantial damage. "Part of the system" means something that would substantially interfere with its working and bring it into discredit: *Gordon* v. *Vestry St. Mary Abbotts, Kensington* (5); *Gibbon* v. *Paddington Vestry* (6).

The agreement is to be construed as a whole, not in severed parts: *Henderson* v. *Mersey Docks and Harbour Board (Over-*

(1) 7 W.A.L.R., 166.
(2) (1896) 1 Q.B., 626.
(3) (1906) 1 K.B., 425.
(4) (1905) A.C., 6, at pp. 9, 15.
(5) (1894) 2 Q.B., 742.
(6) (1900) 2 Ch., 794.

seers of) (1). No distinction can be drawn here between executed and executory consideration.

Cur. adv. vult.

The following judgments were read:—

GRIFFITH C.J. This is an appeal from an order of *Cooper* C.J. rejecting a proof of debt for £885 tendered by the appellant company in the winding-up of the respondent company. The proof was founded upon an agreement dated 12th August 1904, made between the appellants and the respondents. By this agreement, which recited that the appellants, therein called the lessors, were the sole owners of letters patent in the United Kingdom and in New South Wales, Queensland, South Australia, and New Zealand, for manufacturers of automatic, pneumatic, and mechanical apparatus for cash and despatch service in drapery, grocery and other stores, banks, warehouses, factories, offices, &c., and that the respondents, therein called the lessees, desired to use the particular apparatus called the "Lamson Perfection Cable System," it was stipulated (amongst other things), as follows:—

"1. It is witnessed that the lessors do hereby demise and lease unto the lessees the said apparatus to be used only in the lessees premises at Queen-street Brisbane in the State of Queensland for the term of ten years from the date of completion of the said system, and thereafter until the lessees shall give the lessors two months' notice in writing before the expiration of any current year determining this lease; provided that the lessors hereby reserve the right to determine this lease at any time after the expiration of the said term of ten years by giving two calendar months' notice in writing to the lessees.

"2. Yielding and paying therefor an annual rental as follows: —Six pounds ten shillings sterling net per annum per station. Each home station to be considered and paid for as one station. Such annual rental to be paid without any deduction whatever at the offices of the company situate at 234 Clarence-street Sydney aforesaid."

By clauses 3, 4 and 5, it was stipulated that the lessors should at their own expense keep the apparatus in repair except when

(1) 13 App. Cas., 599.

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damage was caused by the negligence of the lessees or their servants; that the lessors should provide suitable machinery for operating the apparatus, and that the lessees should take proper care of and operate the machinery and system during the term; that the cost of alterations should be borne by the lessees.

Clause 6 was as follows:—

"And the lessees agree with the lessors that the lessees should pay to the lessors the said annual rental in advance during the continuance of this lease, the first annual payment to be made upon the completion date of the said system as aforesaid, and will not without the consent in writing of the lessors discontinue the use of the said system, nor use the said system elsewhere than on the said premises as erected, nor detach remove sell assign underlet or part with possession of the said system or any part of it, nor make unreasonable or improper use thereof, or suffer or make any changes or additions to the said system without the written consent of the lessors, and will allow the lessors and their agents at all reasonable times to enter upon the said premises where the said system may be and examine the condition thereof and make necessary repairs, and the lessees will at the expiration of this lease deliver up the said system and machinery to the lessors in as good order and condition as when accepted by the lessees (reasonable use and wear thereof only excepted)."

Clause 7 provided that the lessors should bear the risk of damage by fire, but that in the event of total destruction the contract should become void.

Clause 8 was as follows:—

"Provided always that the said system and every part of it shall be and remain the sole and exclusive property of the lessors, and this agreement is upon the condition that in case of a breach of any of the conditions or agreements to be observed or performed on the part of the lessees, or in case the said system shall be taken from the lessees or attached by process of law by proceedings in bankruptcy or insolvency or otherwise, the whole of the rent for the remainder of the term shall immediately become due, and the lessors may forthwith without notice or demand enter upon the said premises where the said system may be, and take possession of the said system and remove the same forcibly,

if necessary, without let or hindrance from the lessees or any person claiming through or under the lessees, and without prejudice to the lessors' right to recover the said rent."

By an addendum to the agreement it was stipulated that the lessors would sell the apparatus to the lessees at any time within thirty days from the date of erection at the price of £40 per station, less any rent already paid.

The apparatus supplied to the respondents comprised 14 stations, and the erection was completed on 18th January 1905, on which day the first annual instalment became due under the terms of clauses 1 and 2. A sum of £25 was paid by the respondents to the appellants during the progress of the erection, but no further or other payment was made on account of rent. On 15th March 1905, the respondent company was ordered to be wound up. This had the effect of an absolute refusal on their part to perform the contract. The appellants tendered a proof for the full amount of the ten years' rent, less the £25.

The learned Chief Justice was of opinion that the stipulation for the whole sum (£910) in the events mentioned in clause 8 was in the nature of a penalty and not in the nature of agreed damages, and he accordingly rejected the proof.

It is admitted that, if literal effect is to be given to the language of clause 8, the appellants are entitled to prove for the whole amount claimed; but it is contended that such a stipulation is to be construed according to certain arbitrary rules which have been laid down by authority that cannot now be questioned, and that, if these rules are applied, it must be held that the parties did not mean that the whole rent for the ten years was to become payable at once, although they said so.

I agree with the learned Chief Justice in thinking that the question is one of construction, and that the intention of the parties is to be collected from the whole instrument. As put by *Jessel* M.R. in *Wallis* v. *Smith* (1):—"The only question we have to decide is whether the authorities compel us to construe this document in an extraordinary or non-natural sense contrary to the plain meaning of the words." In the same case he said (2):—"I have always thought, and still think, that it is of the utmost

(1) 21 Ch. D., 243, at p. 254. (2) 21 Ch. D., 243, at p. 266.

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importance as regards contracts between adults—persons not under disability, and at arm's length—that the Courts of Law should maintain the performance of the contracts according to the intention of the parties; that they should not overrule any clearly expressed intention on the ground that Judges know the business of the people better than the people know it themselves. I am perfectly well aware that there are exceptions, but they are exceptions of a legislative character." In considering the question we must put ourselves in the position of the parties at the time when the agreement was made, and have regard to its subject matter and the purposes intended to be effected by it.

It is, however, difficult, if not impossible, to reconcile the opinions expressed by the learned Judges who constituted the Court of Appeal in *Wallis* v. *Smith* (1) with those of the Judges who formed the Court in *Willson* v. *Love* (2). In the former case *Jessel* M.R. said, in effect, that up to that time the doctrine that a stipulation for the payment of a fixed sum as liquidated damages upon the breach of any one of several conditions might be regarded as a stipulation for a penalty, so that only the actual damage was recoverable, had never been applied to any case in which one of the conditions was not a condition for the payment of a sum of money of less amount. In the latter case Lord *Esher* M.R., after quoting the following language of Lord *Watson* in *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (3)—"When a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage, the presumption is that the parties intended the sum to be penal, and subject to modification," added: (4)—"I think the effect is substantially the same as if, instead of the words 'some of which may occasion serious and others but trifling damage,' he had said 'some of which may occasion serious and others less serious damage'; and the rule so laid down is in accordance with all the *dicta* which had gone before; and it is laid down after the observations made with regard to them by *Jessel* M.R." And he went on to say:—"In this case, although there is a substantial

(1) 21 Ch. D., 243.
(2) (1896) 1 Q.B., 626.
(3) 11 App. Cas., 332, at p. 342.
(4) (1896), 1 Q.B., 626, at p. 630.

difference between the damages which would arise on two events, the same sum is made payable in either event. Under those circumstances I think that this sum is a penalty and not liquidated damages."

It is not, however, in my opinion, necessary to choose between these conflicting views; for in the case of *Public Works Commissioner* v. *Hills* (1), decided by the Judicial Committee a few days after the decision now under appeal was given, a rule was laid down, which I venture to think is consistent with all the cases, notwithstanding their apparent conflict, and which, in any event, is binding upon this Court in any case to which it is applicable. The rule is thus stated by Lord *Dunedin* (2):—"The general principle to be deduced from that judgment (in the case of *Clydebank Engineering and Shipbuilding Co.* v. *Don José Ramos Yzquierdo y Castaneda* (3)), seems to be this, that the criterion of whether a sum—be it called penalty or damages—is truly liquidated damages, and as such not to be interfered with by the Court, or is truly a penalty which covers the damage if proved, but does not assess it, is to be found in whether the sum stipulated for can or can not be regarded as a 'genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation.'"

I proceed to apply this rule to the present case, assuming, though not deciding, for present purposes, that the amount of future rent payable under clause 8 of the agreement is to be regarded in the same way as if it had been called "liquidated damages."

The subject matter of the agreement was a newly invented appliance, the subject of a patent which the lessors were desirous of introducing to public notice. By the agreement it was stipulated that the apparatus should remain their property during the term of ten years unless the option to purchase were exercised within thirty days. Regarding the matter from the point of view of the parties at the date of the agreement, it might reasonably have been desired by the lessors, and have been in the contemplation of both parties when fixing the amount of the rent

(1) (1906) A.C., 368.
(2) (1906) A.C., 368, at p. 375.
(3) (1905) A.C., 6.

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and the conditions of the lease, that a fair opportunity should be given for the public use of the invention in its entirety, for a considerable time, on suitable premises, and by persons carrying on a business in which its advantages would commend it to the public, and so be likely to induce future purchases from the patentees. The agreement contains stipulations apt for all these purposes, to which I will directly refer in detail. I will deal separately with the stipulation that in certain events the rent for the whole term of ten years was to be paid in full in advance. Regarding the agreement from this point of view, can it be predicated of any of the conditions on which an amount equal to the deferred instalments of rent was to become payable at once that it could not be regarded as a genuine pre-estimate of the lessors' probable or possible interest in the due performance of the obligation? I leave for a moment the default in payment of any instalment of rent in advance. The first condition is that the lessees will not without the lessors' consent discontinue the use of the system during the term. Such a discontinuance might or might not be injurious to the reputation of the patented appliance, and the amount of the injury would obviously be uncertain. It might be very small or very great. The next condition was that the appliance should be used on the specified premises as erected. A removal to other premises might have the effect of greatly diminishing the beneficial effect to the lessors of the public exhibition stipulated for. The next condition, that the lessees should not detach, remove, sell, assign, underlet or part with the possession of the system or any part thereof (by which I understand any substantial integral part of the system), suggests the same considerations. In the same way the conditions that the lessees should not make unreasonable or improper use of the system, or suffer or make any changes or additions in it without the lessors' written consent, and that the lessors should be allowed access to examine and make necessary repairs, are conditions directed to ensure the full and fair exhibition of the appliance in its entirety. The damages for a breach of any of these conditions would be problematical, to this extent at least, that a jury could not be directed to assess them upon any fixed arithmetical basis. I think they might fairly be the subject of

a pre-estimate of damages made by the parties. So far, therefore, I think that the agreement is not open to the application of the artificial rule which is invoked to control the *primâ facie* grammatical meaning of the express stipulation made by the parties themselves.

I return to the stipulation for acceleration of the payment of rent in the event of default in the payment of any instalment. What is the substance of the agreement in this respect? Is it a mere agreement of demise for a term of years at a yearly rent, not creating any absolute obligation to pay rent for more than one year, so that the obligation may be terminated by abandoning the demised premises, with a collateral stipulation that an amount equal to ten years' rent shall be payable on default in payment of that one year's rent? Or is it an agreement creating an absolute obligation to pay ten years' rent in any event, with a provision that it may be paid in annual instalments? If the first contention is the right one, there is no doubt that the decision appealed from is correct. If the latter is the true construction, there was a *debitum in presenti solvendum in futuro*. Having regard to the subject matter of the agreement, the case appears to me analogous to the case of a lessor letting land—say, in a newly settled locality where he owns other land which he is anxious to develop and dispose of at a profit—for a term of years on the condition that in any event he shall be entitled to receive the agreed rent for the whole term, and shall have the land put to a stipulated use during that time. In such a case it would be impossible to predicate what his loss might be if the stipulations were not observed, and there would be nothing unconscionable in a stipulation that in any event he should receive the agreed rent for the whole term.

If parties agree in plain words that in a given event they will pay a stipulated sum, I do not think that the Court ought to say that they did not mean what they said, unless the terms used have been made the subject of judicial interpretation so that the parties may be taken to have used them in a non-natural sense. When by a valid contract between parties *sui juris* one party promises to pay the other a sum of money by instalments, with a stipulation that on default in payment of one instalment all the

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others shall become due immediately, the nature of the consideration for the promise is immaterial. The only question is whether it is a good consideration. If it is, it matters not whether it was an existing debt, or a grant of an optional privilege, or any other thing that in law is regarded as a good consideration.

In my opinion the agreement now in question expresses a clear intention that a sum equal to the rent for ten years shall be paid by the lessees in any event.

In the ordinary case of a demise for a term of years with an express covenant to pay the rent, if the lessee unequivocally repudiates the lease and abandons the land, the lessor may at his option bring an immediate action for breach of covenant, in which he will be entitled to recover the full amount of the agreed rent for the whole term, less such sum as a jury may think he is likely to derive as profits from the use of the land during the residue of the term: *Buchanan* v. *Byrnes* (1). This is the ordinary rule of damages. Can it then be said that in such a case the parties are not competent to stipulate that no deduction shall be made for acceleration of payment? I do not think so.

If the agreement is construed as I construe it, I am unable to distinguish the case from that of *Protector Loan Co.* v. *Grice* (2). In that case the plaintiff had lent to the defendant a sum of money repayable by instalments, together with interest and other contingent charges considerably exceeding the amount of the original debt, at dates extending over a period of five years, and it was held by the Court of Appeal that a stipulation that, on default of payment of any instalment, the whole amount of the future payments should become payable at once was not open to objection on the ground that it was in the nature of a penalty. It is true that in that case the consideration was a debt already existing. Here, on the other hand, the only debt is created by agreement of the parties, and is payable *in futuro*. But for the reasons already given, I do not think that this difference is material.

This question was very fully considered by the Supreme Court of the United States in the recent case of *Sun Printing and*

(1) 3 C.L.R., 704.

(2) 5 Q.B.D., 592.

Publishing Association v. *Moore* (1). After reviewing the English and American authorities the Court concluded with the following quotation from the judgment of *Wright* J. in *Clement* v. *Cash* (2):—"When the parties to a contract, in which the damages to be ascertained, growing out of a breach, are uncertain in amount, mutually agree that a certain sum shall be the damages, in case of a failure to perform, and in language plainly expressive of such agreement, I know of no sound principle or rule applicable to the construction of contracts that will enable a Court of law to say that they intended something else. Where the sum fixed is greatly disproportionate to the presumed actual damages, probably a Court of equity may relieve; but a Court of law has no right to erroneously construe the intention of the parties, when clearly expressed, in the endeavour to make better contracts for them than they have made for themselves. In these, as in all other cases, the Courts are bound to ascertain and carry into effect the true intent of the parties. I am not disposed to deny that a case may arise in which it is doubtful, from the language employed in the instrument, whether the parties meant to agree upon the measure of compensation to the injured party in case of a breach. In such cases, there would be room for construction; but certainly none where the meaning of the parties was evident and unmistakeable. When they declare, in distinct and unequivocal terms, that they have settled and ascertained the damages to be $500.00. or any other sum, to be paid by either party failing to perform, it seems absurd for a Court to tell them that it has looked into the contract and reached the conclusion that no such thing was intended; but that the intention was to name the sum as a penalty to cover any damages that might be proved to have been sustained by a breach of the agreement." I venture, with the Supreme Court of the United States, to express my concurrence in this statement of the law.

It was further contended that the supplementary agreement under which the lessees were entitled to buy the apparatus out and out within thirty days from erection at a fixed sum of £40 per station, which is less than the total amount of ten years' rent at £6 10s. per station, showed that the latter sum could not be

(1) 183 U.S., 642, at p. 673.

(2) 21 N.Y., 253, at p. 257.

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regarded as an honest pre-estimate of damages. I cannot accede to this argument. The circumstance that an optional privilege is offered for a limited time cannot control the plain meaning of the rest of the agreement, when advantage is not taken of the option. The lessors were entitled to weigh the respective benefits of a lease for the whole term of ten years subject to conditions onerous to them, and a purchase at a lower price paid in cash within thirty days. The lessees were free to accept or refuse the lease, and to avail themselves or not avail themselves of the option. On the whole, to use the words of *Jessel* M.R. in *Wallis* v. *Smith* (1), "I am glad to find that I do not feel myself compelled to decide contrary to what is the plain meaning of the terms by any of the decisions."

The Supreme Court of Western Australia arrived at the same conclusion in the case of *Lamson Store Service Co.* v. *Weidenbach and Co.'s Trustee* (2), in which the facts were identical with the present case, except that the lease in that case was for five years only.

For the reasons which I have given I think that the decision in that case was correct, and that this appeal should be allowed.

The order appealed from should be discharged, and the proof admitted with such costs as are usually allowed on the admission of a proof in a winding up. The respondents must pay the costs of the appeal. The liquidator may take his costs in both Courts out of the assets.

BARTON J. I concur.

O'CONNOR J. I regret that I am unable to take the same view of this matter as my learned brothers. It has long been settled law that the Courts will not enforce the condition of a contract stipulating for penalties on breach. Controversies frequently arise as to whether the fixed sum to be paid is in reality a penalty or is liquidated damages, but when once the Court has determined that it is a penalty then, no matter in what terms it may have been described, the condition will not be enforced. In determining whether the amount was intended by

(1) 21 Ch. D., 243, at p. 267. (2) 7 W.A.L.R., 166.

the parties to be a penalty or liquidated damages, the language of the whole contract must be considered as in the interpretation of other contracts. But for many years the Courts have uniformly followed in such cases certain rules of interpretation. One of them may be thus stated :—Where there are covenants to do or refrain from doing several things, the performance of some having a definite value such as the payment of a sum of money, and the performance of others having an uncertain value, and one fixed amount is stipulated to be paid for any of the breaches, the fixed amount will be adjudged to be a penalty and not liquidated damages. That was the rule recognized in *Kemble* v. *Farren* (1). In *Wallis* v. *Smith* (2) it was doubted by *Jessel* M.R. but was approved in even a wider form by *Cotton* L.J. (3) in the following passage :—" The Court is not called upon to decide it now, but I must say for myself that I incline to saying that the cases do justify us by following them out to their reasonable conclusion in saying that in such a case where there are various covenants to the breach of which this clause applies, and some of them are of such a small nature that the damages will presumably be very small—obviously and necessarily must be small—then the Court, whatever language the parties may have used, will say : 'This is not damage assessed for the breach of all these covenants, but upon the breach of any of them the real damage is the sum which ought to be paid, liquidated damages being looked upon as a penalty only.' "

In *Willson* v. *Love* (4) in which Lord *Esher* M.R., *A. L. Smith* L.J., and *Rigby* L.J., delivered judgments, *Sir George Jessel's* observations in *Wallis* v. *Smith* (5) were considered, and it was pointed out that the doubts expressed in that case had not affected the rule now under consideration. Indeed its authority is recognized by all three Judges: *Rigby* L.J. (6), taking it as " generally admitted that where, among various stipulations covered by one sum, whether called a penalty or liquidated damages, is included a stipulation for a payment of a smaller sum of money, that is a case of penalty and not liquidated damages."

(1) 6 Bing., 141.
(2) 21 Ch. D., 243, at p. 264.
(3) 21 Ch. D., 243, at p. 270.
(4) (1896) 1 Q.B., 626.
(5) 21 Ch. D., 243.
(6) (1896) 1 Q.B., 626, at p. 633.

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In the case of *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (1); and *The Clydebank Engineering and Shipbuilding Co.* v. *Don José Ramos Yzquierdo y Castaneda* (2) in the House of Lords the rule now under consideration was also recognized as having been generally followed by the Courts in the interpretation of such contracts. But on the facts of both those cases it was not directly applicable, the decision turning more on the reasonable relation of the sum fixed to the damage flowing from the several breaches. I come now to the latest case: *Public Works Commissioner* v. *Hills* (3). The ground of that decision was that the sum to be paid over as penalty or damages, consisting of a fund accruing during the progress of the contract indefinite in amount and liable to great fluctuation dependent on events not connected with the fulfilment of the contract, could not be taken as a genuine pre-estimate of loss. Lord *Dunedin* after referring to the *Clydebank Engineering and Shipbuilding Co.* v. *Don José Ramos Yzquierdo y Castaneda* (2) says (4):— "The general principle to be deduced from that judgment seems to be this, that the criterion of whether a sum—be it called penalty or damages—is truly liquidated damages, and as such not to be interfered with by the Court, or is truly a penalty which covers the damage if proved, but does not assess it, is to be found in whether the sum stipulated for can or can not be regarded as a 'genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation.' The indicia of this question will vary according to circumstances. Enormous disparity of the sum to any conceivable loss will point one way, while the fact of the payment being in terms proportionate to the loss will point the other. But the circumstances must be taken as a whole, and must be viewed as at the same time the bargain was made."

It will be observed that Lord *Dunedin* purports to deduce a principle from the judgments delivered in the House of Lords in the *Clydebank Engineering and Shipbuilding Co.* v. *Don José Ramos Yzquierdo y Castaneda* (2) and he quotes and adopts

(1) 11 App. Cas., 332.
(2) (1905) A.C., 6.
(3) (1906) A.C., 368.
(4) (1906) A.C., 368, at p. 375.

Lord *Watson's* statement of the rule which is entirely in accordance with the earlier cases I have cited. The principle laid down by Lord *Dunedin* is of much wider application, and on the face of it interferes less than the earlier cases did with the discretion of the Court in applying its own views of the meaning of the language used by the parties. But he in no way declares the rules laid down in the earlier cases to be erroneous or no longer applicable. I think, therefore, that the generality of that statement of principle must be controlled by the facts of that case, and cannot be taken as a pronouncement that the old rules are to be treated as no longer applicable, and that the new principle of interpretation is in all cases to take their place. It is not perhaps necessary to decide that question at present, because in the view I take it is immaterial whether the rule of interpretation, which I have been considering, or the principle stated by Lord *Dunedin* is to be taken as the proper guide. I propose to apply to the facts of this case the simple test suggested by Lord *Dunedin*, namely, whether the "sum stipulated for can or can not be regarded as a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation." It is impossible in applying the test to separate the covenants for payment of rent from the other covenants of the agreement. In *Astley* v. *Weldon* (1), where it was attempted to separate the covenant to pay a certain sum of money from other covenants in respect of which the damages for breach were uncertain, *Chambre* J., in delivering judgment said :— "There is one case in which the sum agreed for must always be considered as a penalty; and that is, where the payment of a smaller sum is secured by a larger. In this case it is impossible to garble the covenants, and to hold that in one case the plaintiff shall recover only for the damages sustained, and in another that he shall recover the penalty: the concluding clause applies equally to all the covenants."

So here the penalty clause applies to each one of the covenants, and if in regard to any one of them the sum stipulated to be paid on breach cannot be regarded as a genuine pre-estimate of the creditor's interest in the performance of that covenant, the stipulated

(1) 2 Bos. & P., 346, at p. 354.

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sum will be regarded as to all of them to be a penalty, not liquidated damages; and for the purpose of applying that test the contract must be construed irrespective of the particular breach which was the foundation of the appellants' proof of debt. Before examining the agreement in detail I may say at once that I entirely concur in the observations of my brother the Chief Justice as to all the covenants except those relating to the payment of rent. As to the damages for these breaches, I think, for the reasons he has given, that the whole amount of rent which would be due at the end of the term might, under the circumstances, be fairly regarded as the genuine pre-estimate. But, as I have pointed out, those breaches cannot be considered apart from the breach of the covenant to pay rent.

Turning now to the clauses of the agreement, it is important to notice that they constitute both in form and in substance a lease of the appellant company's system for ten years with the option of purchase within a certain period. Clause 2 provides for an annual rental of £6 10s. nett per annum per station, which is to be paid without any deduction at the office of the Lamson company in Sydney. With this must be read the portion of clause 6 which provides that the annual rent shall be paid in advance, and that the first annual payment is to be made on the completion date of the system. The effect of these provisions taken together is that for each year's use of the apparatus a year's rent is to be paid, the payment to be made at the beginning instead of at the end of the year's use. Taking into consideration the number of stations supplied, the amount of rent due and payable on the date of the completion of the system would be £91. If that sum were then paid no more rent could be due until a year after that date when another £91 would then become due. So that, assuming no rent at all had been paid at the date of winding up, the amount recoverable on the covenant for rent could not be more than £91, and the damages sustained by reason of that breach could not exceed that amount. Now, the total rent for the ten years is £910, so that clause 8 has in effect stipulated that in event of the failure to make that payment of £91 or any part thereof the lessees are immediately to pay to the lessors the rent for the whole of the term unexpired

at the date of that failure. On completion the sum would be £910, and after each annual payment it would be £91 less. If, instead of stipulating for payment of the ten years rent, the agreement had provided for payment of the same sum merely as money, the stipulation would be clearly for a penalty, and it seems to me that there can be no difference, if that is the real nature of the transaction, whether the payment is described as the rent for ten years or an amount equal to the rent for ten years. In either case it is in reality the fixing of damages for breach of the whole of the covenants, including that for payment of the annual rent. But as I have pointed out it cannot be regarded as a genuine pre-estimate of the damage which may flow from the breach of that covenant. Mr. Power contended that the principle under discussion did not apply, urging that the agreement provided merely for the acceleration of payment of rent and that the rule on which the *Protector Endowment Loan Co.* v. *Grice* (1) was decided is applicable. That case followed two others, *Sterne* v. *Beck* (2) and *Thompson* v. *Hudson* (3), which Lord *Esher*, then Lord Justice *Brett*, referred to "as showing what the true rule is." Lord *Hatherley* L.C. in delivering judgment in *Thompson* v. *Hudson* (4) expounds the principle upon which these cases rest. After explaining the grounds upon which Courts of Equity refuse to enforce an agreed penalty he proceeds:— "Now, that being clear on the one hand, it is equally clear on the other that where there is a debt due, and an agreement is entered into at the time of that debt having become due and not being paid, in regard to farther indulgence to be conceded to the debtor, or farther time to be accorded to him for the payment of the debt, or in regard to his paying it immediately, if that be a portion of the stipulations of the agreement, or at some further time which may be named, and the creditor is willing to allow him certain advantages and deductions from that debt, as well as to extend the time for its payment, if adequate and proper security in the mind of the creditor be afforded him as his part of the bargain in respect of which he is to make these concessions, then it is perfectly competent to the creditor to say:

(1) 5 Q.B.D., 592.
(2) 32 L.J. Ch., 682.
(3) L.R. 4 H.L., 1.
(4) L.R. 4 H.L., 1, at p. 15.

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'If the payment be not made *modo et forma* as I have stipulated, then forthwith the right to the original debt reverts, and it is to be open to me to proceed with reference to the original debt, and to exercise all those powers which I possess for compelling payment of the original debt; in other words, I am entitled to be replaced in the position in which I was when this agreement, which has been now broken, was entered into.'"

The existence of one fact is essential before the principle of those cases can be applied; the amount stipulated to be paid on breach must have been a debt before then actually due. The effect of the transaction in such a case is that the debtor on failure to pay an instalment forfeits the indulgence which the agreement gave him, and the original debt thereupon again becomes due. If in this case the whole amount of rent was actually due on the signing of the contract the provisions of clause 8 might well be regarded as providing merely for acceleration of payment within the principle expounded by Lord *Hatherley*, but, as I have already pointed out, the whole amount of rent was not then due under the agreement. No more than the annual instalment could become due in the first year. Under these circumstances the facts necessary to make the principle of the *Protector Loan Co.* v. *Grice* (1) applicable do not exist.

It has been further contended that provision making the whole rent for the remainder of the term payable on breach of any of the covenants, including the covenant to pay the annual rent, is not the assessment of compensation for breaches, but is merely a variation in the time for payment of rent depending upon the lessees performing or failing to perform certain conditions and that it is always open to a lessee to make the amount and time of payment of rent depend upon the performance of conditions. But can clause 8 be so read? The following is the material portion of the clause. "And this agreement is upon the condition that in case of a breach of any of the conditions or agreements to be observed or performed in the part of the lessees, or in case the said system shall be taken from the lessees or attached by process of law by proceedings in bankruptcy or insolvency or otherwise, the whole of the rent for the remainder

(1) 5 Q.B.D., 592.

of the term shall immediately become due, and the lessors may forthwith without notice or demand enter upon the said premises where the said system may be, and take possession of the said system and remove the same forcibly, if necessary, without let or hindrance from the lessees or any person claiming through or under the lessees, without prejudice to the lessor's right to recover the said rent." If the failure to pay the year's rent or any portion thereof were merely to make the rent for the remainder of the term payable, there might be some ground for the appellants' view. The lessors would then have the whole rent, and the lessees would have the benefit of the remainder of the term without further payment of rent. But the agreement goes much beyond that. The failure to pay the year's rent on the due date, not only makes the lessees liable in the first year to the immediate payment of £910, but enables the lessors to take possession of the system and carry it away. In other words, it enables them to demand the whole rent for 10 years, and at the same time to deprive the lessees of the consideration for which it has been paid, to put the 10 years' rent in their pocket, and at the same time to put an end to the lease. Where such is the effect of the agreement, although the stipulated payment is called rent for the remainder of the term, it seems difficult to regard it in substance as anything other than a form of fixing compensation, especially when it is remembered that it is payable, not only on failure to pay the annual rent, but on the breach of any of the numerous covenants in the agreement. In my opinion, the stipulation is in reality one for compensation for breaches of the covenants. Being therefore in reality a stipulation for compensation, it becomes subject to the rules of interpretation to which I have referred, and applying even Lord *Dunedin's* very broad statement of the rule I am of opinion that it must be held that the parties have stipulated for a penalty and not for liquidated damages.

I agree therefore with the judgment of the Chief Justice in the Court below, and am of opinion that he was right in rejecting the appellant company's proof for £885, and in holding that they were only entitled to prove for the amount of the rent actually due, and for the amount of damages (if any) which they might after-

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wards prove they have sustained. For these reasons I think the appeal should be dismissed.

Appeal allowed. Order appealed from discharged and proof allowed with such costs as are usually allowed in a liquidation on an admission of a proof. Respondents to pay costs of appeal, and to have their costs in both Courts out of the assets.

Solicitors, for the appellants, *Ruthning & Jenson.*
Solicitors, for the respondents, *O'Sullivan & Scott.*

N. G. P.

Rev *Williams v Curator of Intestate Estates* (1909) 8 CLR 760

[HIGH COURT OF AUSTRALIA.]

GREVILLE . . . . . APPELLANT;
PLAINTIFF,

AND

WILLIAMS . . . . . RESPONDENT.
(NOMINAL DEFENDANT),

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 24, 27, 28. *Dec.* 17, 20.

Griffith C.J., Barton and O'Connor JJ.

Civil Service Act (*N.S.W.*), (48 *Vict. No.* 24), *secs.* 46, 48—*Public Service Act* (*N.S.W.*), (*No.* 25 *of* 1895), *secs.* 8, 59, 60—*Public Service* (*Superannuation*) *Act* (*N.S.W.*), (*No.* 55 *of* 1899), *sec.* 2—*Services of officer dispensed with—Abolition of office—Question of fact—Estoppel by acquiescence.*

Sec. 46 of the *Civil Service Act* 1884 provides that when the services of an officer of the Civil Service are dispensed with "in consequence of the abolition of his office," and no other office can be offered him, he shall be entitled to retire upon the superannuation allowance provided for by other sections of the Act.

Sec. 8 of the *Public Service Act* 1895 provides that the Public Service Board shall investigate the working of each department of the Public Service, and if it finds a greater number of persons employed than necessary, and if the per-