the opening words, 'if three months before the termination of this contract.' It was intended, no doubt, that the parties should consider the matter three months before the expiry of the contract, but I can see no difference in substance as to the rights of the parties if they did not consider it two or three months before the expiry. It would have been all the same had it been three days, and I read the provision as being applicable to the natural termination of the contract, or if thereafter carried on as a partnership at will, then to its termination by a notice from any of the partners." I should be inclined to agree with these observations if I were satisfied that the opening words merely imply that the obligation shall attach to the retiring partner, at the termination of the contract, in the event of no agreement having been made three months previously, by all the partners, to continue to carry on the business together. That construction would, however, make the words of the condition mere surplusage, because it is obvious that no partner could have a right or be under an obligation to retire at the termination of the contract who had three months before agreed with his remaining copartners to extend its currency beyond that term. I think a great deal more is implied in these words. They appear to me, when read in the light of the context, to imply that three months at least before the time appointed for the termination of the contract the partners shall then ascertain definitely whether all are agreed to continue the concern, and, in the event of their not being so agreed, that those members who desire to retire shall intimate their resolution before the termination of the contract; and I am of opinion that all these things must be done at and during the periods specified, and that they are made a condition-precedent of the right of the retiring partner to be paid out in terms of article 12, as well as of the right of the partners electing to continue, to insist that he shall retire on these terms.

Is then the appellant bound to retire in terms of article 12? I venture to think that he is not. He gave notice on the 4th of May 1883, to terminate the copartnership as at that date. In so doing he acted within his powers as a member of a firm trading under a contract at will. Nothing had been previously done, by the appellant or his copartners, in compliance with the condition upon which the obligation they seek to enforce against him depends; and I cannot understand how the respondents can bring the appellant within the obligation of article 12 except on the footing that the notice of the 4th of May 1883 was not duly given.

But I desire to rest my opinion not upon the circumstance that the condition was not observed, but upon the ground that the condition and the rights and obligations arising out of it are totally inapplicable to a contract at will. They have plain reference to a fixed *punctum temporis*, the termination of the original contract; but how are they to be applied to a contract which has no definite currency? Time is of the essence of the condition, but a contract at will affords no terminus from which it can be measured or computed. I need, however, say no more upon this subject, because I concur in the observations which have been already made by the noble and learned Earl.

I have only to add that I agree with the noble and learned Earl in thinking that the mode of winding-up the partnership must be determined by the arbiter, and that it ought not to proceed according to the legal method as concluded for in the summons. Upon the question of expenses I also entirely agree with his Lordship.

Lord Fitzgerald—My Lords, I would willingly have come to a different conclusion, but I have been coerced to say that in my judgment, as in that of the noble and learned Lords who have preceded me, it is impossible upon any reasonable construction of the first article, if it is applicable, to apply it to a partnership at will terminable at a moment's notice. If it terminates by a partner saying—as in words like those put in the case of *Featherstonhaugh* v. *Fenwick*, 17 Ves. 309—"It is my pleasure on this day to dissolve the partnership," then *ipso facto* it ceases to exist as a partnership, and the legal results follow unless they are controlled by some article. Even omitting the first article and striking it out altogether, I tried as well as I could to apply the 12th article to a partnership at will, but I found it utterly impracticable; and therefore I feel myself coerced to agree with the judgment which has been proposed.

Lord Ashbourne concurred.

Ordered and adjudged: Interlocutors appealed from reversed so far as they relate to the action of the appellant Hugh Neilson junior. Declared in that action that the pursuer Hugh Neilson junior is entitled to have the copartnery and the business thereof now wound up as at the 4th of May 1883, in such way or manner as shall be mutually agreed upon or as shall be fixed by the arbiter named in the draft article of copartnership. With that declaration cause remitted to the Court below. The appellant to be paid his costs in this House and in the Court below by the respondents, the Mossend Iron Company. The Mossend Iron Company and James Neilson and James Thomson, trustees of William Neilson, to severally repay any costs paid to them by the appellant.

Counsel for Hugh Neilson jr. (Appellant)—Rigby, Q.C.—Rawlins. Agents—Clarke, Rawlins, & Co., for H. B. & F. J. Dewar, W.S.

Counsel for Mossend Iron Co.—Lord Adv. Balfour, Q.C.—Low. Agents—Hollams, Son, & Coward, for Webster, Will, & Ritchie, S.S.C.

Counsel for William Neilson's Trustees—Sol.-Gen. Davey, Q.C.—Haldane. Agents—Freshfield & Williams, for Morton, Neilson, & Smart, W.S.

Tuesday, June 29.

(Before Lord Chancellor Herschell, Lords Blackburn, Watson, and Fitzgerald.)

LORD ELPHINSTONE *v.* MONKLAND IRON AND COAL COMPANY.

Lease—Landlord and Tenant—Landlord's Consent to Assignation.

Where a landlord has right to refuse to accept assignees of the tenant's it is material evidence of his consent to an assignation that

the assignee has with his knowledge and without objection by him obtained possession of the subject, but such evidence is not conclusive of his acceptance of the assignee as tenant, and it may therefore be negatived by the other circumstances of the case.

Lease—Mineral Lease—Damages, Pactional or Penal.

By a contract between landlord and tenant it was provided that the tenant might lay down mineral refuse on certain land, but should within a certain time level and soil over such deposit, and in the event of failure to do so within the time specified, should pay the landlord, to enable him to complete the work, "a sum of money at the rate of £100 per imperial acre for all land covered with slag and not levelled and soiled within the foresaid period," and interest was to be payable from the date of failure. *Held* (*rev.* judgment of Second Division) that the damage here specified was not penal but pactional, in respect that there was a single obligation, and the sum to be paid bore a strict proportion to the extent to which it was unfulfilled.

Observed (by Lord Watson) that when a single lump sum is made payable by way of compensation on the occurrence of one or more of several events, of which some may occasion serious and others but trifling damage, the presumption is that the parties intended the sum to be penal and subject to modification.

Public Company—Contingent Claim of Damages—Winding-up

A public company was wound up voluntarily. A claim was lodged in the liquidation by one claiming that the company was liable to fulfil all the obligations and liabilities incurred or to be incurred under certain contracts to which he and the company were the parties. The liquidators made no deliverance on his claim, but settled the claims of other creditors, and then after a correspondence as to whether his claims remained entire against the company or had been transferred by assignation of its interest to a new company and become claims against it, gave him notice that unless proceedings were taken against them within a certain time they would distribute the surplus assets among the shareholders. He brought an action to have it declared that the company was still bound by the contracts with him, and that the liquidators were bound to set aside so much of the assets as should be required to meet his claims. The Second Division, in respect that there was no present debt or liability by the company, dismissed the action, leaving him to claim in the liquidation. The House *reversed* this judgment, *holding* that when a limited company is being wound up voluntarily, a creditor asserting future or even contingent claims may have the liquidators interpelled from dividing the surplus assets among the shareholders without making any provision to meet his claims when they arise.

This case was decided in the Second Division on 27th May 1885, when the Court dismissed the action. The pursuer appealed to the House of Lords. The facts are fully stated in the opinion of Lord Watson.

At delivering judgment—

Lord Watson—The respondent company was incorporated in 1872 for the purpose of acquiring the business and works of the Monkland Iron and Steel Company. The assets of the older company included (1) a lease, dated the 8th of March 1836, for sixty years from Martinmas 1834, of coal, ironstone, and fire-clay, and other subjects forming part of the estate of Monkland, now belonging to the appellant; (2) a minute of agreement between the appellant's predecessors and the company with regard to certain way-leaves over the Monkland estate, dated the 25th and 27th of April 1853; (3) a tack to the company of the mill lands of Monkland for the unexpired term of the mineral lease, dated the 10th and 19th of December 1855; (4) an agreement between the appellant, the company, and certain trustees for behalf of the creditors of the company, dated the 18th and 21st of November 1862; and (5) a minute of agreement, dated the 4th, 9th, and 14th of November 1870, whereby the appellant let to the company, with concurrence of the trustees foresaid, the farms and lands of Petersburn, Peep-o'-day, and others for the period of nineteen years from and after Martinmas 1870, at a cumulo rent of £640. The Monkland Iron and Steel Company in March 1875 assigned their whole rights and liabilities under these five deeds of lease and agreement to the respondent company. A sixth minute of agreement was entered into between the appellant and the respondent company dated the 1st of August and 13th of December 1877, with respect to the deposit of mineral refuse upon the appellant's lands of Monkland and other matters, to which it will be necessary to advert more particularly hereafter.

The affairs of the respondent company became embarrassed; and at an extraordinary meeting held on the 30th of May 1881 it was resolved that the company should be wound up voluntarily, and the respondents William Mackinnon and Nathaniel Spens were appointed liquidators. On the 9th of August 1881 the liquidators sold, by public roup, the whole property and assets of the company, heritable and moveable, including the company's right and interest in the leases and agreements to which I have already referred, to a gentleman, who subsequently declared that he made the purchase on behalf of a new company then in course of formation, which was incorporated and registered in September 1881 as the Monkland Iron Company, Limited. In December 1881 the respondents executed two formal assignations transferring and making over their whole rights and interests, as tenants or otherwise, and their whole obligations and liabilities, under the six deeds of lease and agreement already specified, to the new company.

On the 1st of July 1881 the appellant lodged a claim in the liquidation, in which he insisted upon the liability of the respondent company to fulfil all the obligations and liabilities already incurred, or to become prestable to him under these six deeds. The liquidators gave no deliverance upon the claim, but proceeded to pay the creditors of the company; and after settling all claims of debt (other than the appellant's) a considerable sum remained in their hands at the time when this action was raised, on the 29th of October 1883. Between September 1881 and

October 1883 there was a good deal of correspondence between the appellant's agents on the one hand, and the respondents and the new company on the other, as to the terms upon which the appellant should recognise the new company as having right by assignation to the leases and agreements in question. These negotiations terminated with an assertion on the part of the respondents and the new company that the respondents had absolute power to assign, and that the appellant had not the option to give or withhold recognition of the new company as tenants in lieu and stead of the respondent company; and the present action was brought in consequence of an intimation made by the liquidators on the 4th of October 1883, to the effect that if no proceedings were taken to interpel them before the 31st of that month they would distribute the surplus assets among the shareholders of the company.

The leading conclusions of the appellant's summons are for declarator that the respondent company are still liable to fulfil the whole obligations and liabilities attaching to them under the contracts assigned to the new company, and that the liquidators are bound to set aside the whole or so much of the surplus assets as may be required to meet such obligations and liabilities as they become due and prestable. These conclusions are founded upon the allegation that the respondents had no power to assign so as to make the new company the appellant's debtors in these obligations and liabilities without his consent. The Lord Ordinary (Lee) on the 22d of March 1884 gave the appellant decree in terms of the declaratory conclusions. This case was carried by reclaiming note to the Second Division of the Court, who on the 30th of October 1884 allowed the parties a proof before answer of their respective averments. The learned Judges at the same time decided that four of the contracts specified in the summons, viz., the mineral lease of March 1836, the minute of April 1853, the mill lands tack of December 1855, and the agreement of November 1862, were in terms assignable, and had been lawfully assigned by the respondents. Against that decision, which was given effect to in the subsequent interlocutor of the 27th of May 1885, no appeal has been taken. The proof allowed was led on the 2d of December 1884 before one of the Judges of the Division. The case, which was then confined to the agricultural lease of November 1870 and the minute of August and November 1877, was again heard along with the proof; and by interlocutor of the 27th of May 1885 their Lordships recalled the interlocutor of the Lord Ordinary and dismissed the action.

Lord Young, in whose opinion the other Judges concurred, was inclined to think that the appellant had accepted the new company as assignees of the contracts embodied in the lease of 1870 and agreement of 1877, and that he could not therefore take action against the respondents. But inasmuch as he was of opinion that no present debt or liability to the appellant under either of these contracts had been averred or proved, his Lordship preferred to abstain from deciding the point, and to leave the appellant to prefer his claims in the liquidation. His Lordship also expressed the opinion that the circumstances of the case did not justify the appellant in resorting to an extraordinary remedy for his security.

I cannot assent to the propriety of the course taken by the learned Judges in dismissing the action, and leaving the appellant to renew his claims in the liquidation. The appellant had preferred a claim in the liquidation more than two years before the action was instituted. He had during the interval made repeated endeavours to get the liquidators to dispose of the claim, which they declined to do, and ultimately recommended him to take judicial proceedings. It was, in my opinion, inexpedient to send back the appellant with his claim to the liquidators four years after it had been submitted to them. If they had again declined to entertain it, or if they had adjudicated upon it in accordance with the pleas they now maintain, the appellant would have been under the necessity of raising a fresh action, with conclusions substantially the same with those he now insists in, for the purpose of enforcing what he conceives to be his legal rights. When a limited company is in course of being wound up voluntarily, I do not think a creditor who is asserting future or even contingent claims against the company can justly be said to resort to an extraordinary remedy when he seeks to have the liquidators judicially interpelled from dividing the surplus assets among the shareholders without making any provision to meet his claims when they shall arise. I am consequently of opinion that your Lordships ought now to dispose of the case upon its merits.

According to the law of Scotland, the assignation of his lease by a tenant who has power to assign has the effect of making the assignee sole tenant from the time he obtains possession of the subject of the lease, and of discharging the cedent from future liability to the landlord. When the tenant has no power to assign, the unqualified acceptance of the assignee by the landlord, whether express or implied, has the same effect.

The agricultural lease of November 1870, the first of the two contracts with which we have to deal, is conceived in favour of the respondent company as lessees, "but excluding assignees and sub-tenants legal and conventional," these being words which plainly import that the lessees are to have no right either to assign or sub-let without the consent of the lessor. The respondents did not plead that the lease is *sua naturâ* assignable, but they maintained that the appellant accepted their assignees. It was argued for them, on the authority of *Dobie* v. *Marquis of Lothian* [2 Macph. 788] and *Duke of Portland* v. *Baird & Co.* [4 Macph. 10], that the fact of the landlord not objecting to the assignees taking possession must, irrespective of all other circumstances, be held sufficient to imply his recognition of the assignees. The point did not arise for decision in either of these cases, and the *dicta* of the learned Judges, when fairly considered, do not appear to me to give the least countenance to the respondents' contention. That a landlord has by implication consented to receive an assignee, or has so acted as to bar himself from alleging that he has not consented, must, in my opinion, be matter of inference from the whole circumstances of the case. I can easily conceive that the fact of the landlord having, in the full knowledge of the cedent's actings, refrained from making any objection to the assignee entering into possession, might in

the absence of other evidence be conclusive; but that is not the kind of case submitted for our decision.

The evidence bearing on this point is somewhat voluminous, but I have had no difficulty in coming to the conclusion that the appellant has not agreed to receive the new company as his assignees under the lease of 1870, and has done nothing to bar him from pleading the absence of his consent. The respondents appear to me to have been distinctly informed, and to have been throughout the negotiations which preceded this action perfectly aware, that the appellant declined to accept the new company as his tenants, except upon the condition, *inter alia*, that they were to remain liable for the whole prestations stipulated in the lease. It was unquestionably within the right of the appellant to attach that or any other lawful condition to his consent. Of course the respondents were not bound to submit to such a condition; but they knew, or at least ought to have known, that if they did not submit to it they had no power to grant an effectual assignation. His claim, lodged with the liquidators on the 1st of July 1881, which was all along insisted on by the appellant, was substantially the same claim which is preferred by him in this action. In the negotiations which took place between September 1881 and October 1883, the terms of which appear from the correspondence printed in the appendix, the appellant insisted upon the respondent company remaining bound to him as a condition of his assenting to receive their assignees, and the negotiations seemed to have been mainly protracted by attempts to adjust certain other conditions, also insisted on by the appellant, with reference to the carriage of the new company's traffic by lines on which wayleaves were payable to him. It is, moreover, a significant fact that in the course of the correspondence neither the respondents nor the new company ever suggested that the appellant had in point of fact accepted the latter company as his tenants. What they did assert was, that the lease was assignable by the respondents without his consent, an assertion which the appellant persistently disputed. In these circumstances it appears to me that the mere fact that rents were paid to the appellant by the new company is of no consequence. The receipts given for these payments contain no reference to the new company, and no entries or expressions from which his recognition of that company can be reasonably inferred.

The minute of agreement of 1877 stands in a different position from the lease of 1870 in this respect, that it does not contain an express exclusion of assignees. The respondents maintain that the contract of 1877 is in its own nature assignable to the effect of relieving them from its obligations, so far as these became or may become prestable after the date of the assignation. They also maintain that if they had not the power to assign, the appellant has nevertheless accepted the new company as his debtors in these obligations, and discharged them of all future liability. That argument rests upon the same evidence of implied consent which was relied on in the case of the lease of 1870, and must, in my opinion, be rejected for the reasons which I have already indicated.

The respondents maintain that the agreement of 1877 has reference to and is ancillary to the mineral lease of 1836, and other contracts which have been found to be validly assigned, and consequently that it is of the same quality as regards its assignability. I think that proposition would be well founded in law if the respondents were able to show that the agreement of 1877 merely added certain terms to these contracts, or effected some modification of the stipulations which they contain. The appellant, on the other hand, maintains that the minute of 1877 consists of a variety of stipulations which are either independent of the subject-matter of these contracts, or are such as (being connected with them) became prestable before they were assigned to the new company.

The minute of 1877 contains in all thirteen articles of contract, some of which must be separately considered, inasmuch as they refer to different matters. The first to the eleventh articles, both inclusive, appear to me to relate to the same subject-matter, viz., the deposit of slag from their blast furnaces by the respondent company upon certain specified portions of the land let to them under the agricultural lease of 1870. The first, second, and third articles define the extent of the privilege; the fourth and fifth prescribe the compensation in money which the company is to pay for the exercise of the privilege; and articles six to eleven relate to the mode of making the deposit, and to certain relative works necessary for maintaining accesses, protecting open watercourses, and so forth. It is a point in favour of the respondents' argument that the privilege, although it affects the land let to them by the lease of 1870, is not a privilege useful or available to an agricultural tenant, and that it does not terminate at Martinmas 1889, the ish of that lease, but is to endure "till the term of Martinmas 1894, or such earlier date as shall be the termination of the lease of the Monklands minerals, under which the second parties are now the tenants of the first party." But it is admitted that none of the slag to which the privilege relates is produced upon land let by the appellant to the company, and it is shown by the receipts in process, and not disputed, that a very small percentage of the slag actually deposited in pursuance of the privilege was the product of minerals raised from the Monkland estate. It does not appear, and was not alleged by the respondents, that the mineral lease or any other of the contracts libelled gave them the right to erect blast furnaces and carry on the manufacture of pig iron upon the appellant's property, so that in reality the privilege was only available to those in right for the time being of the respondents' Calderbank works, with which the appellant had no connection whatever. In these circumstances, although the question does not appear to me to be free from difficulty, I am of opinion that these eleven articles are not in any proper sense ancillary to the contracts which the respondents had power to assign, and that the respondents, whether it be or be not in their power to communicate the privilege to the new company, cannot assign it to the effect of relieving themselves of the liabilities which they have undertaken to the appellant.

I do not think it necessary to determine whether the contract embodied in the twelfth article of the minute was assignable by the

respondents, because I am of opinion that the whole obligations therein undertaken by them had become due and prestable before the new company came into existence. That article professedly modifies certain liabilities of the respondent company, arising under the previous agreement of November 1862 (which the Court below have held to be well assigned), in reference to the levelling and soiling over of two deposits known as the Peep-o'-day and Brownsburn slag hills. By the seventh article of the agreement of 1862 the mineral tenants became bound to level and soil the surface of the Peep-o'-day deposit, which was then an old slag hill, on or before the 1st of January 1868. The eighth article empowered them to lay slag from their works at Calderbank upon part of the lands of Brownsburn. By article eleven they undertake to level and soil over the deposit within twenty years from the 1st of January 1863, provided the mineral lease should endure for that period, and in the event of its sooner coming to a termination, then within six months thereafter. By the same article it was agreed, that in the event of their failure to complete the levelling and soiling over of the Brownsburn deposit within the time specified, they should pay to the appellant "to enable him to complete the same, a sum of money at the rate of £100 per imperial acre for all the land covered with slag, and not levelled and soiled within the foresaid period, which sum shall be in lieu and full of the second parties' obligation under article eighth." The 12th article of the agreement of 1877 extended the time for completing the operation of levelling and soiling the Peep-o'-day deposit, and as regards the Brownsburn deposit limited the time to Whitsunday 1879. In the case of Peep-o'-day, it provides that, failing performance, the respondent company shall pay to the appellant "at the rate of £100 per imperial acre for all ground not so restored, together with legal interest thereon, from and after the date when the operations should have been completed until paid." In the case of the Brownsburn deposit, which at that time covered the whole area included in the agreement of 1862, it provides that failing completion of soiling over at the term of Whitsunday 1879 the penalty stipulated in the 11th article of that agreement shall be due and payable. The period fixed for completion of these operations was subsequently extended, in reference to both slag hills, to Whitsunday 1881.

At the 15th of May 1881 these slag hills were to a large extent neither levelled nor covered with soil; and it does not appear to me to admit of doubt that the money payments stipulated in article 12 of the agreement of 1877 became at that date instantly due to the appellant. But in the course of the negotiations to which I have already alluded, the agents of the appellant, by letter dated the 11th of November 1882, agreed that he would not press the respondents for payment on condition of the new company proceeding to carry on the work of levelling and soiling continuously and satisfactorily, and completing it by Martinmas 1884 at the latest; and on the further condition that if the new company should fail to do so, all the obligations undertaken by the respondents with reference to pecuniary compensation "shall come into force in the same way as if the term of Martinmas 1884 had been substituted for Whitsunday 1881 in the agreements." The new company apparently did something in the way of soiling and levelling; but they admittedly failed to complete this work by Martinmas 1884. It was pleaded at your Lordships' bar that the appellant thereby accepted the new company as his sole debtors in these obligations. The plea, in my opinion, involves no question of power to assign to the new company. The respondents must prove that the appellant consented to the delegation of his overdue debt to the new company; and the terms of the correspondence afford distinct evidence that he did not.

Whilst the present action depended before the Lord Ordinary the term of Martinmas 1884 had not yet arrived; and the appellant was not in a position to ask decree for the sums due to him under article 12, although the summons contains an appropriate conclusion, and the grounds of the claim (£1630) are set forth in the condescendence. The proof allowed by the Inner House interlocutor of the 30th of October 1884 was of the whole averments of parties; and on the 2d of December the appellant and the respondents both adduced evidence as to the extent of those portions of the slag hills which had not been levelled and soiled, in terms of the agreements, at Martinmas 1884. The appellant asked the Second Division to give him decree for £1630, or such other sum as their Lordships might fix, and he preferred the same claim on the hearing of this appeal. The Second Division refused to give him decree, on the ground, as explained by Lord Young, that no debt under the agreement had been averred or proved in this action. I should have thought the learned Judges were right in so refusing had I been able to concur in their opinion, which is thus expressed by Lord Young:—"The agreement to pay £100 per acre for ground unrestored at a particular date is clearly a penalty under which no more than the actual damage can be recovered." Upon that construction of the agreement the evidence does not afford *data* for assessing the amount due to the appellant. But the payments stipulated in the 12th article are, in my opinion, liquidated damages, and not penalties. When a single slump 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. The payments stipulated in article 12 are not of that character; they are made proportionate to the extent to which the respondent company may fail to implement their obligations, and they are to bear interest from the date of the failure. I can find neither principle nor authority for holding that payments so adjusted by the contracting parties with reference to the actual amount of damage ought to be regarded as penalties. I have examined the evidence on both sides with respect to the condition of the Peep-o'-day and Brownsburn slag hills at Martinmas 1884. The testimony given by Mr Ferrie and Mr Thompson on behalf of the respondents does not appear to me to impeach the accuracy of the measurements made by Mr Macrae and Mr M'Creath, the appellant's witnesses; and I think your Lordships may, without doing injustice to either party, fix the sum due by the respondents to the appellant,

under the 12th article of the agreement of 1877, at £1600.

The 13th article of the minute of 1877 merely alters the consideration prestable by the respondent company in respect of a privilege of wayleave over the appellant's lands of Broadlees. The respondent company assert that the privilege was conferred upon them as tenants by their mineral leases; and seeing that the appellant did not allege, and has not proved, anything to the contrary, I think it must be assumed that article 13 is simply a modification of one of the terms of the contract under which they worked the Monkland minerals, and that they had the right to assign it to the new company.

I am accordingly of opinion that the interlocutors of the Second Division appealed from ought to be reversed, except in so far as they recall the Lord Ordinary's interlocutor of the 22d of March 1884; that the appellant should have decree for payment of £1600, with interest from Martinmas 1884, and of declarator that the respondents are bound to fulfil all the liabilities undertaken to him by the respondent company under the lease of 1870 and the agreement of 1877, with the exception of the 13th article of that agreement; and that the respondents William Mackinnon and Nathaniel Spens are bound to set aside the surplus assets of the company, or so much thereof as may be necessary, in order to make due provision for these liabilities. I think the appellant ought to have the costs of this appeal and also the expenses incurred by him in the Court below, from the date of the interlocutor of the Second Division allowing a proof, and that the parties ought to bear their own expenses down to and including that date.

Lord Chancellor (Herschell)—I have had the advantage of reading the opinion of my noble and learned friend who has just addressed the House, and I concur entirely in the conclusions at which he has arrived, and the reasoning upon which those conclusions are founded. The case turns for the most part, in my opinion, upon the view to be taken of the facts, and I do not think it necessary to repeat the exhaustive examination of them which is to be found in the opinion just expressed. I shall content myself with adding a few observations upon the points of law which were discussed in the arguments before your Lordships.

I cannot think that the learned Judges in the Court below were right in dismissing the action. If any liability to the appellant existed on the part of the respondent company, he was entitled to have provision made for it by the liquidators before the assets of the company were distributed among the shareholders. And I think he was entitled to have it determined in this action whether any such liability did or did not exist.

He had already made application to the liquidators to deal with his claim. This they declined to do, and they in effect invited him to take judicial proceedings in order to obtain an adjudication upon it. The present action was accordingly brought. And I am of opinion that it was not only competent for the Court to determine in this action the rights of the parties, but that they were bound to do so.

There are only two other points upon which I think it necessary to add anything.

It was contended that even if the agricultural lease was not as of right assignable, the appellant had, by permitting possession to be taken by the assignees without objection on his part, accepted the assignees as his obligors. I do not think this contention is sound. Whether assignees have been accepted by the landlord in the place of the assignors must, as it seems to me, be determined as a question of fact upon a review of all the circumstances. The fact that possession has been given to the assignees with the knowledge of the landlord and without objection on his part, is no doubt an important element, but it is not the only element to be taken into consideration. In certain circumstances it might be conclusive. But where the facts show beyond question that the landlord did not intend to accept the assignees in lieu of their assignors, and so far from leading them to the belief that he did so intend, intimated the contrary intention, I cannot think that the mere absence of objection to the possession of the assignees is conclusive that the landlord has accepted them and discharged the assignors. In support of the respondents' contention the cases of *Dobie* v. *Marquis of Lothian* and *Duke of Portland* v. *Baird* [cited *supra*] were referred to. But no such point arose for decision in either of those cases. And I do not think the *dicta* of the learned Judges, which must be read in relation to the matters then before them, can have been intended to bear the construction insisted on by the respondents' counsel at your Lordships' bar.

The other point to which I desire to advert is the question whether the provision in the agreement of 1877, that the respondent company should pay to the appellant £100 per imperial acre for all land covered with slag and not levelled and soiled within the specified period, was in the nature of a penalty only or was an agreed assessment of damages.

The agreement does not provide for the payment of a lump sum upon the non-performance of any one of many obligations differing in importance. It has reference to a single obligation, and the sum to be paid bears a strict proportion to the extent to which that obligation is left unfulfilled. There is nothing whatever to show that the compensation is extravagant in relation to the damage sustained. And provision is made that the payment is to bear interest from the date when the obligation is unfulfilled. I know of no authority for holding that a payment agreed to be made under such conditions as these is to be regarded as a penalty only; and I see no sound reason or principle or even convenience for so holding. With deference, therefore, to the learned Judges in the Court below, I entertain a clear opinion that the appellant is entitled to insist that he has an existing pecuniary claim against the respondent company of £100 an acre to the extent to which their obligation to level and soil remains unfulfilled. And I agree with my noble and learned friend that this may properly be fixed at £1600. I also concur in the form of the judgment proposed.

Lord Blackburn concurred.

Lord Fitzgerald—I take leave to express my complete concurrence.

I desire, however, to observe on the proposition of Lord Young, that "the agreement con-

tained in the 12th article of the agreement of 1877 to pay £100 per acre for ground unrestored at a particular date is clearly a penalty under which no more than the actual damage can be recovered," and I am induced to do so as the law of Scotland, which we are now administering, seems in this respect to agree in principle with the law of the rest of the United Kingdom; or it would be more correct to say that the law of Scotland in this respect existed in full force and equitable effect whilst we were struggling against the hard and technical rules of our common law. I am not aware that there is any enactment in force in Scotland corresponding to our statute of 8 and 9 Will. III. c. 11, sec. 8, nor does the Scots law seem to have required such aid. We may take it, then, that by the law of Scotland the parties to any contract may fix the damages to result from a breach at a sum estimated as liquidated damages, or they may enforce the performance of the stipulations of the agreement by a penalty.

In the first instance the pursuer is, in case of a breach, entitled to recover the estimated sum as pactional damages irrespective of the actual loss sustained. In the other, the penalty is to cover all the damages actually sustained, but it does not estimate them, and the amount of loss (not, however, exceeding the penalty) is to be ascertained in the ordinary way. In determining the character of these stipulations we endeavour to ascertain what the parties must reasonably be presumed to have intended, having regard to the subject-matter, and certain rules have been laid down as judicial aids. Thus, in *Astley* v. *Weldon*, 2 Bos. and Pol. 35, Mr Justice Heath said—"Where articles of agreement contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty. But where it is agreed that if a party do" or (I may add) omit to do "a particular thing such a sum shall be paid by him, there the sum stated may be treated as liquidated damages." Lord Eldon took part in the judgment in *Astley* v. *Weldon*, which has always been considered so far to state the rule correctly.

There is an Irish case particularly applicable to the case before us—*Huband* v. *Grattan*, Alcock & Napier, 389. In that case there was a covenant by the grantee with his grantor (who was also the owner of adjoining lands) that he would prostrate and remove a lime-kiln before a certain day, and if not prostrated and removed before that day then the grantee should pay to the plaintiff the sum of £100 for each year during which the lime-kiln should remain, or a rateable sum for a shorter period. The action was for a breach in not removing the lime-kiln. Held to be liquidated and ascertained damages, and not a penalty.

In *Rolfe* v. *Peterson* (1772), 2 Bro. P.C. 436, no reasons are given, but there Lord Camden's decision was reversed. It was a covenant by a lessee not to plough up ancient pasture, and if he does to pay an additional yearly rent of £5 an acre. Breach, ploughing up ten acres. Held that it was not to be considered as a penalty, but as liquidated satisfaction fixed and agreed upon by the parties, notwithstanding that it was alleged "that the penalty of £5 per acre reserved during the remainder of the term for once ploughing amounted to more than thirty times the value of the inheritance of the ten acres before they were put into a state of cultivation by the respondents;" and although the parties use the words "liquidated damages" or "penalty," though such words are not to be disregarded they are by no means conclusive. Thus, in *Betts* v. *Burch*, 4 H. & N. at p. 511, Bramwell, B., correctly lays it down—"For if the whole agreement is such that the Court can see the sum is a penal sum, it must be so treated; on the other hand, if it is not a penal sum, it would be incorrect to treat it as a penalty merely because the parties have so called it in the agreement." And so in *Kemble* v. *Furren*, 6 Bingham, at p. 148, where the sum of £1000, the subject of the action, was declared by the agreement to be liquidated damages, and not a penalty or in the nature thereof, it was held to be a penalty; but Tindal, C.J., in the course of his judgment observes—"We see nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum they may agree."

There would be some difficulty in criticising some of the English decisions, and it would not be very profitable. Bramwell, L.J., in *Newman's Case*, 4 Ch. D. at p. 734, says—"It seems to me, as I said in *Betts* v. *Burch*, that by some good fortune the Courts have, in the majority of cases, gone right without knowing why they did so." There could be no more competent judge. I leave it in his hands.

I am clearly of opinion, with my noble and learned friend, that the sum of £100 per imperial acre for all ground not restored, though described in one part of the 12th article as "the penalty therein stipulated," is not a penalty, and represents stipulated or estimated damages. It is satisfactory also to be able to make out from the uncontroverted evidence that the sum is not exorbitant or unreasonable.

Lord Halsbury—I entirely concur. With regard to the observation made by Lord Bramwell, it had reference to cases in which the learned Judges apparently decided that at law as distinguished from equity they were entitled to consider penalty as that which was to be enforced *in terrorem*, without having had called to their attention at all the fact that the Act 8 and 9 Will. III., c. 11, existed. It was with reference to that that Lord Bramwell made the not unnatural observation that they had gone right although they were not aware of the ground upon which at law their judgment could be supported.

Interlocutor of the Second Division of the Court of Session, dated the 27th of May 1885, except in so far as it recalls the Lord Ordinary's interlocutor of the 22d of March 1884, and also the interlocutor of the said Division, dated the 20th of June 1885, reversed. Declared that the appellant ought to have decree in his favour, decerning and ordaining the respondents to make payment to him of the principal sum of £1600 sterling, with interest thereon at the rate of 5 per cent. per annum from the term of Martinmas 1884, until payment; and to have decree finding and declaring that the respondents, the Monkland Iron and Coal Company, Limited, were, at the time of their going into voluntary liquidation, and still are, bound to implement and fulfil to the

appellant the whole obligations and liabilities undertaken by the lessees in the lease or minute of agreement libelled, dated the 4th, 9th, and 14th of November 1870, and also the whole obligations and liabilities undertaken by them in the minute of agreement libelled, dated the 1st of August and 13th of December 1877, excepting only such obligations and liabilities as are contained in the 13th article of the said minute; and also that the respondents William Mackinnon and Nathaniel Spens, as liquidators of the said Monkland Iron and Coal Company, Limited, are bound to make due provision for implementing and fulfilling the foresaid obligations and liabilities, and for that purpose to set aside the surplus assets of the company remaining in their hands at the time when this action was raised, or so much thereof as may be necessary for implementing and fulfilling said obligations and liabilities; and also that the appellant ought to have decree against the respondents for the expenses of process incurred by him in the Court of Session, after the 30th of October 1884; that subject to these declarations, the cause be remitted to the Second Division of the Court of Session; and that the respondents do pay to the appellant his costs of this appeal.

Counsel for Pursuer (Appellant)—Sol.-Gen. Asher, Q.C.—Dundas. Agents—W. A. Loch, for Dundas & Wilson, C.S.

Counsel for Defenders (Respondents)—Lord Adv. Balfour, Q.C.—Ure. Agents—Grahames, Currey, & Spens, for Mackenzie, Innes, & Logan, W.S.

Tuesday, June 29.

(Before Lord Chancellor Herschell, Lords Blackburn and Watson.)

EARL OF KINTORE *v.* COUNTESS-DOWAGER OF KINTORE AND OTHERS.

(Ante, xxi., p. 647, 20th June 1884.)

Parent and Child—Legitim—Discharge of Legitim—Antenuptial Contract of Father—Heir-Apparent—Aberdeen Act (5 *Geo. IV. c.* 87)—*Entail Amendment Act* 1848 (11 *and* 12 *Vict. c.* 36).

By antenuptial contract of marriage an heir of entail in possession bound himself and the heirs of entail who should succeed him in the entailed estates to pay to the child or children of the marriage, other than and excluding the heir who should succeed to him in the entailed estates, certain provisions. Tutors and curators were appointed to such of the children of the intended marriage as should be in pupillarity or minority at the husband's death, and they were directed to maintain and educate suitably the heir who should succeed him, and keep up an establishment for him till he reached majority; "which provisions before conceived in favour of the children of this marriage are hereby declared to be in full satisfaction to them of all bairns' part of gear, legitim, portion natural, security," &c. The eldest son of the marriage succeeded under the entail and also claimed legitim. *Held* (*aff.* judgment of First Division) that the marriage-contract contained no provision for him in lieu of legitim, and therefore that he was not excluded by the contract therefrom. *Held*, further, that the provisions for children made by the father in his marriage-contract under the Aberdeen Act not being or being capable of being (without the father's consent) available to the eldest son, they were not effectual to confer an interest in him under the contract in consideration of which legitim could be excluded; and (2) that assuming that under the Entail Amendment Act 1848 the father could have disentailed the estates, a right to share in the marriage-contract fund provided to children would not thereby have been conferred upon the heir, and therefore that in no view was anything provided under the contract in his favour in discharge of legitim.

This Case is reported in Court of Session, *ante*, vol. xxi., p. 647, June 20, 1884, 11 R. 1013.

The defenders appealed to the House of Lords.

At delivering judgment—

Lord Chancellor—My Lords, this is an appeal against certain interlocutors of the Lord Ordinary and the Court of Session, holding that the respondent was entitled in name of legitim to one-half of the free moveable estate of his father.

It seems clear that the respondent is entitled to his claim of legitim unless that claim has been expressly excluded by the marriage-contract of his parents. The question therefore is, whether the clause in the marriage-contract, which undoubtedly excludes legitim in the case of the other children of the marriage, excludes it in the respondent's case also. The clause is in these terms:—"Which provisions before conceived in favour of the children of this marriage are hereby declared to be in full satisfaction to them of all bairns' part of gear, legitim, portion natural, executry, and everything else that they could ask or claim by and through the decease of their said father, or the predecease of their mother, any manner of way, their father's goodwill excepted."

Now, I fully agree with what was said by more than one of the learned Judges in the cases of *Maitland* v. *Maitland*, Dec. 14, 1843, 6 D. 244, and *Keith's Trustees* v. *Keith*, July 17, 1857, 19 D. 1040, that the words "the children of the marriage" in such a clause are general words *prima facie* applying to all the children of the marriage. It strikes me, too, that the object of such conditions in a marriage-contract is, as was said by Lord Curriehill in *Keith's Trustee's* v. *Keith*—"to fix the amount of what the wife and the issue are to have right to claim from the estate of the husband and father, leaving all the rest at his own disposal. The party in whose favour the discharge of the legitim is intended to operate," he continued, "is the father himself and not any of the children; and it would be a strange result if a condition intended to relieve the father's estate from a claim of legitim should leave his estate still subject to that claim, and merely transfer the right to it to the heir of the marriage. Such a construction cannot be put on such a clause unless it will not fairly admit of a more reasonable reading." I confess, therefore, I approached the construction of the settlement