any other endowment, and that to keep up the money he left to raise an endowment fund would be to do what he has given no authority for doing.

Thus his purpose in the bequest for building has failed, as the circumstances are such that those to whom it would fall to consecrate the buildings and to carry on the services decline on the ground of inability to undertake that these conditions of the gift shall be fulfilled.

I feel constrained therefore to hold that the sums bequeathed fall back into the estate of the late Marquis, to be dealt with as the residue is required to be dealt with, and that the interlocutor of the Lord Ordinary should be recalled and the claim of the present Marquis sustained.

LORD YOUNG concurred.

LORD TRAYNER—The late Marquis of Bute directed his trustees to expend a sum of £40,000, or so much of that sum as might be found necessary, on the erection of two churches, one at Oban and the other at Whithorn. When completed these churches were to be conveyed to certain trustees to be nominated by the Roman Catholic Bishops for the time in Argyll and Galloway respectively. The churches, however, were only to be conveyed to the trustees so nominated on certain conditions, which are very clearly stated—about them there is, and can be in my opinion, no dubiety. I need not repeat here what the conditions are. It is enough to say that both the Roman Catholic Bishop of Argyll and the Roman Catholic Bishop of Galloway state in their claims that they cannot accept the legacy, that is, a conveyance of the churches on the conditions specified. That, in my view, is conclusive of their respective claims. The trustees of the late Marquis have no authority or right to build the churches, and would act unreasonably in doing so if they are certiorated that the churches when completed would not be accepted by the donees on the conditions on which alone they could take the benefit of the donation or legacy. One of the grounds on which the legacy is declined is that there would be no funds for maintaining the churches and the celebration of divine service therein. In aid of the reverend claimants the trustees (of the late Marquis) propose that they should be authorised to retain the £40,000 in their hands and accumulate the same with the interest thereon until the fund amounted to a sum sufficient to build the churches and also to endow them. I think this not only not authorised by the truster's settlement but directly opposed to his intention. The truster contemplated that by public subscription or otherwise the churches might be completed without the expenditure of the whole £40,000, and except the sum of £10,000 specially bequeathed for the maintainance of divine service in the church at Oban he neither gave nor intended to give any sum whatever towards endowment. His words are, "My intention being merely to have such church and church or monastery completed, although it may be at a less cost than £20,000 each." I gather it to have been the meaning and intention of the truster that he would provide the churches, but looked to his co-religionists to maintain them and the services therein. The proposal, therefore, of the trustees to accumulate funds for the purpose of endowment is not in accordance with any direction given to them, but contrary to the truster's wish and intention. What, then, is to come of the £40,000. This also is I think provided for. The truster directs that if his trustees find it "unnecessary to expend the whole" of the £40,000 "the balance unexpended by them shall revert to the residue of my estate." As it has turned out, it is not "necessary" for the trustees to expend any part of the £40,000, and therefore the whole of it (although the truster only anticipated a balance) in my opinion reverts to residue. The result in my opinion is, that the claim of the Marquis of Bute (the residuary legatee) should be sustained to the whole fund *in medio* and the other claims repelled.

LORD MONCREIFF was absent.

The Court pronounced this interlocutor—

"Recal the interlocutor reclaimed against: Repel the claims of the claimants other than the claimant the Marquess of Bute: Rank and prefer him to the whole fund *in medio* in terms of his claim."

Counsel for the Pursuers and Real Raisers, Claimants and Respondents, The Marquess of Bute's Trustees — Campbell, K.C.—Pitman. Agents—J. & F. Anderson, W.S.

Counsel for the Claimant and Respondent The Roman Catholic Bishop of Argyll—Campbell, K.C.—Graham Stewart. Agent—William Considine, S.S.C.

Counsel for the Claimant and Respondent The Roman Catholic Bishop of Galloway—Salvesen, K.C. — Scott Brown. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Claimant and Reclaimer The Marquess of Bute—Kincaid Mackenzie, K.C.—Blackburn. Agents—W. & J. Cook, W.S.

Friday, November 18.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

DURAN *v.* DURAN.

Husband and Wife—Constitution of Marriage — Proof — Mutual Declaration in Writing—Necessity of Proving Intention —Effect of Mental Reservation by One of the Parties.

A document constituting on the face of it an interchange of consent to marry is not *per se* proof of marriage without evidence as to the intention of the parties, but if there be such a document, and it is proved that it was signed by both parties in the knowledge of its terms,

and that at the time of signing one of the parties sincerely intended marriage, no mental reservation on the part of the other will prevent marriage resulting.

Circumstances in which *held* that a marriage had been validly constituted by mutual declaration signed by the parties before witnesses.

In July 1903 Mrs Christina Sophia Keith or Morse or Duran brought an action against Francis Duran, commission agent, Glasgow, in which she concluded, *inter alia*, for declarator that on or about 19th November 1902 she and the defender were lawfully married to each other at Glasgow by mutual declaration of that date, subscribed by them in presence of Alexander Watson, insurance agent, Glasgow, and Mrs Margaret Kennedy or Watson his wife. The action was defended.

Three documents were lodged in process, viz., an acknowledgment of marriage dated 19th November 1902, signed by the defender and pursuer, which was produced by the pursuer, and two documents dated 17th November 1902, signed by the pursuer, which were produced by the defender.

The acknowledgment of marriage was as follows:— "65 *West Regent Street*,
"*Glasgow*, 19*th November* 1902.

"We, Francis Duran, commission agent, residing at 189 Hill Street, Garnethill, Glasgow, and Christina Sophia Keith or Morse, housekeeper, residing at 189 Hill Street aforesaid, do hereby accept and acknowledge each other as husband and wife.

"Francis Duran.
"Christina Sophia Morse.

"Alexander Watson, *witness*.
"Margaret Watson, *witness*."

Following upon it, and forming part of the same document, there was a petition by the two parties to the Sheriff of Lanarkshire, in the usual form, in which they asked the Sheriff to certify in terms of section 2 of the Act 19 and 20 Vict. c. 96, that they had been married to one another, and to grant warrant for the registration of the marriage. The petition was also signed by the parties. This document was partly printed, and so far as not printed it was written (except the signatures) by Robert Watson, writer and notary public, Glasgow, on the instruction of the parties. Although so signed the petition was never presented to the Sheriff, and no warrant for registration of the marriage was obtained.

The other two documents were as follows:—

1. "I hereby confess that this marriage, which never would have taken place, as there was no promise nor intention for either party, has been brought about by my own carelessness and foolishness with you, and as you go through this marriage to save my good name, in return I now give you this, and hereby promise not to claim any money, property, or whatsoever you may have or receive either for myself or my two children.

"Should there be any children of this marriage the responsibility must be yours.

"I furthermore hold you alway free to do according to your own inclinations, and never to interfere with you, on condition you do not expect me to live with you.

"Christina S. Morse.

"*Glasgow, Nov.* 17*th* 1902."

2. "To your dictation, Francis Duran, I now write as promised.

"I hereby confess that this marriage, which never would have taken place, as there was no promise or intention by either party, has been brought about by my own carelessness. And as you Francis Duran go through this to save my good name, in return I now give you this, and hereby promise not to claim as your wife any money, property, or whatsoever you may have or receive, either for myself or my children, Constance and Phyllis Morse.

"C. S. Morse.
"17 *Nov*. 1902.

"I do hereby promise that this will be burned, unseen by any eyes but mine, on the death of writer if she has been faithful."

A proof was led before the Lord Ordinary (Kincairney). The facts of the case are stated in the note to his interlocutor.

On 3rd June 1904 the Lord Ordinary pronounced the following interlocutor:—"Finds and declares that on or about 19th November 1902 the pursuer and defender were lawfully married to each other at Glasgow by mutual declaration, subscribed by the parties before Alexander Watson, insurance agent, residing at 96 Thistle Street, Garnethill, Glasgow, and Mrs Margaret Kennedy or Watson, his wife," &c.

Opinion.—"By this action the pursuer Mrs Morse concludes for declarator of marriage between her and the defender Francis Duran, by mutual declaration dated 19th November 1902, and for decree for adherence and aliment. Counsel for the pursuer held the case to be clear as depending on an unambiguous written acknowledgment; but I am rather disposed to take the view of the counsel for the defender that it is exceptionally difficult and doubtful, and I think the evidence extremely unsatisfactory and unreliable, and little to the credit of either party. But the case falls within a brief compass. The evidence, such as it is, is short and scanty. The case is not complicated by correspondence, and the facts of importance are few. A child was born to the pursuer on 15th March 1903, the paternity of which the defender does not deny; but the view that the interests of the child should be protected by a tutor was not presented, and bearing in mind the position and means of the parties it does not seem to me to be necessary.

"The pursuer is a widow, and at the date in question was about thirty-three years of age. The defender is a Spaniard, and he was then about twenty-six. He is a Roman Catholic, but nothing seems to turn on that circumstance. No question of foreign law or of jurisdiction has been raised.

"Although I am compelled to comment on the evidence very unfavourably, yet

nothing against the character of either party has been disclosed except what appears in the proof, and there seems no great inequality in social position.

"The pursuer has stated a plea (the second) importing marriage, constituted or proved, by habit and repute, but the evidence affords no ground whatever for that plea. It must have found its way into the pleadings through misinformation, inadvertence, or mistake, and it was given up in the course of the proof, and the pursuer's case was rested solely on present consent. On the other hand, I have not found any sufficient foundation for the defender's plea of personal bar, and his case consists in a denial of the consent averred by the pursuer. The question is just whether a marriage by consent on 19th November 1902 has or has not been proved.

"The pursuer's case is rested primarily and chiefly on a document dated 19th November 1902. [*His Lordship referred to the acknowledgment of marriage and petition quoted above.*]

"The document includes, as has been seen, a perfectly explicit and unambiguous mutual acknowledgment of marriage, which makes certainly a most formidable beginning to the pursuer's case. The signatures are proved beyond any doubt, and the pursuer contends that as marriage is a contract constituted and completed by mutual consent, and requiring nothing else to complete it, the marriage in this case is established by the written unambiguous contract. The pursuer referred to *Dalrymple*, 16th July 1811, 2 Hag. 54, 107; *MacAdam* v. *MacAdam*, 1813, 1 Dow 148, 189; *Dysart Peerage Case*, 1881, 6 A.C. 489, 543, 556; *Imrie* v. *Imrie*, 26th November 1891, 19 R. 185, 29 S.L.R. 161. If the question here had been as to the effect of an ordinary contract, it would have been very difficult to take off the effect of its explicit language by any amount of parole evidence. Such evidence would probably be at once ruled incompetent. But the contract of marriage has this great peculiarity, that to prove a marriage it is not enough merely to table an express contract or declaration. It is necessary besides to show the circumstances under which the contract is completed, and that these circumstances were consistent with the intention of the parties to contract marriage; and it is competent to prove that, however explicit its terms may be, the parties did not contemplate marriage, but entered into the apparent contract with some different object. What the parties said or wrote is not the chief point in such inquiries, but what they intended. This peculiarity of a contract expressive of marriage is well settled by decisions of the highest authority—*M'Innes* v. *More*, June 27, 1782, 2 Pat. App. 598; *Kello* v. *Taylor*, February 16, 1787, 3 Pat. App. 56; *Lockyer* v. *Sinclair*, March 3, 1846, 8 D. 582, 596, 601; *Fleming* v. *Corbet*, June 24, 1859, 21 D. 1034, 1043-4; *Robertson* v. *Steuart*, February 27, 1874, 1 R. 532, 11 S.L.R. 427; *rev.* June 7, 1875, 2 R. (H.L.) 80, 12 S.L.R. 514. I think that in all these cases there was explicit consent, written or verbal; but marriage was not held to be constituted, because that was not the true intention of the parties.

"I think, however, that this latter rule must be taken with this qualification, that if a party uses words in an apparent contract expressive of his or her consent to marry, and intended to induce and inducing the other party to believe such consent, and inducing the other party to give her or his consent, then the former party will be precluded from denying that he did so consent. If a contract expressive of marriage be interchanged, and the one party sincerely intends marriage, then no mental reservation of the other party will prevent the result of marriage. The best exposition of this view of the law is, I think, contained in the *Dysart Peerage Case*.

"The pursuer maintains that the parties intended the constitution of marriage by the declaration. The defender, on the contrary, maintains that that was not contemplated, but only such a form of marriage as might be shown to the pursuer's parents, and that marriage could not be completed until the declaration was produced to the Sheriff.

"It is therefore clear that it is necessary carefully to examine the whole circumstances under which the acknowledgment on which the pursuer relies was signed.

"It appears that the pursuer kept a boarding-house, and that the defender who, as I have said, was a Spaniard, became an inmate early in 1900. He had come to Scotland about 1897, and appears to have resided chiefly in Scotland, where he obtained employment as a clerk. The circumstances which led to his residence in Scotland have not been explained. He says that he could not speak a word of English when he came to Scotland. But in 1904, when he gave his evidence on this, he spoke the language well.

"It is a fact of first-class importance, and there is no doubt about it, that at some time during his residence in the pursuer's boarding-house illicit intercourse took place between the pursuer and defender. They differ in the point of time. He says that it occurred for the first time about a fortnight after he came to the house, and he gives the details with considerable realism. According to him the advances came from the pursuer. His story may be true or may be false; it is hard to say, because it is impossible to place much reliance on either of the parties. It is not clear, however, that he had any inducement to misrepresent the matter. She post-dates the first connection until April 1902, and I think she gives no particulars, but whichever way it happened the result was that she became pregnant. Perhaps the fact is of more than ordinary importance, because I think there would have been no marriage or marriage ceremony had there been no pregnancy, at least not at that time. She first suspected her condition in July 1902, and he and she agreed to consult a doctor. They called on Dr Howie, the object of their visit being to determine the question of pregnancy. Dr Howie was unable to give a decided opinion, but shortly afterwards

the pregnancy became certain. The only intelligible reason for this consultation is that they intended, if pregnancy were established, to be married or to go through a ceremony of marriage.

"At that time nothing was done, but the question of marriage or of a marriage ceremony was frequently spoken about, and the next significant step was that in or about October 1902 the defender consulted Mr Watson, a writer. This consultation is an important fact in the case, which the defender has considerable difficulty in explaining. He apparently suggests that he consulted Mr Watson in order to ascertain how it would be possible to go through the form of a marriage so that it might appear to the pursuer's parents that they were married while it would not be binding. It is difficult to accept this view, and Mr Watson depones that he did not so understand the matter. He says that the defender asked what he should do to carry through a marriage, and that he (Mr Watson) advised him. He (the defender) made it perfectly clear (Mr Watson says) that he was desirous of going through a marriage, and was in earnest about it. Mr Watson explained to him how a marriage might be carried out under the Act 19 and 20 Vict c. 96. Mr Watson, as he says, told the parties that registration was not essential to marriage, but was important with a view to preservation of proof of the marriage, which depended on consent alone. But I am not certain that he succeeded in making that distinction clearly intelligible to the defender. Certainly the defender professes the most confident belief, and repeats it frequently, that no marriage could be binding without the intervention of a magistrate or minister. He seemed to regard any other law as unthinkable. If he really thought so, and possibly he did, that was his error as to the law, and I do not see how he can escape the consequence of the error.

"Being thus informed, he and the pursuer resumed consideration of the question of a marriage ceremony, and I now come to two very perplexing and singular documents, both of which bear the date 17th November 1902—a date which there is no reason to question—that is to say, they bear a date two days before the acknowledgment on which the pursuer founds.

"Nothing can be imagined more strange than the evidence of the parties about these two documents, and whether they are talking falsely or only mere nonsense it is not easy to say. They are both in the handwriting of the pursuer, and they have substantially the same meaning so far as that is discoverable. The pursuer says that they were written to the dictation of the defender, that there were several such documents (so she seems to say), but she signed only two, and these she signed reluctantly and only because the defender, as she thought, would not sign the declaration of marriage unless she signed these other documents. Why she signed two documents she could not tell.

"The defender's evidence is still more singular. He swears that the second document was written because the first looked like a letter, and the second was written on what he called legal paper.

"Perhaps it is unnecessary to complicate the case with two unintelligible documents, and I think the former may be held to be superseded by the latter; it was so according to the defender. That document (and the former also) in speaking of 'this marriage' plainly refers to the marriage or ceremony about to be performed. The more important points in this letter seem to be these:—*First*, there is an acknowledgment by the pursuer that as the defender was going 'through this' (that is, the marriage) 'to save my good name, in return I now give you this;' then follows an obligation by her 'not to claim as your wife any money, property, or whatsoever you may have or receive either for myself or my children.' The document is signed by the pursuer, and is followed by the perplexing postcript—'I do hereby promise that this will be burned unseen by any eyes but mine on the death of the writer if she has been faithful.'

"The body of this singular document no doubt furnishes a reason for the acknowledgment different from but quite consistent with marriage, and asserts that there had been no previous promise of marriage, but it is quite consistent with present acknowledgment, and indeed I think that according to its true construction it imports on his part an acknowledgment of marriage while he takes care to protect his money.

"The postscript is the most singular of the whole. It was also written by the pursuer, but it is the defender who speaks in it, and I take special note of the last words, which are that the document is to be burned on the pursuer's death if she has been faithful. Why it was to be burned is not obvious, but these words are important, and they can hardly be read as having any other meaning than if she had been faithful as a wife to her husband.

"The documents are, however, perhaps too incoherent and eccentric to be pressed very far either way. But I consider that they favour the pursuer's case of acknowledgment of marriage rather than the defence.

"I understood that these documents were left in the hands of the defender, and that he produced them in process, and has founded on them with the view of showing that he did not intend marriage by the declaration stating that he did.

"On 19th November the declaration of marriage to which reference has already been made was signed in Mr Watson's office. I have already referred to that document at length, and have only to add that I am unable to see that its force is weakened by the two singular writings which preceded it. It may possibly be suggested that it is an inchoate and incomplete deed, seeing it is a portion of a petition to the Sheriff which was never presented. But Mr Watson explained to the parties that it was sufficient to make mar-

riage without registration, and I am not aware of any authority to the contrary.

"I think there is very little more to be said. There is very little more evidence. The case rests mainly on these three documents, and the rest of the evidence seems neither to add to nor detract from their effect. There was little change in the mode of life of the pursuer and defender after their declarator of marriage. If the marriage was not completed by the declaration, there is no room for the contention for marriage at any subsequent time. No evidence has been led that the declaration of marriage was ever exhibited to the pursuer's parents, and neither of them gave evidence, which was perhaps not unnatural. But in truth the case has been practically left to depend on the three documents which I have considered, and I cannot resist the conclusion that they establish marriage. The defender's case seems to be rested on the mere idea that a man is not, in this question of marriage, bound to keep his word unless the marriage have the sanction of a magistrate or of a minister. That is not so. There is evidence that the defender was fully informed of his mistake, and he offers nothing but his own assertion in support of his averment.

"I am far from saying that the case is an easy one. I have found it very much the reverse, and it is not without great difficulty and misgiving that I hold that the pursuer has established her right to a judgment of declarator. There are other conclusions in the summons, but they were not argued, and if a judgment is desired on them they will require to be debated.

"No doubt the fact that the defender was a Spaniard has to be taken into consideration. It appeared to me that he understands the language well, but I do not doubt that he may not fully appreciate the customs of this country, in particular in regard to irregular marriages, but in coming to a conclusion in favour of the pursuer I have endeavoured to keep in view the disadvantage of the situation—of the defender as a foreigner."

The defender reclaimed, and argued—The mere signing of an acknowledgment of marriage by two persons was not *per se* sufficient to constitute marriage. It must be accompanied by a real or serious intention, and in an action for declarator of marriage the onus of proving such intention lay upon the pursuer—*M'Innes* v. *More*, June 27, 1782, 2 Pat. App. 598; *Kello* v. *Taylor*, February 16, 1787, 3 Pat. App. 56; *Lockyer* v. *Sinclair*, March 3, 1846, 8 D. 582. The pursuer here had entirely failed to prove intention—the two declarations signed by the pursuer on 17th November, the absence of any evidence of change in the mode of life of the parties, or that the pursuer was ever treated by the defender as his wife, taken along with the circumstances which led up to the signing of the acknowledgment, formed conclusive proof that the parties merely intended to go through a form which might be useful to the pursuer in her relation with her parents and enable her to retain her good name.

Argued for the respondent—There was nothing in the documents of 17th November to prove that the parties did not intend marriage at the time of signing the acknowledgment. The word "marriage" occurred in them, and their purpose evidently was to form a kind of antenuptial marriage-contract. A mere form of marriage would be useless to the pursuer and could not have been intended by her. The facts of the case, the consultation with the doctor and lawyer, and the solemn declaration in the lawyer's office, all proved that at the time both parties intended marriage. Provided, however, that there was intention on the part of the pursuer, its absence on the defender's part was immaterial.

At advising—

LORD JUSTICE-CLERK—I am of opinion that the judgment of the Lord Ordinary ought to be adhered to.

While the document constituting on the face of it an interchange of matrimonial consent cannot be accepted as conclusive proof of a marriage without evidence of its being a true interchange of matrimonial consent, it is a contract which if shown to have been *bona fide* and with intention entered into will establish a marriage by the law of Scotland.

The proof satisfies me that the pursuer entered into the contract with the intention of becoming the wife of the defender, and that in doing so she was in the belief, induced by the conduct of the defender, that he intended to do the same. Whether he really so intended at first, and afterwards went back upon it, or whether he fraudulently led the pursuer to believe that he so intended, does not I think matter as regards the result. If she truly intended marriage, and the defender led her to believe that he was really marrying her, then he cannot now draw back. He cannot be allowed to say that he did not intend what he held himself out as intending.

LORD YOUNG concurred.

LORD TRAYNER—The Lord Ordinary says that he has found this an exceptionally difficult case, and I agree with him, but after consideration of the evidence with the aid of the argument addressed to us I have come to the conclusion that the interlocutor should be affirmed. The impression left on my mind by the evidence is that the pursuer, in the condition in which she found herself owing to her intercourse with the defender, was very anxious both for the protection of her own good name and for the sake of the child to which she was going to give birth, to become the wife of the defender, and that she urged this desire upon him. He consented to go through the form or ceremony of marriage which took place. I think the two singular documents to which the Lord Ordinary has referred may be explained on this view—which is the view I take of the evidence—that the defender intended to go through a form which would satisfy the pursuer's wishes but which would not bind him. He did not intend to marry the pursuer, but to go through

a form short of marriage which he thought would effect the objects which the pursuer had in view. On the other hand I am quite satisfied that the defender led the pursuer to believe that he was marrying her, and that she honestly believed him, and understood that she was being married. She intended marriage, and nothing short of that. If that is so, then, as your Lordship and the Lord Ordinary have said, it makes no difference that the defender did not intend marriage, it being the fact that he led the pursuer to believe he did.

LORD MONCREIFF—I agree with the Lord Ordinary. I hold it to be distinctly proved that what passed between the pursuer and the defender on 19th November 1902 in Mr Watson's office constituted a valid marriage. It is distinctly proved that the pursuer so understood and intended. And in that view it is immaterial, if the defender in his own mind resolved not to be bound by the contract, because that mental reservation, if it existed, was not communicated to the pursuer or to any of the parties present on that occasion—Fraser on Husband and Wife, p. 436, *et seq.* I am by no means satisfied that the defender did not intend to marry the pursuer; he had compromised her, and she seems to have had sufficient influence with him to induce him to make this reparation. Again, it may be that after the marriage the defender thought that he saw his way to back out of the contract by not registering it, but that does not affect the question.

My opinion is that the defender knew quite well what he was about, and that he quite understood the explanations given by Mr Watson as to the law of the matter. His evidence and line of defence show considerable cunning, and on the whole matter I think the defence is a shabby and unsuccessful attempt to back out of the contract which he had deliberately entered into.

The Court adhered.

Counsel for the Pursuer and Respondent —Hunter — Spens. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Defender and Reclaimer —Salvesen, K.C.—J. A. Christie. Agents —St Clair Swanson & Manson, W.S.

HOUSE OF LORDS.

Thursday, November 17.

(Before the Lord Chancellor (Halsbury), Lords Davey and Robertson.)

CASTANEDA *v.* CLYDEBANK ENGINEERING AND SHIPBUILDING COMPANY, LIMITED.

(In the Court of Session June 17, 1903, 5 F. 1016, 40 S.L.R. 713.)

Contract—Breach of Contract—Damages for Late Delivery of Ship — Penalty or Liquidate Damages.

While endeavouring to suppress the insurrection in Cuba, and apprehending the intervention of the United States, the Spanish Government by two contracts, dated in June and December 1896, contracted with a Clyde shipbuilding firm to build four torpedo boat destroyers at prices under the first conract of £67,180, and under the second of £65,650, for each vessel, to be delivered within periods varying from six and a-half to seven and three-fourth months from the date of the contract. A clause in each of the contracts provided that "the penalty for later delivery shall be at the rate of £500 per week for each vessel." The vessels were delivered forty-six, forty-one, twenty-eight, and twenty weeks late respectively.

In an action of damages for late delivery brought in 1900 by the Spanish Government against the shipbuilders, *held* (*aff.* the judgment of the Second Division) that as the sum stipulated to be paid in the event of late delivery applied to one particular term of the contract, and not to the contract generally, and was proportioned in amount according to the extent of the breach, it was *prima facie* liquidate damages and not penalty, and as the defenders had not shown that the amount was in the circumstances exorbitant or unconscionable, the pursuers were entitled to the full sum of £500 per week as damages.

Personal Objection—Waiver—Payment of Price of Ship without Reservation of Claim for Damages for Late Delivery.

Circumstances in which *held* (*aff.* the judgment of the Second Division) that the acceptance by the purchaser of delivery of a ship after the date stipulated for in the contract, and the payment by him of the last instalment of the price without reservation, did not imply waiver of his right to insist on a clause in the contract entitling him to a specified sum as damages for late delivery.

This case is reported *ante ut supra.*

The defenders the Clydebank Engineering and Shipbuilding Company, Limited, appealed to the House of Lords.