to afford the workman, when he is dismissed, reasonable facilities for leaving the place of employment, and that if the servant is injured while availing himself of those facilities the master may be liable," the conclusion in this case seems to me to be a very simple one. I see no reason why we should disturb the conclusion come to as a point of fact by the County Court Judge. It may be that there is a certain amount of inference in his finding as to the facts, but that does not prevent us, as long as the learned County Court Judge had evidence on which to act and has not misdirected himself on points of law, from accepting what he has said in accordance with the principle which has been laid down frequently in this House. Of course, if *Cook* v. *Owners of Ship "Montreal"* had really governed the present case, then the learned County Court Judge must be taken to have misdirected himself, but I have already indicated to your Lordships why in my opinion that is not so. Therefore I am of opinion that the learned County Court Judge was right and that the Court of Appeal were wrong in disturbing his finding, and I move that the judgment of the Court of Appeal be reversed and that of the County Court Judge restored. The appellant must have his costs here and in the Court of Appeal taxed according to the usual rule in the case of an appeal *in forma pauperis*.

LORD SHAW—I concur.

LORD MOULTON—This case is, in my view, eminently a border-line case. I do not think that there is any doubt as to the principles of law which we ought to apply. They may be said to be two in number—one is that which was laid down in *Kitchenham* v. *Owners of "Johannesburg"*, [1911] A.C. 417, 49 S.L.R. 626, and the other is that which was laid down by Buckley, L.J., and has been referred to by the Lord Chancellor, namely, that employers are bound to give reasonable means of access and exit to their workmen. If I thought that the County Court Judge was of opinion that the plank alone was a reasonable mode of access and exit for the workman I should have thought that it was not our business to disturb his finding, and that this appeal must fail, but on examining his findings carefully I think that he thought that the ladder on which the plank landed the workman was not such a safe portion of the quay that the responsibility of the employers ceased when they had put the workman there. Nothing that I say must be supposed to mean that I think that under no circumstances would it be sufficient to land a sailor on one of these vertical ladders fixed to the sides of docks, with which we are well acquainted; to a sailor that ought to be almost as safe as walking on the highway. But I do not think that it necessarily follows that it is so. Certainly if the person had not been a sailor I should have thought that the probability was that it was not so, but in this case I see no reason for thinking that the learned County Court Judge misdirected himself in finding that the ladder was part of the access to the vessel in the sense of being there, for the sufficiency and safety of which the employers were liable. If that be so, there is an end of the case if the accident occurred before he was outside the scope of his employment, and therefore I agree with the motion which has been made by the Lord Chancellor that this appeal should be allowed.

Their Lordships reversed the judgment appealed from, with expenses.

Counsel for the Appellant — Knockes— Dale. Agents—E. E. Baron Reed, London— C. P. Clarke & Company, Taunton, Solicitors.

Counsel for the Respondents—Neilson— Langton. Agents—Holman, Birdwood, & Company, Solicitors.

HOUSE OF LORDS.

Wednesday, July 1, 1914.

(Before Lords Dunedin, Atkinson, Parker, and Parmoor.)

DUNLOP PNEUMATIC TYRE COMPANY *v.* NEW GARAGE AND MOTOR COMPANY.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Contract—Breach—Measure of Damages—Liquidated Damages or Penalty.

Where there was an agreement by retailers to sell a manufacturer's goods under certain restrictions as to price, &c., and pay £5 "by way of liquidated damages and not as a penalty" for each article sold in breach of the agreement, *held* that the stipulation was for liquidated damages.

The assertion in the agreement that a sum is payable as liquidated damages and not as a penalty is not in itself conclusive.

The naming of a single sum as compensation for different breaches differing in the damage they are likely to inflict creates a presumption that that sum is to be taken as a penalty, but that presumption may be rebutted, *e.g.*, as here, when the damage though varying in degree is such that accurate preestimation is impossible.

Their Lordships' considered judgment, from which the *facts* appear, was delivered as follows:—

LORD DUNEDIN—The appellants through an agent entered into a contract with the respondents under which they supplied them with their goods, which consisted mainly of motor tyres, covers, and tubes. By this contract, in respect of certain concessions as to discounts, the respondents bound themselves not to do several things, which may be shortly set forth as follows: —Not to tamper with the manufacturers' marks, not to sell to any private customer or co-operative society at prices less than the current price list issued by the Dunlop Company, not to supply to persons whose supplies the Dunlop Company had decided

to suspend, not to exhibit or to export without the Dunlop Company's assent. Finally the agreement concluded (clause 5)—"We agree to pay to the Dunlop Company the sum of £5 for each and every tyre, cover, or tube sold or offered in breach of this agreement, as and by way of liquidated damages and not as a penalty."

The appellants having discovered that the respondents had sold covers and tubes at prices under the current list price raised action and demanded damages. The case was tried and the breach in fact held proved. An inquiry was directed before the master as to damages. The master inquired and assessed the damages at £250, adding this explanation—"I find that it was left open to me to decide whether the £5 fixed in the agreement was penalty or liquidated damages. I find that it was liquidated damages."

The respondents appealed to the Court of Appeal, when the majority of that Court—Vaughan Williams and Swinfen Eady, L.JJ.—held (Kennedy, L.J., dissenting) that the said sum of £5 was a penalty, and entered judgment for the plaintiffs for the sum of £2 as nominal damages. Appeal from that decision is now before your Lordships' House.

We had the benefit of a full and satisfactory argument, and a citation of the very numerous cases which have been decided on this branch of the law. The matter has been handled, and at a recent date, in the courts of highest resort. I particularly refer to *Clydebank Engineering Company* v. *Castaneda*, [1905] A.C. 6, 7 F. (H.L.) 77, 42 S.L.R. 74, in your Lordships' House, and the cases of *Public Works Commissioners* v. *Hills*, [1906] A.C. 368, 43 S.L.R. 894, and *Webster* v. *Bosanquet*, [1912] A.C. 394, 49 S.L.R. 1023, in the Privy Council. In all of these cases many of the previous cases were considered. In view of that fact and of the number of the authorities available, I do not think it advisable to attempt any detailed review of the various cases, but I shall content myself with stating succinctly the various propositions which I think are deducible from the decisions which rank as authoritative:—

1. Though the parties to a contract who use the words penalty or liquidated damages may *prima facie* be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found *passim* in nearly every case.

2. The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage—*Clydebank Engineering Company* v. *Castaneda*.

3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach—*Public Works Commissioners* v. *Hills* and *Webster* v. *Bosanquet*.

4. To assist this task of construction various tests have been suggested, which, if applicable to the case under consideration, may prove helpful or even conclusive. Such are—(*a*) It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss which could conceivably be proved to have followed from the breach—illustration given by Lord Halsbury in the *Clydebank* case. (*b*) It will be held to be penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid—*Kemble* v. *Farren*, 6 Bing. 141. This, though one of the most ancient instances, is truly a corollary to the last test. Whether it had its historical origin in the doctrine of the common law that when A promised to pay B a sum of money on a certain day and did not do so, B could only recover the sum with, in certain cases, interest, but could never recover further damages for non-timeous payment, or whether it was a survival of the time when equity reformed unconscionable bargains merely because they were unconscionable—a subject which much exercised Jessel, M.R., in *Wallis* v. *Smith*, 21 Ch. D. 243—is probably more interesting than material. (*c*) There is a presumption (but no more) that it is penalty 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 trifling damage"—Lord Watson in *Lord Elphinstone* v. *Monkland Iron and Coal Company*, 11 A.C. 332, 13 R. (H.L.) 98, 24 S.L.R. 323. On the other hand—(*d*) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties—*Clydebank* case, Lord Halsbury; *Webster* v. *Bosanquet*, Lord Mersey.

Turning now to the facts of the case, it is evident that the damage apprehended by the appellants owing to the breaking of the agreement was an indirect and not a direct damage. So long as they got their price from the respondents for each article sold it could not matter to them directly what the respondents did with it. Indirectly it did. Accordingly the agreement is headed "Price Maintainance Agreement," and the way in which the appellants would be damaged if prices were cut was clearly explained in evidence, and no successful attempt was made to controvert that evidence. But though damages as a whole from such a practice would be certain, yet damages from any one sale would be impossible to forecast. It is just, therefore, one of those cases where it seems quite reasonable for parties to contract that they should estimate that damage at a certain figure, and provided that the figure is not extrava-

gant there would seem no reason to suspect that it is not truly a bargain to assess damages but rather a penalty to be held *in terrorem*.

The argument of the respondents was really based on two heads. They overpressed, in my judgment, the dictum of Lord Watson in *Lord Elphinstone's* case, reading it as if he said that the matter was conclusive, instead of saying, as he did, that it raised a presumption, and they relied strongly on the case of *Willson* v. *Love*, [1896] 1 Q.B. 626.

Now, in the first place, I have considerable doubt whether the stipulated payment here can fairly be said to deal with the breaches, "some of which"—I am quoting Lord Watson's words—"may occasion serious and others but trifling damage." As a mere matter of construction I doubt whether clause 5 applies to anything but sales below price. But I will assume that it does. None the less the mischief, as I have already pointed out, is an indirect mischief, and I see no data on which, as a matter of construction, I could settle in my own mind that the indirect damage from selling a cover would differ in magnitude from the indirect damage from selling a tube, or that the indirect damage from a cutting-price sale would differ from the indirect damage from supply at full price to a hostile because prohibited agent. You cannot weigh such things in a chemical balance. The character of the agricultural land which was ruined by slag heaps in *Elphinstone's* case was not all the same, but no objection was raised by Lord Watson to applying an overhead rate per acre, the sum not being in itself unconscionable.

I think that *Elphinstone's* case, or rather the dicta in it, do go this length, that if there are various breaches to which one indiscriminate sum to be paid in breach is applied, then the strength of the claim must be taken at its weakest link. If you can see clearly that the loss on one particular breach could never amount to the stipulated sum, then you may come to the conclusion that the sum is a penalty, but further than this it does not go. So, for the reasons already stated, I do not think that the present case forms an instance of what I have just expressed.

As regards *Willson's* case, I do not think it material to consider whether it was well decided on the facts, for it was decided on the view of the facts that the manurial value of straw and of hay were known ascertainable quantities as at the time of the bargain, and radically different, so that the damage resulting from the want of one could never be the same as the damage resulting from the want of the other.

Added to that the parties there had said penalty, and the effort was to make out that they really meant liquidated damages; and lastly, if my view of the facts in the present case is correct, then Rigby, L.J., would have agreed with me, for the last words of his judgment are as follows—"On the other hand it is stated that when the damages caused by a breach of contract are incapable of being ascertained, the sum made by the contract payable on such a breach is to be regarded as liquidated damages. The question arises, what is meant in this statement by the expression 'incapable of being ascertained.' In their proper sense the words appear to refer to a case where no rule or measure of damages is available for the guidance of a jury as to the amount of damages, and the judge would have to tell them they must fix the amount as best they can." To arrive at the indirect damage in this case, supposing no sum had been stipulated, that is just what a judge would in my opinion have had to do.

On the whole matter, therefore, I go with the opinion of Kennedy, L.J., and I move your Lordships that the appeal be allowed and judgment given for the sum as brought out by the master, the appellants to have their costs in this House and in the courts below.

LORD ATKINSON—The action out of which this appeal arises was brought upon a contract entered into between the appellants, through the agency of Messrs Pellant Limited, and the respondents, claiming amongst other things to recover a sum of £5 in respect of each of the breaches of this contract complained of. The sole question for decision on this appeal is whether the sum of £5 is a penalty or liquidated damages.

The appellants are extensive and well-known manufacturers of motor tyres, covers, and tubes—a trade in which there is keen competition. They have no patents protecting their manufacture. Success over their competitors depends on the reputation acquired for their products, and largely upon the efficiency of the organisation of their business. Ninety-nine per cent. of their output in this class of goods is sold through what one of their managers, who was examined as a witness, described as their distributing organisation. It consists in this, that they sell to motor-car manufacturers, persons called factors who re-sell to retail agents, and retail agents themselves, and that all these latter sell to the public, the users of the goods.

The appellants produce price lists of these goods of theirs varying from time to time. They invariably sell at these prices to the members of their distributing organisation under agreements similar to that sued upon, giving, however, discount and rebates at varying rates. These agreements are styled price-maintenance agreements, and their main purpose obviously is to prevent the sale to the public, the users either directly or indirectly of the goods which the appellants manufacture at prices less than those named in their price lists. The result of this is that competition having reduced these prices to the lowest remunerative scale, the agent secures his remuneration by selling at the prices at which he buys. If he sells at lower prices than these the loss comes out of his discount and rebates, his own profits. The manager in his evidence explains elaborately the dislocation of the distributing organisation of the appellants, and the injury to their trade which would ensue, from the sale by one or more of their agents

or factors of their goods at prices less than those named in these lists. He pointed out that if the business of one of their agents in any particular place was undercut by such sales the agent would, owing to the diminution of his remuneration, most probably throw up his agency and become the agent of a competitor, thus leaving the field open to the rivals of the appellants; that it was essential for their trade that their wares should be obtainable all over the country at as many places as possible; that though the consequential injury to their trade by this undercutting, would, or might, be very serious, it would be very difficult to prove in evidence the precise amount of their loss in money; that considering all these things, the appellant company fixed £5, the sum mentioned in the agreement, as a fair and reasonable sum for liquidated damage in respect of the breaches specified. This evidence was uncontradicted.

In a good deal of the argument which has been addressed to your Lordships on behalf of the respondents, the true object of this price-maintenance agreement and the nature of the consequential injury to the plaintiffs' trade flowing from the breaches of it have been somewhat lost sight of. It has been urged that as the sum of £5 becomes payable on the sale of even one tube at a shilling less than the listed price, and as it was impossible that the appellant company should lose that sum on such a transaction, the sum fixed must be a penalty. In the sense of direct and immediate loss the appellants lose nothing by such a sale. It is the agent or dealer who loses by selling at a price less than that at which he buys, but the appellants have to look at their trade *in globo*, and to prevent the setting up, in reference to all their goods anywhere and everywhere, a system of injurious undercutting.

The object of the appellants in making this agreement, if the substance and reality of the thing and the real nature of the transaction be looked at, would appear to be a single one, namely, to prevent the disorganisation of their trading system and the consequent injury to their trade in many directions. The means of effecting this is by keeping up their price to the public to the level of their price-list, this last being secured by contracting that a sum of £5 shall be paid for every one of the three classes of articles named sold or offered for sale at prices below those named on the list. The very fact that this sum is to be paid if a tyre cover or tube be merely offered for sale, though not sold, shows that it was the consequential injury to their trade due to undercutting which they had in view. They had an obvious interest in preventing this undercutting, and on the evidence it would appear to me impossible to say that their interest was incommensurate with the sum which it was agreed to pay.

Their object is akin in some respects to that which a trader has in binding a former employee not to set up or carry on a rival business within a certain area. The trader's object is to prevent competition, and especially to prevent his old customers whom the employee knows from being enticed away from him. If one takes, for example, the case of a plumber, the carrying on of the trade of a plumber may mean anything from mending gas-pipes for a few pence apiece up to doing all the plumbing work of a big hotel. If the employee should mend a hundred of such pipes for twenty old customers at 6d. apiece, for which the employer would charge 1s. apiece, could it possibly be contended that the trader's loss was only a hundred sixpences—£2, 10s.? It is, I think, quite misleading to concentrate one's attention upon the particular act or acts by which in such cases as this the rivalry in trade is set up and the repute acquired by the former employee that he works cheaper and charges less than his old master, and to lose sight of the risk to the latter that old customers once tempted to leave him may never return to deal with him, or that business which might otherwise have come to him may be captured by his rival. The consequential injuries to the trader's business arising from each breach by the employee of his covenant cannot be measured by the direct loss in a monetary point of view on the particular transaction involved in the breach. An old customer may be as effectively enticed away from him through the medium of a 10s. job done at a cheap rate as by a £50 job done at a cheap rate, or a reputation for cheap workmanship may be acquired possibly as effectively in one case as in the other.

In many cases a person may contract to do or abstain from doing an act which is a composite act, the product or result of almost numberless other acts. For instance, if one should contract with a builder to build a house of the best materials and with the most skilled workmanship, and to hand over possession of the same completed on a certain day for £1000, £500 to be paid if the agreement was not performed, every firegrate set which on completion would be found to be of bad material, every door which would be then found to have been defectively hung, every cubic foot of masonry which would be found to have been badly and improperly built, would involve a breach of the agreement, but it would be quite illegitimate to thus disintegrate the obligation to do what the parties regarded as a single whole into a number of obligations to do a number of things of varying importance, and treat the £500 as *prima facie* a penalty because these individual breaches of the agreement did not cause in many instances any injury commensurate with that sum. This is the very ground, or one of the grounds, upon which Lord Herschell rests his judgment in *Lord Elphinstone* v. *Monkland Iron and Coal Company*, 24 S.L.R. 323. He said—"The agreement does not provide for the payment of a 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."

In the present case the agreement of the parties, in effect though possibly not in form, did little if anything more than im-

pose a single obligation, namely, to sell or endeavour to sell the goods of the appellants at the prices named in their lists, though of course as they sold different kinds of goods this single obligation might be violated in many ways. Much reliance was placed by the respondents on the well-known passage in the judgment of Lord Watson in the last-mentioned case, to the effect that "where a single lump sum is made payable by way of compensation, on the occurrence of one or more of several events, some of which may occasion serious and others but trifling damage, the presumption is that the partner intended the sum to be penal and subject to modification. It is quite true that, as mentioned by Swinfen Eady, L.J., Lord Esher in *Willson* v. *Love*, [1896] 1 Q.B. 626, said that he thought that this passage meant the same thing as if it ran "some of which occasion serious and others less serious damage." With all respect, this alteration would mean that the damage resulting from each event should be uniform in amount—a construction which would mean that the stipulated compensation must presumably be a penalty in almost every conceivable case. Moreover, Lord Watson's statement of the law as it stands was approved by Lord Davey in *Clydebank Engineering Company* v. *Castaneda*, 42 S.L.R. 74, and in *Webster* v. *Bosanquet*, 43 S.L.R. 894, without any qualification of that kind.

In this last-mentioned case, as in the present, the contract provided that the amount specified should be paid as "liquidated damages and not as a penalty." The covenant upon which the matter in controversy turned was contained in a deed made on the dissolution of a partnership between two partners, the plaintiff and defendant, and it provided that the defendant should not during a certain period be at liberty to sell the whole or part of the tea crops of two estates named to any person other than the plaintiff without first offering to him the option of buying the same, and further provided that on breach of this covenant by the defendant he should pay to the petitioner the sum of £500 as "liquidated damages and not as a penalty."

Now it will be observed that this covenant would be violated by the sale of any appreciable part, in a business point of view, of the crops of either of these estates, no matter how relatively small that part might be compared with the entire crop of either. It is also clear that the object of the parties when they executed the deed was to secure to the plaintiff the option of buying the entire crops of both estates, and that when they fixed this sum of £500 they were thinking of the loss which the plaintiff might sustain by the loss of that option. The amount of tea sold by the defendant in breach of the covenant was considerable—nearly 54,000 lb. It was laid down that in determining whether a sum contracted to be paid is liquidated damages or a penalty one is to consider whether the contract, whatever its language, would at the time it was entered into have been unconscionable and extravagant, and one which no court ought to allow to be enforced if this sum were to be treated as liquidated damages, having regard to any possible amount of damages conceived to have been in the contemplation of the parties when they made the contract. Lord Mersey, in delivering the judgment of the Board, said—"When making the contract it was impossible to foresee the extent of the injury which might be sustained by the plaintiff if sales of tea were made without his consent. That such sales might seriously affect his business was obvious, and the very uncertainty of the loss to arise made it all the more reasonable for the parties to agree beforehand as to what the damages should be. And furthermore, it is well known that damages of this kind, though very real, may be difficult of proof, and that the proof may entail considerable expense." Those remarks are, having regard to the evidence in the present case, particularly applicable to it.

In *Kemble* v. *Farren*, 6 Bing. 141, Tindal, C.J., said—"We see nothing illegal or unreasonable in the parties in their mutual agreement settling the amount of damages, uncertain in their nature, at any sum upon which they may agree. In many cases an agreement fixes that which is almost impossible to be accurately ascertained, and in all cases it saves the expense and difficulty of bringing witnesses to that point."

Therefore although it may be true, as laid down by Lord Watson, that a presumption is raised in favour of a penalty where a single lump sum is to be paid by way of compensation in respect of many different events, some occasioning serious and some trifling damage, it seems to me that this presumption is rebutted by the very fact that the damage caused by each and every one of those events, however varying in importance, may be of such an uncertain nature that it cannot be accurately ascertained. The damages have been proved to be of that nature in the present case, and the very fact that they are so renders it all the more probable that the sum of £5 was not stipulated for merely *in terrorem*, but was really and genuinely "a pre-estimate of the appellants' probable or possible interest in the due performance of this contract."

Swinfen Eady, L.J., holds that clause No. 5 of the agreement applies to the first part of clause 3, the supplying of these goods to persons on the appellants' black list, as it was styled. I confess that this seems to me a very very doubtful construction. What is prohibited by the second clause is "the sale or offering for sale of motor tyres, cases, or tubes, at prices less than those in the price list." What is dealt with in clause 5 is a sale or offering for sale of these particular kinds of goods in breach of the agreement. What is dealt with in the first part of clause 3 is the supplying without consent of any such goods to these black-listed agents at any price whatever; but even if Swinfen Eady, L.J., should be right in this it would not lead me to a conclusion different from that to which I have come.

The appellants, like the respondents, are most probably good business men. Neither of them contemplated, presumably, the black-listing of these agents without ade-

quate trade reasons. Nothing was more natural than that the appellants should seek to prevent the supply of their goods indirectly to persons to whom they would not supply them directly. Considerable injury to the appellants' trade interests might obviously be done by putting such persons in a position to undercut their prices, and derange their supply organisation, and nothing conceivable could be more difficult than to prove by evidence, or to estimate precisely in money, the exact amount of damages which might be caused by such an injury. The passage in the judgment of Tindal, C.J., above quoted, applies directly to such state of things.

I entirely concur with Kennedy, L.J., in his criticism of the agreement. I agree with him that on the face of it, on this point of liquidated damages, it contains nothing unreasonable, unconscionable, or extravagant; and I further think that the same may be said of the real transaction between the parties if its substance be regarded, reasonably.

For these reasons, I think that the judgment of Kennedy, L.J., was right, that the judgment appealed from was wrong and should be reversed, and the judgment of Phillimore, J., be restored, and the appeal allowed with costs.

LORD PARKER — Where the damages which may arise out of a breach of contract are in their nature uncertain, the law permits the parties to agree beforehand the amount to be paid on such breach. Whether the parties have so agreed or whether the sum agreed to be paid on the breach is really a penalty must depend on the circumstances of each particular case. There are, however, certain general considerations which have to be borne in mind in determining the question. If, for example, the sum agreed to be paid is in excess of any actual damage which can possibly, or even probably, arise from the breach, the possibility of the parties having made a *bona fide* pre-estimate of damage has always been held to be excluded, and it is the same if they have stipulated for the payment of a larger sum in the event of breach of an agreement for the payment of a smaller sum.

The really difficult cases are those in which the Court has to consider what presumptions or inferences arise from the number or nature of the stipulations on breach of which it is agreed that the sum in question should be paid. In the case of a single stipulation, which if broken at all can be broken once only, and in one way only, such as a covenant not to reveal a trade secret to a rival trader, there can be no inference or presumption that the sum payable on breach is not in the nature of agreed damages, and if the parties have referred to it as agreed or liquidated damages, no reason why the Court should not treat it as such. The question is more complicated when the stipulation, though still a single stipulation, is capable of being broken more than once, and more ways than one, such as a stipulation not to solicit the customers of a firm. A solicitation which is unsuccessful can give rise to only nominal damages, and even if it be successful the actual damage may vary greatly according to the value of the custom which is thereby directly or indirectly lost to the firm. Still, whatever damage there is must be the same in kind for every possible breach, and the fact that it may vary in amount for each particular breach has never been held to raise any presumption or inference that the sum agreed to be paid is a penalty, at any rate in cases where the parties have referred to it as agreed or liquidated damages.

The question becomes still more complicated where it is agreed to pay a single sum on the breach of a number of stipulations of varying importance. It is said that in such a case an inference or presumption is raised against the sum in question being in the nature of agreed damages, even though the parties have referred to it as such. In this respect I think that a distinction should be drawn between cases in which the damage likely to accrue from each stipulation is the same in kind, and cases in which the damage likely to accrue varies in kind with each stipulation. Cases of the former class seem to me to be completely analogous to those of a single stipulation, which can be broken in various ways and with varying damages; but probably it would be difficult for the Court to hold that the parties had pre-estimated the damage if they have referred to the sum payable as a penalty.

In cases, however, of the latter class I am inclined to think that the *prima facie* presumption or inference is against the parties having pre-estimated the damage, even though the sum payable is referred to as agreed or liquidated damages. The damage likely to accrue from breaches of the various stipulations being in kind different, a separate pre-estimate in the case of each stipulation would be necessary, and it would not be very likely that the same result would be arrived at in respect of each kind of damage. In my opinion, however, any such presumption or inference would be *prima facie* only and capable of being displaced by other considerations. Supposing it were recited in the agreement that the parties had estimated the probable damage from a breach of one stipulation at from £5 to £15, and the probable damage from a breach of another stipulation at from £2 to £12, and had agreed on a sum of £8 as a reasonable sum to be paid on the breach of either stipulation, I cannot think that the Court would refuse to give effect to the bargain between the parties.

In the present case, even accepting the construction of the contract which makes clause 5 apply not only to a sale or offer contrary to the provisions of clause 2 but also to one contrary to the provisions of clause 3, I think it reasonably clear that the damage likely to accrue from the breach of every stipulation to which clause 5 applies is the same in kind. Such damage will in every case consist in the disturbance or derangement of the system of distribution by means of which the appellants' goods reach the ultimate consumer. The parties

by their contract agree that the sum payable on breach of any such stipulation is to be paid by way of damages and not by way of penalty, and I can see nothing to justify the Court in refusing to give effect to this bargain.

LORD PARMOOR — On the 7th April 1911 Messrs A. Pellant Limited (acting as agents for the appellants) entered into a price-maintenance agreement with the respondents. The question to be determined is the construction of this agreement.

In the fifth clause the respondents agreed to pay to the appellants "the sum of £5 for each and every tyre, cover, or tube, sold or offered in breach of this agreement, as and by way of liquidated damages and not as a penalty." There has been difference of opinion whether the sum of £5 is applicable only to a breach of the conditions contained in paragraph 2 of the agreement, or extends to a breach of the conditions contained in this paragraph.

Paragraph 2 contains an undertaking by the respondents that they "will not sell or offer any Dunlop motor tyres, covers, or tubes to any private customers or to any co-operative society at prices below those mentioned in the price list current at the time of sale, nor give to any such customer or society any cash or other discounts or advantages reducing the same, and will not sell or offer any Dunlop motor tyres, covers, or tubes to any other person, firm, or company at prices less than those mentioned in the said price list." I agree with the opinion of Kennedy, L.J., that under the terms of the contract the sum of £5 is only payable in respect of a breach of the undertaking in paragraph 2 of the contract and does not extend to other breaches. I further agree with the opinion expressed by the Lord Justice that within this limitation clause 5 of the contract does apply to more than one contingency, and that the case must be considered on this basis.

It was held by the Court of Appeal that although the sum of £5 was agreed between the parties to be by way of liquidated damages and not as a penalty, yet it must be regarded as a penalty; that the appellants could not recover any greater damages for breach of the agreement in the sale or offering of any tyre, cover, or tube than such damage as they could prove that they had sustained; since they could not prove that they had sustained actual damage they were not entitled to more than nominal damages. It is against this decision that the appeal is brought to your Lordships' House.

There is no question as to the competency of parties to agree beforehand the amount of damages, uncertain in their nature, payable on the breach of a contract. There are cases, however, in which the courts have interfered with the free right of contract, although the parties have specified the definite sum agreed on by them to be in the nature of liquidated damages and not of a penalty. If the Court, after looking at the language of the contract, the character of the transaction, and the circumstances under which it was entered into, comes to the conclusion that the parties have made a mistake in calling the agreed sum liquidated damages, and that such sum is not really a pactional pre-estimate of loss within the contemplation of the parties at the time when the arrangement was made, but a penal sum inserted as a punishment on the defaulter irrespective of the amount of any loss which could at the time have been in contemplation of the parties, then such sum is a penalty, and the defaulter is only liable in respect of damages which can be proved against him. It is too late to say whether such interference with the language of a contract can be justified on any rational principle.

There are two instances in which the Court has interfered when the agreed sum is referable to the breach of a single stipulation. It is important that the principle of interference should not be extended. The agreed sum, though described in the contract as liquidated damages, is held to be a penalty if it is extravagant or unconscionable in relation to any possible amount of damages which could have been within the contemplation of the parties at the time when the contract was made. No abstract rule can be laid down without reference to the special facts of the particular case, but when competent parties by free contract are purporting to agree on a sum as liquidated damages there is no reason for refusing a wide limit of discretion. To justify interference there must be an extravagant disproportion between the agreed sum and the amount of any damage capable of pre-estimate. In the case of *Clydebank Engineering Company* v. *Castaneda*, 42 S.L.R. 74, Lord Halsbury gives an apt illustration of what would probably render a sum agreed by the parties unconscionable and therefore a penalty—"For instance, if you agreed to build a house in a year, and agreed that if you did not build this for £50 you were to pay a million of money as a penalty, the extravagance of that would be at once apparent." In the present case the definite sum agreed by the parties is £5, and this cannot be said to be extravagant or extortionate, having regard to the nature of the contract.

The second instance in which the Courts have sanctioned interference is in the case of a covenant for a fixed sum or for a sum definitely ascertainable, and a larger sum is inserted by arrangement between the parties, payable as liquidated damages in default of payment. Since the damage for the breach of covenant is in such cases by English law capable of exact definition, the substitution of a larger sum as liquidated damages is regarded not as a pre-estimate of damage but as a penalty in the nature of a penal sum. In the present case this limitation has no application. It cannot be said that the sum of £5 is being substituted for the payment of a smaller fixed or ascertainable sum, since from the nature of this contract any accurate pre-estimate of damage would be practically impossible. The words of Tindal, C.J., in the case of *Kemble* v. *Farren*, 6 Bing. 141, are directly applicable—"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 upon which they may agree. In many cases such an agreement gives that which is almost impossible to be accurately ascertained, and in all cases it saves the expense and difficulty of bringing witnesses to that point."

The point on which the majority of the Court of Appeal decided this case against the appellants is that where a contract contains various stipulations, and the evidence shows that these stipulations are of varying degrees of importance, the Court exercises a wider power of interference, and a single sum made payable by the occurrence of the breach of one or more, or all of such stipulations, is *prima facie* a penalty and not liquidated damages. If this statement of the law is accurate without limitation, the agreed sum of £5 in the present case would be *prima facie* in the nature of a penalty, since that sum is fixed irrespective of the varying degrees of importance of the stipulations. I agree with Kennedy, L.J., that though the fact that the agreed sum covers more than one event is an element in the case, or may constitute a presumption that it is a penalty, it is in no sense conclusive against such sum being treated as liquidated damages. There may be a greater risk of infringing the principle against extortion, or against the substitution of a larger for a smaller payment, in applying the same figure to a number of different breaches of varying importance, more especially if some occasion serious and others but trifling damage, than when it is applied to one breach; but if these tests are complied with the parties may reasonably be allowed to make their own agreement. No doubt if the agreed sum is not applied distributively but equally to stipulations of varying importance, and in reference to any of the stipulations it is a penalty, it is a penalty for the purpose of the whole contract, since it could not in the same contract be construed both as a penalty and as liquidated damages.

If the same agreed sum, separately allocated in different agreements to breaches of varying importance, could be properly construed as a pre-estimate of damage, it seems illogical to regard such sum as a penal payment, because for convenience or economy the whole transaction is included in one agreement. The present case is an illustration in point. Having regard to the character of the contract, it would have been possible to have a series of contracts applicable to the various stipulations, and to have inserted in each of them a sum of £5 as liquidated damages to compensate a loss difficult if not incapable of ascertainment at the time when the contract was made. I can see no reason why the parties should not be allowed to contract in one document instead of several, or that in such a case the law should interfere with freedom of contract.

Swinfen Eady, L.J., in the Court of Appeal, largely bases his judgment on the case of *Wilson* v. *Love*, [1896] 1 Q.B. 626. In that case there was a covenant by the lessees of a farm not to sell hay or straw off the premises during the last twelve months of a term, and provision that an additional rent of £3 per ton should be payable by way of penalty for every ton of hay or straw so sold. There was a substantial difference between the manurial value of hay and that of straw, and it was held that the sum so made payable was a penalty and not liquidated damages.

It is noticeable in this case that the parties expressed the sum to be a penalty and not liquidated damages, but in giving judgment A. L. Smith, L.J., says—"Where a sum is made payable by a contract to secure the performance of several stipulations, the damages for the breach of which respectively must be substantially different, or, in other words, the performance of stipulations of varying degrees of importance, that sum is *prima facie* to be regarded as a penalty and not as liquidated damages." If the words *prima facie* only apply to a presumption which can be displaced, then I agree with Kennedy, L.J., that the presumption is misplaced in the present case, which belongs to a class in which it is practically impossible to make an accurate assessment of damage, and there is no question of extortion or of substituting a larger for a smaller sum. If the words *prima facie* imply that the sum will be regarded as a penalty unless there are some special circumstances which could justify an opposite conclusion, the statement appears to be expressed in too general terms.

In the case of *Wallis* v. *Smith*, 21 Ch.D. 273, tried before Fry, J., and taken to the Court of Appeal, it was necessary to decide whether when a contract contained a condition for payment of a sum of money or liquidated damages for the breach of stipulations of varied importance, none of which is for payment of an ascertained sum of money, the sum named should be treated as liquidated damages or as a penalty. All the previous cases were examined in the Court of Appeal, and the Court unanimously affirmed the judgment of Fry, J., that the agreed sum was not a penalty but liquidated damages. Lindley, L.J., says—"When I come to look at the cases I cannot find a single case in which the larger sum has been treated as penalty where there has been no smaller sum ascertainable as the amount of damages." Cotton, L.J., says—"There are a number of covenants to which clause 25 applies, and in respect of the breach of which it is said that £5000 shall be liquidated damages. Now in what cases have the Courts said that in these circumstances you shall construe the words 'liquidated damages,' not what they mean—as a sum assessed between the parties—but only as a penal sum, leaving the real damages to be ascertained? Undoubtedly the cases do say this, that when a stipulation applies to a breach of a number of covenants and one of these covenants is for payment of a sum of money, where the damage for the breach of it is, according to English law, capable of being actually defined, then where a sum said to be liquidated damages applies, not distribu-

tively to the different covenants but equally to all, you must hold that the sum cannot be damages assessed by parties as in the case of a particular covenant with respect to which the damages are incapable of being ascertained and are by law fixed in a different way, but you must look upon it as a mere penalty, and ascertain where the breach occurs, what is the damage sustained in respect of the particular breach."

In the present case there is no question of giving a larger sum as liquidated damages for a fixed or ascertainable sum, in reference to any of the stipulations to which the agreed figure is applicable, and no adequate reason for altering the terms of the contract as arranged by the parties. The parties adopted a wise and prudent course, having regard to the nature of the contract and the practical impossibility of an accurate ascertainment of damages.

In my opinion this appeal should be allowed with costs.

Their Lordships reversed the judgment appealed from; restored the judgment of Phillimore, J., and gave appellants their costs in the House of Lords and in the Courts below.

Counsel for the Appellants—Younger, K.C.—Disturnal, K.C.—Kingsbury. Agents—John B. & F. Purchase, Solicitors.

Counsel for the Respondents—M'Call, K.C.—Morton Smith. Agent—John Hands, Solicitor.

PRIVY COUNCIL.

Tuesday, July 14, 1914.

(Present—The Right Hons. Lords Dunedin, Atkinson, and Sumner, and Sir Joshua Williams.)

CORRIE AND ANOTHER *v.* MACDERMOTT.

(On Appeal from the High Court of Australia.)

Property—Sale—Valuation—Compulsory Sale—Restriction on the Title.

The price paid for land acquired under compulsory powers for public purposes depends on the value to the seller, not the value to the buyer. Hence a restriction on the title affects the value.

Hillcoats v. *Archbishops of Canterbury and York*, 10 C.B. 327, and *Stebbing* v. *Metropolitan Board of Works*, L.R., 6 Q.B. 37, *discussed.*

Their Lordships' considered judgment was delivered by

Lord Dunedin — The Acclimatisation Society of Queensland is a society constituted under Acts of Parliament for the purpose of carrying out experiments in the acclimatisation of animals and plants, using the latter word in its widest sense. The Society holds lands where its experiments are carried out. Such land is held by the Society through the medium of trustees, who hold the same in trust for the uses of the Society.

By deed of grant of the 17th July 1892 the land which forms the subject of this appeal was granted by the Crown to trustees for the Society "upon trust for the appropriation thereof to the use and for the grounds of the Acclimatisation Society of Queensland, and for no other purpose whatsoever."

Mines of gold, silver, and coal were reserved to the Crown, and the deed of grant contained also the following clause:—"And we do further reserve unto us our heirs and successors full power for us or them or for the governor for the time being of our said colony with the advice aforesaid to resume and take possession of all or any part of the said land which may be required at any time or times hereafter for any public purpose whatsoever, twelve calendar months' notice of its being so required being previously given in the *Government Gazette* or otherwise, and the value of the said land or of so much thereof as shall be so required, and of any building standing on the said required land being paid by the Government to the party entitled thereto at a valuation fixed by arbitrators chosen as hereinafter mentioned, in which valuation the benefit to accrue to the said party from any such public purpose shall be allowed by way of set-off."

Then follows an arbitration clause providing for appointment of arbitrators and umpire in common form.

The deed contained no power of sale in favour of the trustees, and no general power of sale of this land is conferred on them by any of the Acts under which the Society is governed, but by an Act of 1907 the Society was allowed to sell any part of its lands to the local authority and to the National Agricultural and Industrial Association,

In 1911 the Government resolved to exercise the above narrated power of resumption and gave the necessary notice. Arbitrators and umpire were appointed, the arbitrators disagreed, and the umpire made his award in the following terms:—"1. I find that the value of the total area of the land proposed to be resumed as aforesaid as set out in the said schedule hereto on the basis of freehold land unrestricted in any way and as land held in fee-simple is the sum of Seven thousand four hundred and ninety pounds (£7490). 2. I find that there is no building on the said land. 3. I find that the value of the total area of the said land proposed to be resumed as aforesaid as set out in the said schedule hereto being required for a public purpose (namely an exhibition ground) in accordance with the said deed of grant and reference is the sum of Three thousand eight hundred and thirty-five pounds (£3835). 4. I find that the value of the benefit to accrue to the said trustees from the said public purpose by way of set-off is *nil.* I award and determine that the valuation of the said land described in the schedule hereto in accordance with the said deed of grant and reference is the sum of Three thousand eight hundred and thirty-five pounds (£3835), which amount is the amount I award and adjudge to be paid by