*Present:* The Hon. Mr. J. P. Middleton, Acting Chief Justice, and Mr. Justice Pereira.

*Dec. 21, 1909*

## WEBSTER *v.* BOSANQUET.

*D. C., Colombo, 26,132.*

*Liquidated damages—Penalty—Estoppel—Hearsay evidence—Evidence Ordinance, s. 32.*

If a lump sum is made payable by way of compensation on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling (or even less serious) damage, the presumption is that the parties intended the sum to be penal, and subject to modification by Court; but although the presumption may arise, the fact does not necessarily oblige the Court to treat such lump sum as a penalty. The use of the words "penalty or liquidated damages" does not determine the intention of the parties; but when the parties themselves call the sum made payable a penalty, the onus lies on those who seek to show it is to be payable as liquidated damages (and *vice versâ*).

The criterion whether a sum—whether it is called penalty or liquidated damages—is truly liquidated damages is to be found in ascertaining whether the sum stipulated for can or cannot be regarded as a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation.

Where a contract contains several stipulations, and damage for the breach of one or more is incapable of precise estimation, that is to say, is not readily ascertainable, the amount agreed to in the contract is to be deemed to be liquidated damage.

A representation in order to work an estoppel must be of such a nature as would naturally lead a man of prudence to act upon it, and in order to justify a prudent man in acting upon it, it must be plain, not doubtful or matter of questionable inference. Certainty is essential to all estoppels.

APPEAL from a judgment of the District Judge of Colombo.

By the agreement sued upon in this case the defendant agreed, *inter alia*, that the plaintiff should have the exclusive right of advertising and selling the teas of three estates, including Palamcotta; that the defendant should not sell to anybody else the tea of the said estates without offering it, in the first instance, to the plaintiff for purchase; that the defendant should not in any event sell the tea of the said estates to any of the constituents, clients, or purchasers of teas whose names appear in the books of the Ceylon Co-operative Tea Gardens Company or the Maravila Tea Company, and the defendant should not divulge to any company, person, or persons the name or names of any such constituents, clients, or purchasers.

*Dec. 21, 1909*

*Webster v. Bosanquet*

The plaintiff alleged in the plaint (1) that the defendant had omitted to offer to him for purchase certain invoices of Palamcotta tea, and (2) that the defendant had sold the tea to others, and sued the defendant to recover £500 as liquidated damages.

The District Judge entered judgment for plaintiff as prayed for.

The defendant appealed.

*Bawa* (with him *F. J. de Saram*), for the appellant (defendant).—The amount stipulated is penalty, and not liquidated damages. The use of the words " liquidated damages " by the parties is not conclusive on the point (*Pye v. British Automobile Commercial Syndicate*,[1] *Wilson v. Love*[2]). There is no substantial difference between the English Law and the Roman-Dutch Law on this question (*Pless Poll v. De Soysa* [3]); the Roman-Dutch Law permits even greater latitude to the Court; even if the parties clearly intended that the amount stipulated should be liquidated damages, Courts will sometimes interfere if there is great disparity between the actual damage and the liquidated sum (*2 Nathan's Common Law of South Africa, 669*). The evidence in this case shows an enormous disproportion between the actual damage and the amount agreed upon.

*De Sampayo, K.C.*, for respondent.—The defendant understood the damages which would result to plaintiff by his losing touch with his markets in consequence of defendant breaking his contract. It would be almost impossible to estimate the actual damage which plaintiff may suffer. The parties clearly intended the sum stipulated to be liquidated damages. Counsel cited *Wallis v. Smith*,[4] *Kemble v. Farren*,[5] *Price v. Green*,[6] *Atkins v. Kinnier*.[7]

*Bawa*, in reply cited *Commissioner of Public Works v. Hills*.[8]

*Cur. adv. vult.*

December 21, 1909. MIDDLETON A.C.J.—

In this case the plaintiff had obtained judgment against the defendant for £500 as liquidated damages for breach of a contract, by which he agreed to offer the plaintiff the option of purchasing certain portions of the tea crop of Palamcotta estate, in 1906, *i.e.*, invoices 1, 2, 3, 4, 7 and 8 of the months of February, March, April, May, June, and July, amounting in the aggregate to 53,315 lb. of tea.

[1] *(1906) 1 K. B. 425.*
[2] *(1896)1 Q. B. 626.*
[3] *(1909) 12 N. L. R. 45.*
[4] *(1882) 21 Ch. D. 243.*
[5] *(1829) 6 Bing. 141.*
[6] *(1847) 16 M. & W. 346.*
[7] *(1850) 4 Ex. 776.*
[8] *(1906) A. C. 368.*

The defendant appealed, and the grounds relied on were (1) that the plaintiff was estopped by his conduct from making any claim for breach of contract; (2) that the sum agreed upon in the contract as liquidated damages was in fact a penalty, and that the damages must be estimated by the Court. As regards the question of estoppel, it was only raised for the first time on the day of trial and not in the answer, and the Judge refused to allow it to be raised upon the pleadings as they stood. The defendant's counsel applied to amend the answer, but was told that if he was allowed to do so an adjournment must be given to the plaintiff.

An issue had been proposed by the defendant's counsel and objected to by the plaintiff's counsel, whether the failure to give the plaintiff the option of purchasing the tea invoices Nos. 1, 2, 3, and 4 was due to a mutual mistake on the part of the plaintiff and defendant. As the plaintiff was leaving Ceylon in a few days, his advocate withdrew his objection to this issue, and the parties went to trial on it, possibly, on the defendant's side, under a misapprehension that it raised the question of estoppel he was desirous of having tried.

At first I inclined to the opinion that the parties had intended that the issue agreed to should raise the question of estoppel, and I am not quite sure now if the appellant did not suppose it did. It is clear, however, that such an issue does not raise the defence of estoppel against the plaintiff, and I am of opinion that it was too late upon the hearing of the appeal to raise a question which would involve a further elucidation of and finding of fact, and to which it seems to me that the dictum of Lord Herschell in the *Tasmania* [1] applied. We therefore did not call upon the respondent upon the conclusion of the appellant's argument on this point.

The mistake here was not in making the contract, but in failing to observe its conditions on a representation made by the plaintiff that it was at an end. The defendant, who made the mistake, had the means of knowledge in virtue of his possession of a copy of the contract to which he might have easily referred, and I think therefore, that unless he can prove an estoppel under section 115 against the defendant, he will be liable for the mistake in a matter of fact which it was his duty to know, and of which he had the means of knowledge (*Leak on Contracts, 207*).

Then there remains only the question whether the £500 mentioned in the contract was intended by the parties as a penalty or liquidated damages. The principal tests under the English Law appear to be that all the circumstances should be taken into consideration to ascertain the intention of the parties, and that if a lump sum is made payable by way of compensation on the occurrence of one, more, or all of several events, some of which may occasion serious and others but trifling damage, the presumption is the parties intended

[1] *(1890) 15 A. C. 223*

*Dec. 21, 1909*

MIDDLETON A.C.J:

*Webster v. Bosanquet*

the sum to be penal and subject to modification, per Lord Watson in *Lord Elphinstone v. The Monkland Iron and Coal Co.*,[1] *Wilson v. Love*,[2] *Pye v. British Automobile Commercial Syndicate Co., Ltd.*,[3] but, although the presumption may arise, the fact does not necessarily oblige the Court to treat such lump sum as a penalty. Lord Esher in *Wilson v. Love*, commenting on *Wallis v. Smith*,[4] remarked that Sir George Jessel went through the *dicta* on this question, finding fault with them, but he, Lord Esher, did not think he over-ruled them, and went on to say that the House of Lords in *Lord Elphinstone v. The Monkland Iron and Coal Co.* have adopted them.

In *Dimech v. Corlet*[5] and *Diestal v. Stevenson & Co.*[6] and *Wilson v. Love, ubi supra*, it was held that the use of the words " penalty or liquidated damages " does not determine the intention of the parties, but in *Wilson v. Love* Lord Esher said that when the parties themselves call the sum made payable a penalty, the onus lies on those who seek to show it is to be payable as liquidated damages, and I presume the converse would be equally true.

In the *Commissioner of Public Works (Cape of Good Hope) v. Hills*[7] it was held that the criterion whether a sum—whether it is called penalty or liquidated damages—is truly liquidated damages is to be found in ascertaining whether the sum stipulated for can or cannot be regarded as a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation. I have gone through the terms of the contract, and it seems to me, as put by counsel for the appellant, that a strict enforcement of the penal clause on the footing it was liquidated damages for a series of trifling breaches, in neglecting to give the option of purchase for small breaks, or in selling even a pound of tea on occasions to some prohibited persons, might involve the defaulting party, in the first case, in many thousands of pounds worth as damages, and in the second in the sum of £500 at least. I therefore hold that the parties had not pre-estimated their damages by the words they used, but intended that the sum of £500 should be a prohibitive penalty to cover the real damages incurred upon estimation.

The parties to this case are English, and may have intended their contract to be governed by the English Law I have been referring to above, but whether this is so or not is a matter of no importance. As I had occasion to say in *Pless Pol v. De Soysa*,[8] there appears to be but little difference between the English and Roman-Dutch Law on the question, and this view appears to be assented to by counsel on both sides.

We now come to the question of damages. In assessing the damages in this case, it must be remembered that the contract

[1] *(1886) 11 A. C. 332, 342.*
[2] *(1896) 1 Q. B. 626.*
[3] *(1906) 1 K. B. 425.*
[4] *(1882) L. R. 21, Ch. D. 243.*
[5] *(1858) Moore P. C. 199.*
[6] *(1906) 2 K. B. 345.*
[7] *(1906) A. C. 368.*
[8] *(1909) 12 N. L. R. 52.*

between the parties ended on July 30, 1906; that only six invoices of tea, amounting, as stated in the plaint, to 53,315 lb. of tea, were alleged to have been not presented for the plaintiff's option of purchase; that his right only amounted to an option of purchase, which in two instances at least, in the case of invoices Nos. 5 and 6, not included in the plaint, was declined with very narrow margins between defendant's prices and plaintiff's offers; that if these teas were of such extreme importance to the plaintiff's trade, it would have been well worth his while to concede the few cents that divided his offer and the defendant's prices, or even to have bought the teas in the open market when they were put for sale and sold—the plaintiff admits in one instance at a lesser rate—by Forbes and Walker, p. 8/15. The plaintiff alleges he lost touch with the New Zealand and Canadian markets in consequence of his failure to supply them with these estate teas, and yet he states that he made no attempt to retrieve his position by purchasing the teas in the open market, as he might have done at a possibly lower price. If these teas were of such value to him, that their absence in his consignments affected his position so crucially in his foreign markets, he could surely have afforded to purchase them at the rates asked by the defendant's agents, and should most certainly have bought them in the open market if they were to be had. At the same time also it must be remembered that the plaintiff never apparently exercised his rights to refer to another broker in the case of invoices 5 and 6, nor evinced any such great anxiety about these breaks as would lead an impartial person to believe that their purchase as Palamcotta teas was vital to his interests in New Zealand and Canada. It must be remembered also that after July 30, 1906, the plaintiff would not have been entitled to the option contracted for, nor does he, from his evidence, appear to have done anything to prove how great was the value of the right of purchase of these teas to him or to provide for their substitution by others. The inference I draw from the plaintiff's evidence, amounting to mere unsupported assertion, is that the absence of these teas did not in the least affect his position in the New Zealand and Canadian markets, and that the reputation of the teas he was able to supply his foreign customers with was not perceptibly influenced by the fact that he had not the option given him by purchasing these six small breaks of tea. A further thing to be remembered is also that there appear to have been no complaints made subsequently to July 30, 1906, of the defendant's action in omitting to give him the option contracted for, nor from the plaintiff's foreign constituents, nor was plaintiff's action begun until February 12, 1908.

It is difficult to assess the damages here because of the option the plaintiff had of purchase. That option might always have been nullified by a high Colombo valuation, and the Palamcotta teas would not then have entered the plaintiff's foreign consignments, as it

*Dec. 21, 1909*

MIDDLETON A.C.J.

*Webster v. Bosanquet*

does not appear to have been his custom to purchase them at any price. I think, however, the proper measure of damages is the difference between the Colombo valuation of these teas at the respective dates they would have been presented to him and the value at which the plaintiff invoiced them to his foreign customers. If the teas left the plaintiff for foreign consignment as a blend, it would not be unfair, perhaps, to allow to the plaintiff the invoiced prices per pound of his blend to his foreign customers at the same dates I have mentioned. The difference between the two prices will be the damage which, I think, the plaintiff has incurred.

The appeal must be allowed, and the judgment of the District Court varied by entering judgment for the plaintiff either for a sum to be ascertained or to be agreed on. If the parties cannot agree upon the damages, which appear easy of ascertainment, the case must go back to the District Court for an inquiry and assessment on the basis I have laid down. As regards costs; considering the long period of time during which the parties have worked amicably together, and the fact that plaintiff sent P 1 to the defendant and certainly misled him, I am not favourably impressed with his adoption of the position of a greatly aggrieved party as shown by his bringing this action for the full amount of the penalty. I would therefore give him only half his costs in the Court below, and in the class upon which an action might be brought for the sum assessed as damages. The defendant will have his costs of the appeal, and the costs of the inquiry for assessment of damages, if rendered necessary, will be in the discretion of the District Court.

PEREIRA A.J.—

In this case the plaintiff claimed to be entitled to recover from the defendant £500 as liquidated damages, stipulated for in the indenture filed of record for breach of one of its terms, that is to say, for failure on the part of the defendant to offer to the plaintiff the option of buying certain portions of the tea crop of the tea estate known as Palamcotta in 1906. The defendant pleaded, *inter alia*, that in the genuine belief, induced by a misunderstanding, that the term of ten years of the agreement had expired on December 31, 1905, he had sold by public auction certain invoices of Palamcotta tea which, in terms of the agreement, should have been offered to the plaintiff. At the trial the following, among other issues, appears to have been suggested by the defendant: "Was the failure to give the plaintiff the option of purchasing the tea invoices 1, 2, 3, and 4 due to a mutual mistake on the part of the plaintiff and defendant?" And an idea then appears to have gained ground in the Court that the defendant was attempting to plead a new defence, namely, that he had been misled by the plaintiff into the belief that the contract had terminated at the end of December, 1905, and

that the plaintiff was hence by his own act estopped from holding the defendant liable for not offering to him the option of purchasing tea since that year. In this belief the plaintiff's counsel vehemently opposed the framing of the issue, but with reluctance consented to it eventually, because he was anxious to proceed with the trial without further delay, inasmuch as the plaintiff was about to leave the Island shortly. It does not appear to have struck anybody that the issue was as harmless as the defence of mistake pleaded in paragraph 5 of the answer. It did not raise the question of estoppel at all, and it is clear that the fact of mutual mistake could not advance the defence any further than that of mistake on the part of the defendant only. Mutual mistake was insufficient to constitute estoppel. It was necessary that the plaintiff should, by declaration, act, or omission, have intentionally caused or permitted the defendant to believe a thing to be true, and to act upon such belief. Counsel for the appellant submitted that it was this state of things that was intended to be established under the issue referred to. Counsel for the respondent would not concede that. The issue speaks for itself, and, in the absence of special concession on the part of the defendant's counsel, I do not think it will be fair, just, or equitable to put upon an issue a construction which the words used do not in any recognized sense admit of. The District Judge has been at pains to express a desire " to make it quite clear that the breach of the contract was due to some mistake or misunderstanding somewhere, and nothing else. " This, practically, is an answer to the issue in the affirmative. What then? The nett result, as regards the main question of liability, is no improvement on the admission, already made by the defendant in the 5th paragraph of the answer, of a breach of the contract.

The question of estoppel was argued at great length by the appellant's counsel, but in view of the issues framed it could be but of merely academical interest. I shall, however, deal with it briefly. The contention was based upon a letter (P 1) addressed by the plaintiff to the defendant, in which the plaintiff says that he encloses a cheque for £37.10*s*., being the last payment due to the defendant " as per our agreement. " He, however, adds: " I beg to point out that no Palamcotta teas have been offered for some time, the last invoice being No. 16. " Now, invoice No. 16 had been delivered on December 29, 1905. It is, therefore, manifest that the plaintiff did not intend to convey, by the reference to the cheque for £37.10*s*. as the " last payment, " that the contract had terminated. He, on the other hand, pointed to a fact, namely, the absence of offers " for some time, " which should have induced the belief that in his view the contract was in subsistence still; and, indeed, the defendant might well be expected to have known that the contract had not yet terminated. But Mr. Bawa very properly argued that intention on the part of the plaintiff was to be presumed from the

*Dec. 21, 1909*

PEREIRA A.J.

*Webster v. Bosanquet*

natural or probable consequence of his act, and it did not matter that the defendant might on inquiry have discovered the real state of things. The law on the point is clearly enunciated by Lord Herschell in the case of *Bloomenthal v. Ford.*[1] It was there laid down that where an " unequivocal " statement is made by one party to another of a particular fact, the party who made that statement could not get rid of the estoppel which arose from another man's acting upon it by saying that if the person to whom he made the statement had reflected and thought all about it, he would have seen that it could not be true. In the present case, however, considering the letter P 1 as a whole, it is clear that the statement that the cheque was the last payment due to the defendant " as per our agreement " cannot, particularly in view of what follows, be said to be an unequivocal statement to the effect that the contract had terminated.

A representation in order to work an estoppel must be of such a nature as would naturally lead a man of prudence to act upon it; and in order to justify a prudent man in acting upon it, it must be plain, not doubtful or matter of questionable inference. It has been held that certainty is essential to all estoppels (see *Smith v. Chadwick*[2]).

There is, moreover, a lack of evidence that the defendant was, in point of fact, misled by the representation made by the plaintiff. Letter P 1 was written not to the defendant direct, but to his agents. It may fairly be presumed that it was communicated to the defendant. His witness, Mr. Unwin, says: " In the ordinary course we would have sent a copy of P 1 to the defendant. " The defendant, however, has not been called as a witness, and the chief evidence of his having been misled is to be found in the letters X 1, X 2, and X 3. These letters written by the defendant to his agents were tendered in evidence. The District Judge says that he rejects them, for the very elementary reason that evidence must be given on oath and subject to cross-examination. But I take it that the letters were tendered under the provision of our law, which constitutes an exception to the rule, excluding hearsay, and dispenses under certain special conditions with direct oral evidence and the safeguards provided by cross-examination and the sanction of an oath. One of these conditions is that the attendance of the witness cannot be procured without an amount of delay or expense which, in the circumstances of the case, appears to the Court unreasonable. The District Judge expressly held that it would be unreasonable to expect the defendant " to come down to Ceylon to give evidence in this case. " That at once paved the way for the admission of the letters tendered (whatever weight their contents might merit as evidentiary material), provided certain other conditions laid down in section 32 of the Evidence Ordinance were also fulfilled; and I

[1] *(1877) A. C. 158.*

[2] *(1882) 20 Ch. D. 27.*

confess I cannot follow the District Judge when he gives as a further reason for rejecting the letters that the defendant might have taken out a commission to have himself examined as a witness in England. That, no doubt, would have been a prudent course to take in the circumstances of this case, but the omission of the defendant to take that course could not affect his right to have the letters read in evidence, if they were otherwise admissible. To meet one other condition prescribed by the Evidence Ordinance, the statements in the letters should have been made in the ordinary course of business. As regards that, I agree with the District Judge that the condition has not been fulfilled. The addressees were the agents of the defendant for certain commercial purposes only, and it could hardly be said that the information that the defendant gave in those letters to those agents was in the nature of statements in the ordinary routine of business necessary for or germane to the carrying out of those purposes.

*Dec. 21, 1909*

PEREIRA A.J.

*Webster v. Bosanquet*

I now come to the question as to the amount that the plaintiff is entitled to by way of loss sustained. The District Judge has treated the sum of £500 named in the agreement as liquidated damages, and has awarded to the plaintiff the whole of that sum. Now, if we are concerned with merely the assessment of damages for the breach of this contract, it is clear that, in view of the District Judge's finding of the entire absence of *mala fides* on the part of the defendant, the damages should be placed at the lowest possible figure. The obligee would be entitled to only the damage sustained as a direct result of the breach complained of, and not to such as were merely incidental to it (see *Poth. 1, 2, 3*). But in the present case the amount recoverable as damage is, as observed above, fixed in the agreement at £500, and the question is whether the whole of that sum is exigible as liquidated damages, regardless of the amount of damage actually sustained. It is contended by the defendant in his petition of appeal that the contract is governed by the Roman-Dutch Law. It is not altogether an agreement for the sale of goods, and it may well be that it is so governed. The contention was mentioned by counsel in the course of the argument, and it was said that on the above question there was no difference between the Roman-Dutch and the English Law, and reference was made to *Nathan's Common Law of South Africa, vol. II., 638*. The South African cases cited by Nathan would appear to have been decided on principles similar to those of the English Law; but the reports cited from are not available here, and it is not possible to say that they contain an enunciation of the Roman-Dutch Law untinged by local legislation or local usage. In this connection I may say that the inclination of my opinion is in the direction of there being a difference between the English Law and the Roman-Dutch on the point in question. Under the English Law a sum stipulated to be paid as damage for the breach of the covenants in an indenture is to be deemed to be a

*Dec. 21, 1909*

PEREIRA A.J.

*Webster v. Bosanquet*

penalty or liquidated damages (regardless even of the nomenclature in the indenture itself) in accordance with certain rules, to be noticed hereafter, laid down and explained from time to time by judicial authority; and in the event of its being held to be a penalty, the actual amount of the loss sustained is to be assessed and awarded to the injured party. In the Roman-Dutch Law such a sum has only one designation—*pœna*—which, as observed by Mr. Justice Withers in the case of *Fernando v. Fernando*,[1] has not the same force as the word " penalty " in the English Law. As a general rule, this *pœna* is exigible to its fullest extent in every case, but, as explained by Bonser C.J. in the case just cited, where it happens to be out of all proportion to the damages sustained, is manifestly excessive or exorbitant, the Court has the power to make a reduction. This reduction is, I conceive, not to be based upon a minute calculation of the loss actually sustained, but may be effected in a more or less arbitrary manner. The reduced sum still retains the character of a penalty, or, more properly, of *pœna*, but it is awardable, nevertheless, to the obligee in lieu of loss actually sustained. The Court, however, I take it, is not absolutely precluded from having a correct assessment made of the damages actually sustained. That, apparently, is a matter which is more or less in its discretion. In the present case I am inclined to the opinion, for reasons to be given later, that the sum stipulated for in the contract to be paid as damages is manifestly excessive. No more need be said on the question of the loan applicable, because counsel who argued the appeal appeared to be content to let the decision of the case be governed by the principles of the English Law, and English authorities were therefore largely cited. It is thus necessary to decide, in the first place, whether the sum of £500 stipulated for in the contract is to be deemed to be a penalty or liquidated damages under the English Law.

The cases upon the question as to whether a sum stipulated in a contract as payable as damage in the event of a breach of its terms is to be regarded as a penalty or liquidated damages appear to be very numerous. Where the sum stipulated has been deposited somewhere, or placed in the hands of a stakeholder to abide the performance of the contract, the idea of its being liquidated damages has been given effect to (see *Lea v. Whitaker*[2]). Then, again, as held in the case of *Law v. Local Board of Redditch*,[3] where parties to a contract have agreed that in case of one of the parties doing or omitting to do some one thing he shall pay a specific sum to the other as damages, the sum is to be regarded as liquidated damages, and not a penalty; but it will be seen that Lord Esher, M.R., mentions in his judgment certain exceptions to this rule, one of them being that where the sum agreed to be paid is, with regard to the matter in

[1] *(1899) 4 N. L. R. 285.*
[2] *(1872) L. R. 8, C. P. 70.*
[3] *(1892) 1 Q. B. 127.*

respect of which it is agreed to be paid, so large as to make the idea that it was intended to be payable by way of liquidated damages so absurd that the Court would be compelled to arrive at the conclusion that it was to be paid not as liquidated damages, but as a penalty.

On the other hand, there are many cases in which it has been held that where a sum is mentioned in an agreement as payable as liquidated damages on the performance or non-performance of a number of matters, some of which would involve very inconsiderable damages, it should be treated as a penalty. *Kemble v. Farren* [1] and *Astley v. Weldon* [2] are among the older of these. A very elaborate exposition of the cases on this subject will be found in the judgment of Jessel, M.R., in the case of *Wallis v. Smith.*[3] I need not burden this judgment with authorities in support of the proposition that where a contract contains a variety of stipulations of different degrees of importance, and one sum is stated to be payable on breach of performance of any of them, then, although it is called by the name of liquidated damages, it is in reality a penalty, and the actual damage sustained is alone recoverable. The cases will be found collated in the *Encyclopædic of Laws, vol. IV., 103.* I may mention that in *Lord Elphinstone v. Monkland Iron and Coal Co.*[4] Lord Watson said: " When a single lump sum is 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." On this, Lord Esher, M.R., observes in *Wilson v. Love*[5]: " I think the effect is substantially the same if, instead of the words ' some of which may occasion serious and others but trifling damage,' he had said ' some of which may occasion serious and others less serious damage.' "

There, then, is another class of cases in which it is stated that where a contract contains several stipulations, and damage for the breach of one or more is incapable of precise estimation, that is to say, is not ascertainable or is not readily ascertainable, the amount agreed to in the contract as damage is to be deemed to be liquidated damage. This is the only class referred to by the District Judge, and to the case that he has cited I may add that of *Reynolds v. Bridge.*[6]

Turning now to the agreement sued upon in this case, I see that there are in it certain covenants or groups of covenants in respect of which £500 is mentioned as damage recoverable in the event of breach. The breach complained of by the plaintiff in his plaint is two-fold: (1) The omission to offer to the plaintiff for purchase certain invoices of Palamcotta tea; and (2) the sale of such tea to others. At the trial, as appears from the first issue agreed to, the

[1] *(1829) 6 Bing. 141.*
[2] *(1801) 2 B. & P. 346.*
[3] *(1882) 21 Ch. D. 243.*
[4] *11 A. C. 332, 342.*
[5] *(1896) 1 Q. B. D. 630.*
[6] *(1856) 6 Ellis & Bl. 528.*

*Dec. 21, 1909*

PEREIRA A.J.

*Webster v. Bosanquiet*

plaintiff apparently confined himself to the first of these breaches. Now, in the group of covenants in the deed of agreement, in which is comprised the covenant securing to the plaintiff the right of pre-emption, there are many other covenants, which, omitting immaterial portions, may be summarized thus. That the defendant should in certain circumstances instruct a certain attorney, agent, or proctor to register or cause to be registered certain descriptions, devices, and trade marks, although, I may mention, the failure of such attorney, agent, or proctor to obtain such registration is not to render the defendant liable in damages; that the plaintiff should have the exclusive right of advertising and selling the teas of three estates, including Palamcotta; that the defendant should not sell to anybody else the tea of the said estates without offering it, in the first instance, to the plaintiff for purchase; that the defendant should not in any event sell the tea of the said estates to any of the constituents, clients, or purchasers of teas whose names appear in the books of the Ceylon Co-operative Tea Gardens Company or the Maravila Tea Company, and that the defendant should not divulge to any company, person, or persons the name or names of any such constituents, clients, or purchasers.

I cannot help thinking that here we have stipulation of varying degrees of importance, and I do not see the difficulty of ascertaining (if it were necessary to apply that test) the damage that the plaintiff may reasonably be deemed to have sustained by reason of the particular breach complained of. It occurred during the expiring days of the contract. The plaintiff apparently felt no pinch until May 9, 1906, when, with no complaint of any serious inconvenience, he inquired of the defendant when he might expect another invoice of tea. Two invoices were thereafter offered to him, the second on June 14, when the plaintiff knew that in about another six weeks from that date he would be entitled to no offers at all. But he refused them because the first was priced at 36 cents and 32 cents, and the second at 35 cents and 31 cents. There is also a complaint by the plaintiff in his evidence that only two grades were offered, but I see no reference to that grievance in his letters of May 16 and June 15, 1906. In these circumstances, I am not prepared to assume the loss of touch by the plaintiff with foreign markets as a result of the particular breach of contract on the part of the defendant, of which the plaintiff complains in this action. No mysteries of the trade have been disclosed by the operation of which such a mighty result can spring from what, at any rate, appears to be such a trivial cause.

I would set aside the judgment, and remit the case to the District Court for the assessment of damages on the lines indicated by the Chief Justice, if an amount could not be agreed to by the parties. As regards costs, I agree to the order proposed.

*Appeal allowed; case remitted.*