[PRIVY COUNCIL.]

1912.

Present: Lord MacNaghten, Lord Shaw, Lord Mersey, and Lord Robson.

WEBSTER *v.* BOSANQUET.

D. C. Colombo, 26,132.

Liquidated damages—Penalty—Breach of contract.

In deciding whether a stipulated payment in respect of the breach of a contract should be regarded as liquidated damages fixing once for all the sum to be paid, or merely as a penalty covering the damages though not assessing them, whatever be the expression used in the contract in describing the payment, the question must always be whether the construction contended for renders the agreement unconscionable and extravagant, and one which no Court ought to allow to be enforced.

It is impossible to lay down any abstract rule as to what it may or may not be extravagant or unconscionable to insist upon, without reference to the particular facts and circumstances which are established in the individual case.

The consideration must be whether it is extravagant, exorbitant, or unconscionable at the time when the stipulation is made—that is to say, in regard to any possible amount of damages which may be conceived to have been within the contemplation of the parties when they made the contract.

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THE facts are stated in full in the judgment of the Supreme Court reported in *13 N. L. R. 47*.

Grant, K.C. (with him *Owen Thompson*), for appellant.

Upjohn, K.C., and F. H. M. Corbet, for the respondent.

February 21, 1912. Delivered by LORD MERSEY:—

This is an appeal from a judgment of the Supreme Court of Ceylon, dated December 21, 1909, reversing a judgment of the District Court of Colombo, dated March 1, 1909. The question raised by the appeal is whether a payment stipulated by deed to be made by the defendant to the plaintiff is to be regarded as a payment by way of liquidated damages or merely as a penalty.

The Court of First Instance held that the sitpulation was for a payment by way of liquidated damages; the Supreme Court took a different view, and held that the stipulation was for a penalty only.

There is no dispute about the facts of the case, and they are as follows:—

In 1891 the plaintiff and the defendant entered into partnership for the purpose of exporting and selling Ceylon tea, and particularly tea grown upon certain estates in the Island belonging to the defendant, and known as the Palamcotta and Marawilla estates. The part of the plaintiff in connection with the enterprise was to travel for the purpose of pushing the sale of the tea, and this he did so successfully that by the year 1895 he had established a valuable trade. In that year the partnership was dissolved, the plaintiff buying the defendant's interest in the goodwill for a sum of £3,500, and taking over the assets at a valuation. The dissolution was effected by a deed dated February 14, 1895, which contained among other things a provision that the defendant should for a period of ten years after July 30, 1896, sell the whole or any part of the crops of the Marawilla and Palamcotta estates to the plaintiff at a valuation so long as the plaintiff should pay to the defendant yearly a sum of £75 for the use of the names of the two estates, and should express his intention of purchasing the whole or any part of the said crops. The deed then provided as follows:—

"And the said Bosanquet shall not be at liberty to sell during the period aforesaid the whole or any part of the tea crops of the Marawilla and/or Paramcotta estates to any person other than the said Webster without first offering to the said Webster the option of buying the same, so long as Webster shall pay to Bosanquet the yearly payment of £75; and if the said Bosanquet shall fail, neglect, or refuse to sell the whole or any part of the crop of the Marawilla and/or Palamcotta estates as hereinbefore provided to the said Webster, he shall pay to Webster the sum of £500 as liquidated damages and not as a penalty."

The plaintiff duly performed his part of this agreement, but in the first half of the year 1906 the defendant, in breach of the

agreement, sold to persons other than the plaintiff five different parcels of tea of the Palamcotta crop, amounting in the aggregate to 53,315 lb., without offering to the plaintiff the option of buying the same. In February, 1908, the plaintiff issued his writ in the present action, claiming the sum of £500 as liquidated damages in respect of the said breach. It was alleged (and found as a fact at the trial) that the sales had been made by the defendant under a mistake of fact as to the date on which the obligation to give the option of purchase to the plaintiff terminated, but the learned Judge held this to be immaterial, and being of opinion that the stipulation for the payment of the £500 meant what it said, namely, that it should be by way of liquidated damages, gave judgment for the amount claimed. The Supreme Court over-ruled this decision, and sent the case back to the Court of First Instance to ascertain the actual damage sustained by the plaintiff by reason of the breach. On the rehearing the plaintiff offered no evidence as to damages, and the Court awarded the plaintiff, by way of nominal damages, the sum of £10, which amount the defendant had brought into Court in satisfaction of the plaintiff's claim. The question is, which view of the contract is right.

The cases in which the Courts have had to consider whether a stipulated payment in respect of the breach of a contract should be regarded as liquidated damages fixing once for all the sum to be paid, or merely as a penalty covering the damages though not assessing them, are innumerable, and perhaps difficult to reconcile. But it is unnecessary to examine them, for their effect is sufficiently and very clearly stated in the case of *The Clydebank Engineering Company, Limited, v. Don Jose Castaneda*, reported in Appeal Cases, 1905, page 6. From that case it appears that whatever be the expression used in the contract in describing the payment, the question must always be whether the construction contended for renders the agreement unconscionable and extravagant, and one which no Court ought to allow to be enforced. After stating this principle, Lord Halsbury proceeded as follows:—

"It is impossible to lay down any abstract rule as to what it may or may not be extravagant or unconscionable to insist upon, without reference to the particular facts and circumstances which are established in the individual case."

And Lord Davey, in delivering his opinion, says:—

"You are to consider whether it is extravagant, exorbitant, or unconscionable at the time when the stipulation is made—that is to say, in regard to any possible amount of damages which may be conceived to have been within the contemplation of the parties when they made the contract."

Applying the principle to be found in these judgments to the facts of the present case, the proper construction to be put upon the contract appears to their Lordships to be plain. When making the

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contract it was impossible to foresee the extent of the injury which might be sustained by the plaintiff if sales of the tea were made to third parties without his consent. That such sales might seriously affect his business was obvious, and the very uncertainty of the loss likely to arise made it most 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. This consideration also afforded a reason for fixing the amount beforehand. It was suggested in the course of the argument that to treat the £500 as liquidated damages might involve such extravagant consequences as to render the agreement absurd, for the sum might be claimed in respect of every pound of tea sold in breach of the stipulation. Their Lordships, however, are of opinion that the stipulation is not capable of such an interpretation. The parties to the agreement were merchants using language in the sense in which it is used in their trade. When they speak of a " part of a crop " they are not contemplating packets which might be sold over a grocer's counter, but parcels such as were in fact sold in the present case. Moreover, the breach consists of the selling to third parties. It matters not whether the sale is of the whole or of part of a crop, nor whether it is made in one lot or in many. The agreement neither says nor means that, if successive parcels forming parts of the same crop be sold, a right to claim £500 in respect of each sale shall accrue; all such parts put together cannot amount to more than the whole crop, and the penalty for the sale of the whole is limited to the £500.

For these reasons their Lordships are of opinion that the contract stipulates for what in words it says, namely, for a payment of money by way of liquidated damages and not by way of penalty. They will, therefore, humbly advise His Majesty that the appeal should be allowed, that the judgment of the Supreme Court should be set aside, and the original judgment of the District Court restored. The respondent must pay all the costs in he Courts below and also the cost of this appeal.

Appeal allowed.