

The parties entered into a contract whereby the defendants agreed, for \$2,700, to supply the plaintiffs with a new boiler for a steam-boat. The boiler was to be delivered not later than the 1st March, 1910, failing which the defendants agreed to pay the plaintiffs "\$25 for each and every working day after the above date as and for liquidated damages and not as a penalty."

The boiler was not delivered within the stipulated period, and this action was brought to recover \$25 for each day's default. The defendants alleged that the contract contained a term whereby they were entitled to be excused for the delay complained of, and also that the \$25 per day only was a penal sum, and that the plaintiffs had sustained no damage.

The trial Judge held that the alleged excusing term formed no part of the contract, and, if it did, that the defendants were not relieved from performance within the time agreed upon. He also held that the \$25 per day was a penalty, and directed a reference to ascertain the damages.

The plaintiffs appealed on the ground that the \$25 per day was liquidated damages; and the defendants appealed on the ground that they were entitled to the benefit of the alleged "excusing term," and also that no damage in fact was sustained.

The appeal was heard by MULOCK, C.J.Ex.D., TEETZEL and SUTHERLAND, JJ.

A. H. Clarke, K.C., for the plaintiffs.

W. Proudfoot, K.C., for the defendants.

MULOCK, C.J.:—Prior to the making of the contract, a correspondence had taken place between the parties, and upon the 6th December, 1909, Frank and Ralph Harris, representing the plaintiffs, and Frederick W. Doty, representing the defendants, met at . . . Windsor and discussed details of the proposed contract. Having agreed upon the 1st March as the day for the delivery of the boiler, they then discussed the question of damages in the event of its not being so delivered. Although navigation was not expected to commence on the 1st March, the plaintiffs' object in securing delivery of the boiler at that date was that they might thereafter have ample time before the opening of navigation to fit up the vessel. Accordingly, they attached importance to its delivery within the named period, and desired the contract to provide for \$50 a day damages for each day's default. Mr. Doty would not agree to that sum, and, finally, according to the evidence of Frank Harris, the plain-