

CURIOSITIES OF ENGLISH LAW.

sum of money (see *Kemble v. Farren*, 6 Bing. 141) so as to bring the case within the statute of Anne against enforcing the penalty on money bonds.

To any but a lawyer it must seem a strange thing that two persons wishing to bind one another to a perfectly legal agreement should have no other way of carrying their wishes into effect except to declare that they desire the Court to put an unreasonable construction on their agreement. If, however, by any contrivance, no matter how childish, it were possible for persons to reckon with reasonable certainty on being able to frame a perfectly legal agreement so that it could be enforced, there would be comparatively little to complain of. If the Judges had had the courage to adhere without flinching to the rule that whenever the contracting parties called a penalty by the name of liquidated damages, it should be deemed that they intended that penalty to be enforced, then a clear and definite rule would have been established, so that persons, with the aid of a competent lawyer, might effectually have prevented the Court from interfering with their wishes.

Unfortunately, the Judges, while still professing to be guided by the intention of the parties, and recognizing in many cases the abstract right to recover penalties however extortionate, provided only they are called liquidated damages, have adopted a course which often amounts in practice to a denial of that right of free contract which in theory they profess to respect. Where an agreement is capable of several breaches of different degrees of magnitude, it is practically impossible to frame a clause of forfeiture which can be enforced. It will not do to stipulate that if the agreement is infringed in any particular a specified sum shall be payable as liquidated damages, "for," as Baron Parke observed in *Homer v. Flintoff* (9 M. and W. 678), "where parties say that the same ascertained sum shall be paid for the breach of every article of an agreement, however minute and unimportant, they must be considered as not meaning exactly what they say;" * so that what has been declared to be liquidated damages will be construed as a penalty, which will not be enforced, no matter how gross the

breach may have been. The Law on this subject has been stated by the Privy Council (*Dinech v. Corlett*, 12 Moo. P.C., p. 229) as follows:—"The Law of this country on the question of penalty, or liquidated damages, may be considered, after a great number of decisions—not, perhaps, all of them strictly reconcilable with each other—to be, however, at length satisfactorily settled, and the hinge on which the decision in every particular case turns, is the intention of the parties, to be collected from the language they have used. The mere use of the term 'penalty,' or the term 'liquidated damages,' does not determine that intention, but like any other question of construction, it is to be determined from the nature of the provisions and the language of the whole instrument. One circumstance, however, is of great importance towards the arriving at a conclusion; if the instrument contains many stipulations of varying importance, or relating to objects of small value calculable in money, there is the strongest ground for supposing that a stipulation, applying generally to the breach of all, or any of them, was intended to be a penalty, and not in the way of liquidated damages."

Baron Alderson, indeed, in the above-mentioned case of *Horner v. Flintoff*, suggests that "where some breaches relate to important, and others to unimportant, matters, parties ought to annex a specific penalty to each breach." This suggestion clearly fails to meet the difficulty, and its inadequacy is well illustrated by the very agreement that called it forth.

By that agreement the Defendant promised to buy the good-will, stock-in-trade, and tenant-right of the Plaintiff, who was an innkeeper and farmer. The Plaintiff promised to give the Defendant possession of certain premises together with furniture, farming stock, etc., and in the meantime to pay rates, taxes, etc., and indemnify the Defendant from all costs and expenses by reason of the non-payment of the same. The Defendant promised to pay £100 for the tenant-right, to take the furniture, plate, etc., and to pay the amount of the valuation, and all rents, rates, and taxes, and to indemnify the Plaintiff from the same. Surely, it would have puzzled the learned Baron himself to draw a schedule of liquidated damages

* Really, one would think the Judges had never heard of such a thing as a fiction before.