act: *Hobson* v. *Trevor* (1723), 2 P. Wms. 191, 24 E.R. 695; *Chilliner* v. *Chilliner*, 2 Ves. Sen. 528; *Clarkson* v. *Edge*, 33 Beav. 227. "The form of marriage articles by bond does not import election": *Roper* v. *Bartholomew*, 12 Pri. 797.

In the third class of contracts, which may be distinguished as alternative contracts, the intention is that a thing shall be done or a sum of money paid at the election of the person bound to do or pay.

In these cases the contract is as fully performed by the payment of the money as by the doing of the act, and therefore where the money is paid or tendered there is no ground for interference by way of specific performance or injunction.

The question to which of the three foregoing classes of contracts any particular one belongs is of course a question of construction. In considering it "the court must, in all cases, look for their guide to the primary intention of the parties, as it may be gathered from the instrument upon the effect of which they are to decide, and for that purpose to ascertain the precise nature and object of the obligation": *Roper* v. *Bartholomew*, 12 Pri. 797, at 821. Consequently each case depends on its own circumstances, but it may be noticed that "a court of equity is in general anxious to treat the penalty as being merely a mode of securing the due performance of the act contracted to be done, and not as a sum of money really intended to be paid": *Per* Lord Cranworth in *Ranger* v. *Great Western R. Co.* (1854), 5 H.L. Cas. 94, 10 E.R. 824; *Astley* v. *Weldon*, 2 Bos. & Pul. 346; and that, "on the other hand, it is certainly open to parties who are entering into contracts to stipulate that on failure to perform what has been agreed to be done, a fixed sum shall be paid by way of compensation": *Ranger* v. *Great Western R. Co.*, 5 H.L. Cas. 94.

On this question it is by no means conclusive that the contract may be alternative in its form, for nevertheless the court may clearly see that it is essentially a contract to do one of the alternatives: so that where there was a contract to renew a certain lease, with an addition of three years to the original term, or to answer the want thereof in damages, the court decreed specific performance of the lease, the second alternative only expressing what the law would imply: *Finch* v. *Earl of Salisbury*, Finch, 212.

The largeness or smallness of the sum named is no reason for considering it a mere penalty, unless that be the apparent intention: *Roy* v. *Duke of Beaufort* (1741), 2 Atk. 190, 26 E.R. 519; *Astley* v. *Weldon*, 2 Bos. & Pul. 346; *French* v. *Macale*, 2 Dr. & War. 269. But see *Burne* v. *Madden* (1835), Ll. & G. *t.* Plunk. 493; but where the amount of the penalty is small, as compared with the value of the subject of the contract, it has been considered a reason for treating the sum reserved as a mere penalty, and not in the nature of an alternative contract: *Chilliner* v. *Chilliner*, 2 Ves. Sen. 528.

In a case where a man, being very uncertain what estate he should derive from his father, entered into a bond in £5,000, on the marriage of his daughter, to settle one-third of such property, and the contract so to settle was recited in the condition of the bond, it was specifically performed in full, and not up to £5,000 only: *Hobson* v. *Trevor*, 2 P. Wms. 191. "Such agreement," said Lord Macclesfield, 2 P. Wms., at p. 192 (6th ed.), "was not to be the weaker but the stronger for the penalty."

The fact that the benefit of the contract would result to one person or