

to burn or bate the demised premises or any part thereof under the penalty of £10 per acre to be recovered as the reserved yearly rent for every acre so burned." His Lordship appears to have considered this increased rent as in the nature of liquidated damages and not a penalty, but nevertheless he granted an injunction against the burning, saying after a careful review of the authorities that in every case of this nature the question is one of construction, and that the court will always interfere unless there is evidence of an intention that the act is to be permitted to be done on payment of the increased rent.

In one case a deed was executed dissolving a partnership between H. and L., and containing a recital that it had been agreed that the deed should contain a covenant by L. not to carry on the trade within one mile from the old place of business "without paying to H., as or by way of stated or liquidated damages," a sum named. In a subsequent part of the deed there was an absolute covenant not to carry on the trade within that limit, followed by a proviso that if L. should act contrary to or in infringement of that agreement he would immediately thereupon pay to H. the sum of £1,500 by way of liquidated damages. Notwithstanding the recital and the form used, it was held that L. was not entitled to break the covenant on paying the £1,500, and an injunction was granted: *Bird v. Lake*, 1 H. & M. 111.

The same view was put forward, though perhaps in slightly different language, by the Lords Justices in *Coles v. Sims*, 5 De G. M. & G. 1. That was a case in which there were mutual covenants between a vendor of part of his land and the purchaser of that part as to building on the sold and unsold parts, with a stipulation for payment of liquidated damages in case of breach of covenant. On an application for an interim injunction (which was granted), Knight Bruce, L.J., said (5 De G. M. & G. 1, at 9): "If I were now deciding the cause, I should probably come to the conclusion that in a case where a covenant is protected (if I may use the expression) by a provision for liquidated damages, it must be in the judicial discretion of the court, according to the contents of the whole instrument and the nature and circumstances of the particular instance, whether to hold itself bound or not bound upon the ground of it to refuse an injunction if otherwise proper to be granted: and that in the present case, the circumstances are such as to render it right for the court to grant an injunction." Turner, L.J., p. 10, added: "The question in such cases, as I conceive, is, whether the clause is inserted by way of penalty or whether it amounts to a stipulation for liberty to do a certain act on the payment of a certain sum."

Where the contract to do or not to do the act is distinct from the obligation to pay a sum of money, it seems that either the contract or the obligation may be sued on.

"Where a person," said Lord Romilly, M.R., in *Fox v. Scard* (1863), 33 Beav., 327, at p. 328, 55 E.R. 394, "enters into an agreement not to do a particular act and gives his bond to another to secure it, the latter has a right at law and equity, and can obtain relief in either, but not in both courts."

It is clear that the fact that the contract may be comprised in a bond does not of itself import any election to pay the money and refuse to do the