

Tuesday, November 29.

SECOND DIVISION.

[Sheriff of Aberdeen.

MURRAY v. MARR.

*Reparation—Newspaper Advertisement—Contract.*

A bookseller in A. made an offer to the publisher of a newspaper in that town to hire a column of the newspaper for a trade advertisement at a lump sum for a period of twelve months. The publisher agreed to let the column on the terms proposed. Afterwards the bookseller addressed a circular letter to a number of well-known publishers stating that he intended to take a column in this paper which was to be filled "with a list of new and recently published works." As a mutual benefit he offered to let the publishers have space in this column for their works at a certain rate per inch per annum, which was proportionately higher than the rate he agreed to pay the newspaper. Two publishers only took small spaces in the column at the rates offered. The bookseller then tendered to the newspaper an advertisement containing a list of books arranged under the names of the publishers by whom they were respectively produced, and including the names and books of the two publishers who had agreed to pay for a share in the bookseller's column. It was stated both at the end and at the beginning of the advertisement that these books could be obtained in the bookseller's shop in A. The newspaper publisher refused to insert this advertisement, on the ground that the agreement between the parties did not contemplate the "farming out" of the space allotted to the pursuer. The bookseller brought an action for damages against the publisher. *Held* (1) that the contract between the parties was not invalidated by the fact that the bookseller did not disclose his intention of "farming out" the advertising space hired by him to publishers; and (2) that the rejection of the advertisement tendered not being justified by any custom of trade, nor by the reservation of an express right of rejection, constituted a breach of contract entitling the pursuer to damages.

Alexander Murray, bookseller and stationer, 271 Union Street, Aberdeen, contracted in November 1890 with Alexander Marr, residing at 23 Carden Place, Aberdeen, for the insertion in his newspaper, the *Daily Free Press*, of a business advertisement consisting of one column in the front page of the newspaper, at the rate of £10, 10s. per month, as he had done in the two previous years at the Christmas season.

Upon 27th November 1890 Murray wrote a letter to Marr, in which he said, *inter alia*,—"Dear Sir,—I have yours of 24th in regard

to my query anent price for column in *Daily Free Press* for twelve months on end on front page. I would be inclined to go in for twelve months of it provided you could do it at the same rate as you are doing it at present—£126 per annum. I may state that when I wrote making the inquiry I was under the impression I would get it at a little less than I was presently paying for it, seeing I was taking it for such a length of time," &c.

The answer on 1st December 1890 was in these terms:—"Dear Sir,—In reply to your offer of 27th ulto., we agree to insert an advertisement to occupy the space of one column on first page of *Free Press* daily for twelve months for the sum of £126 per annum, it being understood that your advertisement may be inserted on any other page during the currency of the twelve months for not more than forty times should we be requiring the space for company or other high-priced advertisements."

Upon 18th December 1890 Murray issued a circular letter marked private to a number of publishers, in which he stated:—"Gentlemen—I have resolved, with the aid of the publishers, to push the book-selling in our university city, with a population of over 120,000, in a way never attempted before, and to this end I intend taking a column of 20 inches in length on the front page for twelve months from January 1891, in the principal daily newspaper, which has a very large circulation in town and country. This space will be filled with a list of new and recently published works, a change being made at least once a week. A column in this paper is so valuable that the proprietors asked over £300 for it for the twelve months. As this will be a mutual benefit, I only ask £12 per inch per annum, payable on July 1st, 1891. If you agree to take one inch or more, which would be the means of keeping your books always before the public in the north of Scotland, I will expect you to send me weekly (say on Saturdays) the list of books you want to appear in the following week's paper. An inch should hold the names and prices of 8 or 9 nine books."

Two publishers, Mr Walter Scott, Durham, and Messrs Macmillan & Company, London, agreed to pay for a certain amount of space in his advertisement.

Upon 5th January 1891 Murray sent to the *Free Press* a copy of an advertisement headed—"New books just published, and to be had at Alexander Murray's, 271 Union Street, Aberdeen. The usual discount allowed for ready money. All orders by post receive immediate attention." Then followed a list—"Macmillan & Company's new books," "Longmans & Company's publications," and the names of nine other well known publishers, under each of which appeared a list of their books. At the end of the list the following words occurred—"The above books supplied at the usual discount rate for ready money by Alexander Murray, bookseller and stationer, 271 Union Street,

Aberdeen." The *Free Press* refused to insert this advertisement tendered, on the ground that part of the space contracted for had been farmed out to different publishers.

Upon 22nd January 1891 Murray raised an action in the Sheriff Court at Aberdeen for £50 damages against Alexander Marr, the printer and publisher of the *Daily Free Press* newspaper.

The pursuer pleaded—"The defender having made a contract with the pursuer, and having refused to implement it, to the pursuer's loss and damage, is liable in reparation to the pursuer, with expenses."

The defender pleaded—" (2) *Separatim*, defender had a right both by custom of trade and at common law to reject any advertisement until submitted to him for approval, and until approved of by him. (3) The proposed advertisement not being in terms of the agreement between the parties, and there being no *consensus in idem placitum*, defender was not bound to insert it. (4) The agreement having been entered into under essential error is not binding on defender."

Upon 25th June 1892 the Sheriff-Substitute (BROWN), after a proof, found—

"(6) That it is admitted by the pursuer that in entering into the contract for a column of the defender's newspaper for his business advertisements, he had in view to enter into sub-contracts with various publishing firms under which, upon an arrangement of terms with him, they should have a portion of the space contracted for with the defender assigned to them for advertising their publications; (7) that the pursuer had never under previous contracts with the defender made such use of the space contracted for, and that the pursuer withheld from the defender, or from Mr Bruce on his behalf, that he intended to make the arrangements above mentioned, or to offer advertisements for insertion in the defender's newspaper giving effect to these; (8) that after said contract was concluded the pursuer put himself in communication with a number of well-known publishers offering to sublet a portion of the space contracted for by him, and came to an agreement with two of said publishers; (9) that it is proved by the defender that the sub-letting of such a contract in the manner proposed and actually carried out by the pursuer would operate to the prejudice of the defender's newspaper by withdrawing valuable custom which the defender might otherwise hope to obtain under contract on his own account, and by derogating from the defender's right to superintend and approve of all advertisements entering his newspaper: (10) that on or about 5th January 1891 the pursuer as in implement of said contract tendered to the defender the advertisement of which No. 16 of process is a proof copy: Finds in law that the contract between the parties falls to be interpreted along with its surrounding circumstances and the course of prior dealing that preceded it, and that having been entered into under essential error on the part of

the defender, and there being therefore no *consensus in idem placitum*, the pursuer cannot found on the defender's rejection of his advertisement as inferring a breach of contract: Therefore sustains the defences, assolizies the defender from the conclusions of the action, &c.

"*Note*.— . . . On the merits, however, I cannot assent to the conclusion that the defender has involved himself in damages as for a breach of contract. It is unfortunate that neither the principal nor a copy of the pursuer's letter of 24th November asking a quotation has been produced, but there is no suggestion that its terms are not sufficiently indicated in his later communication of 27th November. That is his offer marked 'accepted' by Mr Bruce, and it is important to note that in it he makes distinct reference to his then subsisting contract with the defender, stipulating for the same rate at which he had a column of the newspaper for a more limited period, and suggesting indeed that he had looked for a reduction. The advertisements which the pursuer had been in use to have inserted in the *Free Press* prior to that date were of a wholly different character, as instructed by the productions, from that in question, being simply a promiscuous list of books and articles, such as a bookseller and newsagent is in use to retail. Admittedly, in entering into the extended contract, the pursuer had in view a new departure, and it appears to me that the turning point in the case was his withholding that from Mr Bruce, who had otherwise no reason to suspect what the pursuer contemplated. The pursuer makes it perfectly clear what he intended, and it may be fairly summarised by the words—'I contracted for a column of the newspaper. I knew what was in my own mind. I said nothing as to the use I was to make of the advertising space, and I neither know nor care what was in the mind of Mr Bruce.' The pursuer, in other words, takes his stand upon the contract, which, he maintains, is explicit and unambiguous, and demands his rights under it. The agreement is clear enough so far as it goes, but making reference, as it does, to the prior dealing between the parties, I think it falls to be interpreted as made with that in view, and with all other surrounding circumstances. The evidence makes it quite clear—not his own merely, but that of the representatives of three great newspapers, the *Scotsman*, the *Glasgow Herald*, and the *Dundee Advertiser*—that Mr Bruce would not have looked at the offer had he had even an inkling of what the pursuer intended to do. The pursuer's position is that Mr Bruce was bound to make inquiry, and that he was not bound to help him in safeguarding his rights, but I apprehend the principle is a sound one, which has been laid down in two leading English cases—*Venegueta v. Kisch*, L.R., 2 H. of L. 99, and *Redgrave v. Hurd*, March 14 and 15, 1881, 20 Ch. Div. 1—that where there has been wilful concealment of facts by which a person has been induced to enter into a contract, it is no answer to his claim to be

relieved from it that he might have known the truth by proper inquiry.

"In terms, the pursuer does not contend that in farming out the space assigned to him he had not in view to alter his subsisting relations with the newspaper, but in maintaining that the advertisement tendered fell within the contract he practically does so. It is therefore necessary to consider what he actually did. I do not indeed intend to follow the defender into his exposition of the alleged inaccuracies of the pursuer in corresponding with the various publishers. That is a matter which concerned them only, and I do not see that it reflects any light on the case additional to the pursuer's declared purpose. Taking the correspondence with Messrs Hodder & Stoughton as an example, it appears that on 18th December the pursuer urged upon them to take three inches of the advertising space, to be charged for at the rate of £12 per annum, and that on the 29th of the same month he calls on them to furnish 'your list of new and recently published works for space in my column in *Aberdeen Free Press*.' There is, I conceive, no doubt as to what that means. The various publishers were to enjoy the right of having their books advertised in the space contracted for by the pursuer, for a consideration to be paid to him, and his interest in the advertisement beyond that was the plainly subordinate one that by placing his own name at the top and foot of it, he certificated the public that he had in his warehouse these books for sale. He had not made much way with his scheme of subcontract, but he himself says that he took a sanguine view of inducing the publishers to fall in with his arrangement, and what the defender urges is that he was thereby robbed of a share which under independent contract an extensively circulated paper might have expected to make in a lucrative branch of business in an important and highly-educated district of the country. In my opinion that is a formidable plea, and although I do not attach much weight to the argument that the newspaper was compromised by the apparent surrender of the right of supervision, that point in the circumstances being barely a practical question, I think the defender fully establishes that he is injuriously affected by an interpretation of the contract which was not in view of the parties who entered into it, and is only justifiable on the footing that the pursuer was entitled to withhold an essential fact, the disclosure of which would have prevented any contract being made at all. In the case of *Davis v. Haycock*, July 2, 1869, L.R., 4 Ex. 381, it was observed—'It is the essence of a contract that there should be a concurrence of intention between the parties as to the terms. It is an agreement because they agree upon the terms, upon the subject-matter, the consideration, and the promise,'—and the result of my opinion practically, therefore, is that the defender contracted under essential error, and that the contract being thereby vitiated, he was entitled to rescind it by rejecting the pursuer's advertisement, and is not liable in the present claim."

Upon 16th July 1892 the Sheriff (GUTHRIE SMITH) recalled the above finding in law, and found in law "that under the contract libelled the space allotted to the pursuer for his advertisements could not be sold or assigned to others without the defender's assent, and that the defender was entitled to refuse advertisements framed in violation of this principle.

"*Note*.—The Sheriff-Substitute has decided this case on the ground of essential error induced by the pursuer's failure to explain that the kind of advertisement which he had in contemplation was different from the advertisement which he had hitherto been publishing under similar contracts in the defender's newspaper. This is the view presented in the pleadings, and I do not say that there is not evidence to support it were it necessary. But it assumes that the pursuer's construction of the contract is right, and is in fact the only possible construction, which I think is a mistake. I prefer to say that when a man contracts with a newspaper for so much space in its advertising columns, the meaning is that it shall only be used for announcements connected with its own business, and that he cannot sell or assign any part of the allotted space for the use of others unless the contract contains a condition to that effect. It is evident that the right acquired by the advertiser under such a contract is necessarily subject to certain limits. The publisher of a newspaper is as responsible for what appears in its advertising columns as any other part of the paper. The advertisement must not be libellous or indecent. It must not conflict with the recognised opinions of the journal—political, social, or religious. Nor will any respectable journal allow itself to be made a vehicle for the dissemination of announcements intended to defraud, or quack advertisements, betting advertisements, and the like. The right, therefore, which is acquired by the advertiser is in no sense of the word entirely under his own control, and it must be always subject to very considerable qualifications. Further, it is nothing but a privilege—a privilege which he may use or leave unused just as he pleases, subject to this, that at the end of the term the stipulated price has to be paid. Now, it is a well-settled principle in law that under a contract which simply confers a privilege and infers a *delectus personæ*, the right created is generally strictly personal to the party, a principle applied to the case of a shooting lease in *Fyfe v. Wilson*, 3 Macph. 323, mainly because of this element of *delectus personæ*. It is, of course, assignable like any other contract, but only when the contract itself permits it or the other party consents. I think that when a newspaper surrenders to an advertiser a certain portion of its space for a lengthened term, it will carefully consider the character of the person with whom it is dealing, and that there is the strongest *delectus personæ*. There are booksellers and booksellers, and while a well-conducted journal may be quite ready to advertise the wares of a respectable bookseller, it will

scorn to have its columns soiled with the advertisements of a shop in Holywell Street. Another fact which is pointed out by some of the witnesses must not be forgotten—that no newspaper would ever agree to the right being assignable were such a thing proposed except on strict conditions, for otherwise the contractor by offering cheaper terms might withdraw some of its regular customers, and thus in effect come into competition with the newspaper itself. These views appear to be in accordance with the understanding and practice of newspaper men, and although the question is, as far as I know, entirely new, it will I conceive be for the public benefit and the due protection of an important interest if they are now judicially recognised. The conclusion therefore to which I come is, that while there is here a perfectly good contract binding on both parties, under which the pursuer acquired the right to have his own advertisements duly inserted in the *Free Press* for the stipulated term, he was not entitled to sell or farm out the right to other people, and that the defender, whenever he discovered that he was making this use of it, was entitled to stop it. There is therefore no case for damages as the Sheriff-Substitute has decided."

The pursuer appealed, and argued—There was a contract between the pursuer and the defender who was bound to advertise whatever the pursuer sent as an advertisement within the line of his own business. He advertised the books which he sold or was willing to procure for purchasers, and he catalogued them under the heading of their different publishers, but the books were advertised to be sold by him. It was the same where any retail dealer, who sold an article made by a wholesale manufacturer, advertised it—the advertisement was of the retail dealer's wares, and not an advertisement of the wholesale manufacturer. In regard to the alleged custom of trade, there was no averment concerning it on record, and no evidence of it at the proof. No doubt the pursuer had tried to get various publishers to take inches of space from him at a higher rate than he was paying to the newspaper, but that was entirely a matter for himself and the publisher, and outside the contract. Only two publishers had taken a small space in the column, but the newspaper had rejected the whole advertisement. There was no proof that the publishers of books whose names appeared in the advertisement would ever advertise in the paper at all. The advertisement was primarily for the benefit of the pursuer, and if incidentally the publisher was benefited that was not a matter for the newspaper. It was admitted that newspaper authorities had the right to refuse any advertisement of an obscene or libellous nature. In this case although no actual damage could be proved, yet as trouble and inconvenience had resulted there must be substantial damages—*Webster & Company v. Cramond Iron Company*, June 4, 1875, 2 R. 752.

The respondent argued—The contract

as contained in the letters imported the former contract of advertisement into the present contract. That former contract was for the sale of fancy articles, and not for the kind of advertisement the pursuer sent under the present contract. The important part was that it was to be Mr Murray's own advertisement. This was not his own advertisement, it was an advertisement of the publishers mentioned in it. The pursuer had sold the right of advertising in certain parts of the column. In the letter to the publishers he had given them the right to say what books they wished to advertise, and not what books he wished to advertise. In that way he had alienated his right in the column, and the newspaper was entitled to reject it as not being the pursuer's advertisement which he had contracted for. Parole evidence was admissible to show what was meant by the expression "your advertisement"—*Macdonald v. Longbotham*, 27th May 1859, 1 Ellis & Ellis, 977. A newspaper must have complete control of its advertisements, and is entitled to reject any advertisement offered even although it is not libellous or indecent.

At advising--

LORD JUSTICE-CLERK—In this case the question is whether the pursuer has been wronged by the refusal of the defender to insert in his newspaper an advertisement tendered for insertion in a space which the defender had contracted with the pursuer to let to him for advertisements of his business for a year.

The defender maintains (1st) that he has a right of rejection of any advertisement the pursuer may tender, he having a right to reject any advertisement on grounds which he may consider sufficient; and (2nd) that in any view he was entitled to reject this advertisement in respect that it purported to advertise wares other than those of the pursuer himself. I consider the first contention to be extravagant. If the defender desires to reserve to himself the right to reject any advertisement, he would require so to stipulate before contracting to hire out the space to an advertiser. It is, I should think, quite certain that no one would contract with him upon such terms. It is said that there is a custom of trade to this effect, and evidence was led to prove this. I doubt very much the competency of such evidence as was led. It does not tend to show any accepted custom of trade, which must be a custom known and accepted on both sides of the trade in which the custom exists. The evidence such as it is indicates only that newspaper proprietors have certain views. It proves only that they have had no experience which can enable them to give any evidence as to such a case as this. They do prove, what is not disputed, that a right is claimed to reject any advertisements of an immoral nature, or which there may be good reason to suppose are in promotion of fraudulent or illegal schemes. Indeed, such a right is conceded.

The second ground of defence is the only one which requires to be seriously considered. The facts to which the defender proposes to apply it are these—The pursuer keeps a bookshop and stationery and fancy warehouse in combination. He contracted for a year with the defender for a column of the *Free Press* for advertisements. On tendering an advertisement headed "New Books, just published, and to be had at Andrew Murray's 271 Union Street, Aberdeen," in which several lists of books were headed with the publishers' names, thus, "Messrs Macmillan & Company's new books," "Messrs Longman & Company's publications," the defender refused to insert it. His contention is that it was "not in terms of the agreement between the parties." The agreement is in writing. It bears to be for "price for column in *Daily Free Press* for twelve months on end," according to the pursuer's proposal, and is accepted by the defender by his "agreeing to insert an advertisement to occupy the space of one column . . . for twelve months." There are other particulars, but they need not be referred to, as they do not affect the question. Now, that is a very plain and simple bargain, and I can see nothing in it to justify the defender in rejecting the advertisement tendered. There is nothing in the advertisement inconsistent with the agreement. The defender says that the column was let to the pursuer, and that he is not entitled under the agreement to insert anything but an advertisement of his own business. That is a question I do not think it necessary to consider. A retail dealer who advertises that he deals in the wares of a wholesale dealer is, in my opinion, advertising his own business. Could it be suggested that if a firm such as Whiteley in London, or Cranston & Elliot in Edinburgh, who deal in a vast number of articles which they do not manufacture themselves, inserted an advertisement in a column hired for a period, stating that purchasers could obtain Pears' Soap, or Coats' Thread, or Aspinall's Enamel from them, that the newspaper could reject the advertisement because it would tend to benefit these manufacturers? I cannot hold that without any such condition being inserted in the agreement, there is any breach of agreement in the retail advertiser stating whose wares he keeps in stock.

But then it is said that the defender was entitled to reject the advertisements because the pursuer had endeavoured, and with partial success, to recoup himself for the price paid for the column by inducing the publishers whose books he advertised to pay him for advertising them. This, the defender maintains, was illegal, under what he calls an "unwritten law to that effect," but he admits that he cannot say that the pursuer "knew of our objection to farming out." Whatever might be held in a case where an advertiser, after hiring a space, proposed to insert what were not advertisements of his own business at all in the space, as to which I express no opinion,

I hold that this advertisement was an advertisement of his own business. Like many advertisements of retailers, it had a tendency to improve the business of the wholesale dealer, and to advertise him, and I am not prepared to say that apart from contract stipulation an advertisement which it would be a breach of contract to refuse to insert if the hirer had no arrangement regarding the expense, becomes an advertisement which the other contracting party is entitled to refuse because the advertiser recoups himself for part of the expense by an arrangement with the wholesale dealer whose wares he desires to advertise as being sold by him. If it is upon the face of it an advertisement of his business, the financial arrangements under which he so advertises his business cannot, I think, apart from contract, give a right to the proprietor of the advertising medium to refuse to insert the advertisement, which would not exist if there was no such financial arrangement. I cannot agree with the Sheriff-Substitute in holding the cases he refers to upon the duty of disclosure to be applicable to this case. A wilful concealment of facts, which will relieve a contracting party from his contract, must be a concealment of facts which the other party was bound to disclose. It is not enough that there exists a fact which if known would and might have deterred the other party from entering into the contract. The two cases quoted by the Sheriff-Substitute are quite different from the present. In the case of *Venegueta v. Kisch*, the point decided was that false or deceptive representations as to an undertaking set forth in a prospectus were a ground for annulling a contract. In such a case there is a plain duty not to suppress known and material facts. To do so is to make the prospectus a false one. In the case of *Redgrave v. Hurd*, a solicitor who was negotiating with another as to his business made false representations as to the income he derived from it. That was simply a case in which the law that a man cannot profit by his own fraud was enforced. It was a case of direct fraudulent misrepresentation of the simplest kind. There is nothing the least resembling these cases in the circumstances of the present case.

I hold, therefore, that there has been here a failure to fulfil a contract, and that the defender has not justified the failure, and that therefore the pursuer is entitled to succeed, and that we must award him a sum of damages. I do not think that he has proved any serious amount of damage, and am of opinion that in the circumstances an award of £25 will satisfy the justice of the case.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER—None of the facts material to the issue in this case are in dispute. The parties contracted that in respect of a payment of £126 to be made by the pursuer he should have the right to insert an advertisement to occupy the space of one column in the defender's newspaper, daily

for twelve months. In pursuance of this contract the pursuer tendered an advertisement to the defender, which he refused to insert, on the ground that the advertisement was not the pursuer's advertisement, but was, to some extent at least, the advertisement of other parties to whom the pursuer had "farmed" it out. It appears that prior to the advertisement in question being tendered to the defender for insertion, he had ascertained that the pursuer had offered to certain publishers to give them the benefit of his contract with the defender by advertising their publications in his advertisement on certain terms, which were somewhat in excess of the price he had contracted to pay the defender; and it appears further that in the advertisement tendered by the pursuer and rejected by the defender, a comparatively small portion of its space was occupied by the works published by two separate firms who had come to terms with the pursuer, and who were paying him for having their publications there inserted. The question therefore to be determined is, whether the defender was, in the circumstances, justified in refusing to insert the advertisement in question in his newspaper, or whether such refusal was a breach of the contract which the parties had made involving the defender in a liability for damages on account thereof? The Sheriff and Sheriff-Substitute are agreed in thinking that the defender was entitled to reject the advertisement, and they have accordingly pronounced a decree of absolvitor. They differ, however, as to the ground in law on which the defender's proceeding is to be justified, the Sheriff-Substitute holding that in the circumstances there was no contract between the parties, and therefore could be no breach, the Sheriff holding that there was a good contract, but that the pursuer's mode of dealing with that contract warranted on the part of the defender his conduct which is now complained of. I cannot adopt either of these views.

The view of the Sheriff-Substitute (although it is not quite so expressed) involves an alternative—either that there was no contract, because the parties were not agreed as to its terms—no *consensus in idem*—or otherwise that the contract was not enforceable because the defender had entered into it under essential error. For the first alternative I can see no ground whatever. The advertisement was to be one occupying a column; it was to be a business advertisement; it was to be inserted daily for a year, and the price payable to the defender was £126. Let it be added to this, that the advertisement was to be the pursuer's own advertisement, although adding that as a part or condition of the contract seems to me rather to strain the terms of the contract, as expressed in the letters which constitute it, in favour of the defender. But these are the whole terms of the contract, and as regards not one of them was there, or is there, any difference between the parties—they are quite agreed. There was therefore no want of *consensus in idem*. Then as to essential

error on the part of the defender.—To enable him to plead this against the validity of the contract, he must show that the error was induced by misrepresentations or undue concealment on the part of his co-contractor. There is no case of misrepresentation suggested. It is said, however, that the pursuer concealed his negotiations with publishers to which I have referred. But that was, in my opinion, a matter which he was not bound to disclose. What did these negotiations amount to? They were endeavours on the part of the pursuer to procure (1) matter for advertisement quite in the line of his own business; and (2) pecuniary assistance in paying the defender the contract price. These were matters with which the defender had no concern, and in regard to which the pursuer lay under no obligation of disclosure. Provided the defender received his contract price, and the advertisement tendered came from the pursuer, was in his own line of business, and not objectionable in its terms, the defender had no interest as to where or on what terms the matter advertised, or the money which paid for the advertisement, was procured by the pursuer. There may be many things which, if disclosed on one side or the other, would prevent a party from entering into a contract, but the non-disclosure of which will not affect the validity of the contract when made. For example, if the defender, seeking for advertisements, had found that no advertiser would give him more than £100 for that which the pursuer agreed to purchase for £126, no one supposes that the defender would have been bound to disclose that to the pursuer. Such a disclosure, however, if made, might reasonably enough have prevented the pursuer making the contract which he did make. Each party was doing the best for himself, and there was no deceiving of the one by the other, either by misrepresentation or undue concealment. I am of opinion therefore that there was a good contract between the parties, and that it cannot be set aside on the ground of essential error.

The Sheriff thinks that there was a good and binding contract between the parties, but that "the space allotted to the pursuer for his advertisements could not be sold or assigned to others without the defender's assent, and that the defender was entitled to refuse advertisements framed in violation of this principle." I am by no means certain that the contract in question was so purely personal as the Sheriff represents. But I will assume that it was, and that it was not transferable by the pursuer in whole or in part. What then? The pursuer has neither sold nor assigned the right which the contract in question gave him, and no one has yet appeared to claim from the defender any such right as purchaser or assignee. It will be time enough to decide upon the rights of a purchaser or assignee when they are claimed, but in the meantime the only person claiming a right under the pursuer's contract is the pursuer himself. But the Sheriff finds that the rejected advertisement is framed on the

principle that some sale or assignation has taken place. I cannot see it. The parts of the advertisement which are undoubtedly the pursuer's own are in no way different from the parts in connection with which he is being subsidised. If there is any principle in the framing of the advertisement it is the same throughout. The reasoning by the Sheriff in his note in support of his interlocutor does not appear to me to support his conclusion. He says the right to advertise acquired under such a contract as that in question is a privilege merely, that it infers a *delectus personæ*, and leaves in the hands of the newspaper the control of the advertisement. Suppose all this to be admitted. The defender did not reject the advertisement in question under his power of control because there was anything in that advertisement in itself objectionable—he did not reject the advertisement any more because the person presenting it and responsible for it was not the person he had chosen to contract with, or because the limits of the privilege conferred by the contract were being overstepped. I say the limits of the privilege were not overstepped, because for my part I cannot listen to the defender's objections that the advertisement tendered was not the advertisement of the pursuer, because as expressed it advertised the names of the publishers of the several works which he (the pursuer) announced he had for sale or could procure for his customers. Any retail dealer is entitled to advertise that he is selling or prepared to sell a certain manufacturer's goods. That he is selling such a manufacturer's goods may be the chief inducement to customers, and therefore the chief and most important part of the advertisement for the dealer advertising. But it is the retail dealer's advertisement, not the manufacturer's; and in like manner, the pursuer, who is a retail dealer, may in his advertisement advertise not only the authors but the publishers of the books he offers for sale, both names being of importance as likely to induce customers to resort to him for such works.

I dismiss from consideration altogether the question raised about the custom of trade. The custom averred, if proved, has not been violated. The custom which the defender has attempted but has failed to set up in the proof is not averred.

I have not found this case on consideration to be one of difficulty. The advertisement tendered by the pursuer, and rejected by the defender, does not in itself present any feature that is objectionable or disconform to the contract between the parties. The defender's objection lies behind the advertisement, and is simply this—that the pursuer has made an arrangement by which he may be the better enabled to pay the contract price. What that arrangement is, or may be, seems to me to be, as I have already said, a matter with which the pursuer has no concern. The terms of the arrangement actually made by the pursuer are disclosed upon the proof. They might easily have been other than they are, and

been such as to obtain precisely the same end without affording the defender the shadow of an objection. For example, suppose the pursuer had arranged that in respect of a certain payment in cash down, he agreed to give the books advertised by him for sale, published by a certain firm, a more prominent position in his advertisement than the books of other publishers, what objection could the defender have to that? His control of the advertisement does not extend surely to an arrangement according to his pleasure of the books or other articles advertised relatively to each other, and yet in such a case the pursuer could have procured precisely the same advantage by way of subsidy as he did obtain by the arrangement actually made by him. Or if instead of a payment in cash, he had arranged that in return for books so prominently advertised, he should receive from their publishers a larger than the usual trade discount, the same result would or might have been attained without the possibility of objection on the part of the defender.

On the whole matter, I am of opinion that the advertisement tendered by the pursuer was one which he was entitled under his contract to have inserted in the defender's newspaper, and that the rejection of that advertisement by the defender was accordingly a breach of contract on his part entitling the pursuer to damages.

As to the amount of damages to be awarded, I will only say that there is no actual damage proved to have been sustained by the pursuer. I cannot take his speculations on this subject as proof, and there is none else. But he has been subjected to both annoyance and inconvenience through the defender's conduct, and I agree with your Lordship that £25 would be a sufficient award.

LORD YOUNG was absent.

The Court pronounced this interlocutor:—

“Sustain the appeal: Recal the interlocutors appealed against: Find that under the contract entered into between the appellant and respondent, the respondent was bound to insert in his newspaper advertisements of the appellant's business when tendered by him: Find that No. 6 of process is such an advertisement, and that the respondent was not entitled to refuse the same: Therefore find the respondent liable in damages to the appellant, and assess the same at twenty-five pounds sterling,” &c.

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