

furd Clark, heard counsel on the report, and expressed opinions that it was not contemplated by the Act that such general powers as were contained in articles (e), (f), and (g) should be granted to the company before any necessity for using them arose, but that they would be willing to consider any special transaction which the company might wish to carry out in terms of these articles when it arose definitely.

The Court refused to confirm the proposed alterations contained in articles (e), (f), and (g).

Counsel for Petitioner—Lorimer. Agents—Maconochie & Hare, W.S.

Saturday, January 13.

FIRST DIVISION.

BUNTEN AND ROBERTSON, PETITIONERS.

Trust—Trustee—Resignation—Implied Authority to Resign in Trust-Disposition.

A trust-disposition and settlement which did not expressly empower the trustees therein named to resign, contained a declaration that upon any of the trustees resigning, the remaining trustees should be bound to discharge the persons so resigning of their offices. By letter of instructions of later date than the trust-disposition and settlement the testator directed that a sum of £200 should be paid to each of his trustees who should accept and act as such. *Held* that power to resign was impliedly conferred upon the trustees by the settlement, and a petition by certain of the trustees for authority to resign *refused* as unnecessary.

Matthew Andrew Muir died on 23rd January 1880 leaving a trust-disposition and settlement dated 26th April 1876, whereby he conveyed his whole estates to the trustees therein named or who might be assumed into the trust. The deed did not expressly confer power upon the trustees to resign, but contained the following declaration:—“Declaring that upon any of the trustees, executors, and curators herein named, or to be nominated or assumed as aforesaid, resigning the said offices of trustee, executor, tutor, or curator, and accounting for his or their intrusions with my trust-estate, my remaining trustees or trustee, or if there be no remaining trustee, then the beneficiaries under the trust hereby created, are hereby empowered, and shall be bound to discharge the person or persons so resigning of his or their office or offices.” . . .

By separate letter of instructions dated 9th August 1879 the testator directed that a sum of £200 should be paid to each of his trustees and executors “who shall accept and act as such under my trust-disposition and settlement.”

In 1893 James Clark Bunten and Thomas Robertson, two of the trustees nominated under the above settlement, presented a petition to the Court, *inter alia*, for authority to resign.

Answers were lodged objecting to the other parts of the prayer of the petition being granted, but in so far as it craved authority to resign the petition was not opposed.

After certain procedure had taken place the petitioners moved the Court to grant them authority to resign.

At advising—

LORD PRESIDENT—I am satisfied that there is a power to resign here. The clause in question plainly implies that resignation is an act which may be done by any one of the trustees, for it declares that upon any trustee resigning, the remaining trustees shall be bound to discharge him of his office.

In these circumstances we are not called upon to exercise the jurisdiction given us by the Trusts Acts, and accordingly I think we should refuse the latter part of the prayer of the petition on that express ground.

LORDS ADAM, M'LAREN, and KINNEAR concurred.

The Court refused the part of the prayer of the petition in which authority to resign was craved “as unnecessary, having regard to the terms of the trust-disposition and settlement.”

Counsel for the Petitioners—Ure—Wilson. Agents—Davidson & Syme, W.S.

Counsel for the Respondents—C. S. Dickson—Aitken. Agents—Forrester & Davidson, W.S.

Counsel for W. J. Dundas, Curator *ad litem* to Beneficiaries under Mr Muir's Settlement, who were in Pupillarity—Blackburn. Agents—Dundas & Wilson, C.S.

Friday, January 19.

SECOND DIVISION.

[Lord Low, Ordinary.]

ROSS v. M'FARLANE.

Master and Servant—Contract between Proprietor and Manager of Newspaper—Personal Contract—Delectus Personæ—Right of Proprietor to Sell Newspaper.

In 1888 A, the proprietor of a daily newspaper, appointed B to be manager of the paper by letter as follows—“I hereby accept your offer to serve me as general manager of the *Scottish Leader*.” In 1890 the engagement was renewed by letter, signed by both parties, commencing “We have to-day arranged your reappointment as general manager of the *Scottish Leader*.”

In 1892 A sold the paper to C, the

new proprietor agreeing to take over all A's obligations to members on the staff. B refused to enter into an arrangement with C without A being a party thereto, and he was dismissed by C. B thereupon raised an action against A for damages for breach of contract.

Held (aff. judgment of Lord Low) that A, having sold the paper to C, and refused to give B a written assurance that B would not prejudice his claim against A by entering into a contract with C, was liable in damages to B for breach of contract—*diss.* Lord Young, who was of opinion that A had committed no breach of contract in selling the paper to C, and that A did not require to express in writing the fact that he was under obligation to B to see that the contract was fulfilled, and had never been asked by B to do so.

William Dallas Ross, newspaper manager, raised an action against John M'Farlane, lately proprietor of the *Scottish Leader*, for £2500 damages for breach of contract. The pursuer averred that by his actings in selling that paper in 1892 to T. Carlaw Martin, the editor of the paper, the defender had committed a breach of the contract entered into by the pursuer and defender in 1883, and renewed in 1890, by which the defender accepted the pursuer's offer to serve him as general manager of the *Scottish Leader* for the period of two years, extended in 1890 for other five years.

The defender lodged defences, and pleaded, *inter alia*—“(1) No relevant case. (2) The pursuer is barred by his actings from maintaining the present action, and from recovering damages for breach of contract. (3) The pursuer having declined to continue his services as manager of the *Scottish Leader* in terms of his obligation under said contract is barred from maintaining the present action.”

A proof was led before the Lord Ordinary (Low). The facts of the case are fully disclosed in the Lord Ordinary's note.

On 20th July 1893 the Lord Ordinary pronounced the following interlocutor:—“Finds it proved that the defender by his actings has committed a breach of the contract of service entered into between him and the pursuer, and is liable in damages to the pursuer for the loss and damage suffered by the pursuer in consequence of said breach of contract: Assesses the damages at the sum of £800, and decerns against the defender therefor.

“*Opinion.*— . . . The questions to be determined appear to me to be—First, Whether the defender has broken his contract with the pursuer? and secondly, if that question be answered in the affirmative, what is the amount of the damages, if any, in which the defender is liable.

“The defender contends that there was no breach of contract. The agreement which was current when the defender sold the newspaper to Mr Martin is in the form of a letter dated 1st January 1890, addressed by the defender to the pursuer, and is signed by both of these parties. The letter

runs thus—“We have to-day arranged your reappointment as general manager of the *Scottish Leader* on the following terms for a period of five years:—namely, That your salary for the first year (1890) be Eight hundred pounds sterling; for the second year, Nine hundred pounds; and for the third and subsequent years, One thousand pounds, with a bonus of two-and-a-half per cent. on the ascertained net profits of the newspaper after the third year.” It was argued for the defender that that was not a contract of personal service, but a contract that for the period of five years the pursuer should hold the position of general manager of the *Scottish Leader*. The sale of the newspaper by the defender therefore, it was argued, did not involve a breach of contract, unless the result was to deprive the pursuer of the position as manager. The pursuer, however was not thereby deprived of the position of manager, because Mr Martin was willing and offered to continue the pursuer as manager of the paper upon the same terms as those contained in the agreement. The pursuer refused that offer, and accordingly he alone was to blame for the contract not being implemented.

“That view of the agreement is plausible, but I am of opinion that it is not sound. The agreement is for ‘reappointment’ of the pursuer as manager. I think therefore that it is necessary to go back and see what was the nature of the position to which the pursuer was ‘reappointed.’ The pursuer, at the time when the agreement under consideration was made, held office under a letter addressed to him by the defender on 17th May 1888. That letter is in the following terms—“I hereby accept your offer to serve me as general manager of the *Scottish Leader* for two years at the annual salary of four hundred pounds.”

“That was clearly a contract of service, and I do not think that there is anything to suggest that when the pursuer was ‘reappointed’ in 1890 there was any intention to alter the character of the employment.

“Further, the position of manager of a newspaper seems to me to be necessarily a position of service. He manages for the proprietor, and must be under the proprietor's control, and subject to his orders. And it also seems to me to be an employment which involves *delectus personæ*. The office of manager of a daily newspaper is an onerous and responsible one, and in order that the manager may perform his duties with credit and efficiency, it is necessary that he and his employer should work well together.

“I am therefore of opinion that the contract between the pursuer and the defender was a contract of personal service; that the defender was not entitled to assign the pursuer's services to anyone to whom he might sell the newspaper, and that the sale of the newspaper by the defender, by which he disabled himself from performing the contract, was technically a breach of the contract. I think that it follows from what I have said that the pursuer was not bound,

whatever the circumstances might be, to accept the office of manager of the newspaper under anyone to whom the defender might sell it on pain of forfeiting all claim against the defender. At the same time, I am of opinion that the newspaper having been sold, the pursuer could not refuse an offer on the part of the purchaser to continue him in the same position, and with the same emoluments, as formerly, and at the same time claim damages for breach of contract from the defender, unless he could show that he had sufficient and reasonable grounds for refusing the offer.

“Such being my view of the nature of the contract, and of the rules of law applicable to the case, it is necessary to consider what are the facts.

“For some time prior to the transfer of the newspaper to Mr Martin, the pursuer knew that a change of proprietorship was likely to take place, and on the 20th of August 1892 the defender told the pursuer that he had parted with the newspaper, that Mr Martin had taken his place, and that the pursuer's engagement was just to run on.

“Immediately after the defender made this communication to the pursuer, the latter had an interview with Mr Martin, who told him that he had acquired the newspaper, and had succeeded in making financial arrangements for carrying it on. The pursuer was not, however, informed of the precise nature of the arrangements which Mr Martin had made, nor the terms upon which Mr Martin had taken over the newspaper from the defender. The pursuer says that his impression was that the persons who had furnished the funds to carry on the newspaper would have an interest in and some control over it.

“At the interview between the pursuer and Mr Martin it seems to have been assumed that the former would continue to discharge the duties of manager, and after the transfer Mr Martin's name appeared upon the newspaper as publisher, and the pursuer's name as receiver of cash. That announcement was made with the pursuer's knowledge and consent, and showed that he contemplated the continuance of his connection with the newspaper. Further, the pursuer and Mr Martin appear to have been then, and to have continued, upon friendly terms with each other.

“There is some evidence in regard to conversations which the pursuer subsequently had with Mr Martin in regard to his position and remuneration, but the evidence is contradictory, and does not appear to me to be reliable. The most trustworthy history of subsequent events is to be found in a correspondence which ensued between the pursuer and the defender and his agent, and between the pursuer's agent and Mr Martin's agent.

“As I have said, the pursuer at first appears to have been willing to go on acting as manager, just as if no transfer of the newspaper had taken place. Upon thinking over the matter, however, and consulting a friend, he seems to have come to the conclusion that the position of matters necessitated care upon his part.

He knew that Mr Martin had not himself the means required to carry on the newspaper, and he did not know for what period of time the assistance which Mr Martin had obtained would enable him to carry it on. The pursuer, therefore, had not under Mr Martin the same security that his salary would be paid during the period of his engagement as he had when the defender was proprietor of the newspaper. Further, the pursuer had been told that Mr Martin had taken over all the defender's engagements with his employees, and he feared that if he accepted employment with Mr Martin without having his claim against the defender for any loss which he might sustain clearly acknowledged, he might lose any claim which he had against the latter in the event of the newspaper being stopped or his salary not being paid.

“I do not think that the pursuer's fears were unfounded. He had no security that Mr Martin would be able to continue the newspaper and pay his salary during the term of his engagement, and if he had acquiesced in the assignation of his services to Mr Martin, without taking care to have his claims against the defender reserved, he might have found it difficult to maintain, in the event of the newspaper being stopped, or his salary not paid, that he had not released the defender.

“The pursuer accordingly on 1st September wrote the following letter to Mr Robson, the defender's agent—‘As I must look to Mr M'Farlane to implement the agreement with me, or otherwise provide me with satisfactory guarantees that it will be implemented, I have to ask you for a copy of the agreement under which the new proprietors have undertaken Mr M'Farlane's obligations, so that I may consult an agent and put the matter on a satisfactory basis.’

“Upon the same day Mr Robson wrote in reply—‘I cannot give you a copy of Mr M'Farlane's agreement with Mr Martin, nor, in my opinion, are you entitled to ask for it. It relates to many things besides your engagement. Your letter appears to be written under the idea that by his arrangement with Mr Martin you may be barred from any claim on Mr M'Farlane under your engagement with him. I need hardly say that he cannot be liberated from any liability incumbent on him to you under your engagement without your assent, and he has not asked you to give this. With this explanation I may add that Mr Martin takes over all the engagements with members of the staff, including your own, so that your position remains just as it has hitherto been.’

“I do not doubt that Mr Robson did not feel himself justified in giving the pursuer a copy of the agreement between the defender and Mr Martin without the authority of both these gentlemen. It was, however, unfortunate that the pursuer did not see the agreement, especially as there does not seem to be anything in it which he might not have seen. Further, as the pursuer spoke in his letter of the ‘new proprietors,’ it would have been well if Mr Robson had

told him distinctly that Mr Martin was the sole proprietor of the newspaper. Probably Mr Robson did not observe that the pursuer spoke of proprietors, and not only of proprietor.

"In other respects Mr Robson's letter seems to me to be quite distinct. If the pursuer had in addition obtained from Mr Robson an assurance that Mr Martin was the sole proprietor, and the only person with whom he would have to deal, I do not think that he could have reasonably asked for more.

"The pursuer, however, was not satisfied with any part of Mr Robson's letter, and he now explains that he doubted whether Mr Robson had authority to write it, as the letter is dated from Perth, and the pursuer believed that the defender was also out of Edinburgh.

"The pursuer accordingly on the 9th September wrote to the defender. The letter is, I think, very infelicitously expressed. The important question for the pursuer was whether the defender accepted Mr Robson's view of his liability under his agreement with the pursuer. The pursuer, however, unfortunately did not ask that question, but after saying that Mr Robson had refused to give him a copy of the agreement, and that Mr Martin had interfered in certain matters which had hitherto fallen under his charge as manager, he asked this question—'I wish to know from you, as the only person with whom I have an agreement, whether I am to continue as hitherto and as your manager to discharge my duties under the agreement, or whether, on the other hand, I am to cease to do so?'

"I have some difficulty in appreciating what the pursuer had in his mind when he asked that question, because he knew that the defender had parted with the newspaper, and could not possibly employ any one to act as his manager of the newspaper.

"The pursuer then adds—'I would point out to you that an agreement between you and me is one thing, an agreement between Mr Martin and me is a very different thing, and it is not possible for parties to convert the one into the other without my consent. Of course I look to you to fulfil your agreement with me. It would be a serious matter for me, apart altogether from the direct pecuniary consideration, if my agreement were not fulfilled.'

"The last sentence, when taken along with the other parts of the letter which I have quoted, must, I think, be read as meaning that it was not only or mainly his salary about which the pursuer was anxious, but his position as manager of the newspaper. It is proper to keep that in view in considering the defender's answer.

"That answer is dated the 10th September, and prior to that date the defender had received from Mr Robson a copy of his letter to the pursuer of the 1st September. The defender says that he entirely approved of Mr Robson's letter, and acquiesced in the view therein expressed as to his liability. The defender, however, did not

give the slightest hint in his letter to the pursuer that that was his view. On the contrary, he commences his letter by complaining of the pursuer's discourtesy in communicating with his solicitor without his knowledge, and then he goes on to remind the pursuer that he had said that if the defender had to stop the newspaper he would never think of enforcing his engagement, and that if the paper was transferred to a company he would not object to his engagement running on with the company, and that when the arrangements with Mr Martin were completed the pursuer had entered most heartily into the matter, and had worked night and day at the transfer. The conclusion at which the defender arrives is this—'I name these things and could name much more to show that you never once objected to a single arrangement prior to the transfer, and you entered most heartily into matters after the transfer, and homologated the arrangement made with Mr Martin that had relation to 'taking over engagements with members of the staff.' Mr Martin has undoubtedly taken my place, as I told you on the day of the transfer.'

"Now, I think that the natural meaning of that letter was that the defender did not admit any liability to the pursuer, but, on the contrary, maintained that the pursuer had by word and deed agreed that his services should be transferred from the defender to Mr Martin.

"I have already pointed out that the pursuer in his letter to the defender seemed to be more concerned with his position than in regard to his salary, and I accept the defender's statement that it was that view of the matter to which he addressed himself in his answer. But the pursuer had distinctly told the defender that he looked to him to fulfil the agreement, and I think that the defender, if he took the same view of his liability as his agent had done, ought to have said so. When the defender began by reproving the pursuer for communicating with his agent, and laboured to show that the pursuer had "homologated" the arrangements with Mr Martin for taking over the engagements with the staff, and then closed his letter without the slightest hint that he admitted any liability, I am not surprised that the pursuer concluded that he did not agree with Mr Robson but repudiated all liability.

"It is also of some importance to observe, as the matter was a good deal commented upon, that the defender in his letter speaks of the "new proprietors" of the newspaper, and of the pursuer's name having appeared in the paper as the receiver of cash for "the company," expressions which suggested that what the pursuer says he feared, viz., that there were some undisclosed proprietors behind Mr Martin, was actually the case. It must be noticed, however, that the pursuer had before this date, as I shall afterwards shew, a distinct assurance from the agent of Mr Martin that the latter was the sole proprietor.

"On the 12th September the pursuer again

wrote to the defender—‘Your narrative of events is not quite accurate, though it contains facts. I was certainly willing to fall in with any reasonable arrangements, and am so still. But I must know what the arrangement proposed is as far as I am concerned, and then I shall judge of its reasonableness. At the present time I do not know what is proposed. The position is that I have an agreement with you in writing, under which I have certain rights and certain duties. I am not free to alter that or make any agreement with anyone else without having a written arrangement with you to that effect, and I am not to allow parties to drift into such a position that I should not know with whom I had an agreement, whether with you or with Mr Martin. Your statement to the effect that I would not enforce any agreement, and as to my homologating any arrangement between you and Mr Martin, is inaccurate and misleading. I do not know what the arrangement is, and so could not homologate it, and your solicitor’s letter to me shows that your letter is quite erroneous. My position is that I adhere to my agreement unless and until a new arrangement is made definitely in writing between you, Mr Martin, and me, and I fear that matters are drifting into difficulty because you and Mr Martin do not approach the point in a business-like way.’

‘The defender on the 13th September replied in the following terms:—‘I explained to you on the day of the transfer all that was necessary for you to know—(First) that Mr Martin would take my position; and (Second) that he took over all the engagements with members of the staff, including yours, so that, as you yourself expressed it, your engagement will just run on.’

‘That letter appears to me to proceed upon the same lines as the previous letter of the 10th September.

‘The pursuer again wrote to the defender on the 15th September, saying—‘I have yours of the 13th inst. Evidently you and I differ as to facts, and we also differ as to what is necessary so far as I am concerned. You are not entitled to hand over my engagement to any other without my consent any more than I would be to substitute a new manager for myself without yours, and I hope, for the sake of all concerned, that without any more delay you will address yourself to this view of the matter, and obviate difficulties resulting from your breach of my agreement. Matters cannot go on as at present.’

‘The defender replied that he would not return to Edinburgh until the end of the month, when he would take the matter up.

‘The pursuer, however, again wrote to the defender, on the 21st September, saying—‘What I fear is, that you and Mr Martin are not quite at one as to my position. I cannot make any agreement with him without your consent, and of course my agreement with you stands till another is made. I hope that something satisfactory to all parties will ensue.’

‘The defender’s answer, which is dated

the 23rd September, is as follows—‘Mr Martin has taken over your agreement along with that of the others, and stands to you in the same relationship which I did, You are therefore quite at liberty to make any agreement with him you like without my consent.’

‘That letter closed the correspondence between the pursuer and the defender. In the correspondence I think that they both fell into errors. The pursuer never put specifically to the defender the two questions to which it was important that he should have an answer, viz.—First, whether, the defender accepted Mr Robson’s view of his liability; and secondly, whether there were any undisclosed proprietors with whom the pursuer would have to deal as well as with Mr Martin. The defender, on the other hand, wrote in a way calculated, in my opinion, to lead the pursuer to believe that he maintained that the pursuer had agreed to continue his employment with Mr Martin instead of with the defender, and had thereby freed the defender.

‘Meantime communications, both written and verbal, had been passing between the pursuer’s agent Mr Prosser and Mr Martin’s agent Mr Falconer, and also between the pursuer and Mr Falconer, to which it is now necessary to refer.

‘Soon after the transfer of the newspaper, Mr Martin made a proposal to the pursuer that his salary should be reduced, but that he should receive a larger interest in the profits. I am satisfied that the proposal was made in perfect good faith by Mr Martin.

‘The pursuer’s salary was very large—£1000 a-year—and was a great tax upon the resources of a newspaper which was not paying its way. Mr Martin was therefore naturally anxious that the pursuer’s fixed salary should be reduced, but he was willing to give him a large interest in the profits, so that the reduction of the salary might be made up to him if by their joint efforts the newspaper should be rendered prosperous.

‘The proposal was discussed in the first instance between the pursuer and Mr Falconer, and Mr Falconer says that he distinctly told the pursuer that Mr Martin had become absolute proprietor of the *Scottish Leader*. He also explained that Mr Martin was desirous to retain the pursuer’s services as manager, but that he wished to reduce his salary and increase his share of the profits. Nothing definite was settled at this interview, as the pursuer told Mr Falconer that he would take the advice of a legal friend. Mr Prosser and Mr Falconer then had a meeting on the 5th of September, when Mr Prosser declined to entertain Mr Martin’s proposal as to salary. Mr Falconer reported the result of the meeting to Mr Martin, and then with his authority wrote to Mr Prosser saying that Mr Martin had ‘decided to make no change.’

‘It was thus made clear that if the pursuer continued to act as manager under Mr Martin the terms of his engagement would not be altered.

"On the 7th September Mr Prosser wrote to Mr Falconer, referring to the statement in his letter that Mr Martin had 'decided to make no change,' and saying that it did not lie with Mr Martin to decide anything in reference to the pursuer; that the latter had no agreement with Mr Martin, and that Mr Martin would not, without the pursuer's consent, assume the defender's position and relation to him.

"On the 8th September Mr Falconer replied to Mr Prosser and said—'As I informed Mr Ross at my meeting with him; Mr Martin has purchased the *Scottish Leader* from Mr M'Farlane, and is now the sole proprietor of it. Am I to understand from your letter that Mr Ross refuses to act as manager under Mr Martin's proprietorship on the conditions set forth in the letter appointing him?'

"There then followed two long letters from Mr Prosser. I do not think that it is necessary to quote from these letters. The import of them was that the pursuer would not make any agreement with Mr Martin alone, but only with Mr Martin and the defender in conjunction.

"On the 16th September Mr Falconer wrote that the only question between the pursuer and Mr Martin was whether the pursuer was willing to carry out the existing agreement under Mr Martin as coming in place of the defender. Mr Falconer added that Mr Martin had no wish to prejudice any claims which the pursuer had against the defender.

"On the 20th September Mr Prosser again wrote a long letter to Mr Falconer, the gist of which seems to me to be in this sentence—'He' (*i.e.*, the pursuer) 'will make no agreement on any terms without Mr M'Farlane's written concurrence.' Mr Prosser also indicated his opinion that Mr Falconer's question, whether the pursuer was willing to carry out the existing agreement under Mr Martin was not a clear question, because among other things it might mean that Mr Martin should step into the defender's shoes as regarded rights but not as regarded liabilities.

"Mr Falconer replied on the 22nd September, saying that the question was asked on the footing that Mr Martin would become liable for all the obligations incumbent on the defender under the agreement, so far as they had not been already implemented. He also said that the pursuer's claims against the defender was not a matter for Mr Martin to deal with or discuss, and he repeated that Mr Martin had no wish to prejudice any such claims.

"In answer to another letter from Mr Prosser, upon the same lines as his previous letters, Mr Falconer wrote on the 29th September:—'I have stated fully the footing upon which Mr Martin is willing to continue Mr Ross in his employment; and unless Mr Ross is prepared to accept that footing I am afraid he must be left to take his own course.'

"On the following day Mr Prosser replied:—'Mr Ross is not in Mr Martin's employment, and no question of continuation arises. Hitherto I have been under the

impression that we were corresponding because my client was willing to consider any reasonable proposal whereby he should convenience Mr M'Farlane and Mr Martin; but this does not appear to be your view, and Mr Ross consequently will adhere to his existing agreement.'

"That letter was taken by Mr Falconer as a declination on the part of the pursuer to accept the employment offered to him by Mr Martin, and accordingly he wrote to Mr Prosser to that effect on the 1st October, and intimated that the pursuer's connection with the *Scottish Leader* must cease.

"On the 3rd October Mr Prosser again wrote to Mr Falconer saying—'Mr Ross has no intention of breaking his agreement, to which he adheres, and he does not intend to cease attendance at the office of the *Scottish Leader*.'

"The latter statement naturally brought from Mr Falconer the reply that 'Mr Ross can have no right to enter the *Leader* office except by the authority of Mr Martin, and if he insists upon doing so I shall advise Mr Martin to take steps for having him excluded.'

"That is all the correspondence between Mr Prosser and Mr Falconer to which it is necessary for me to refer. The position taken up by Mr Falconer seems to me to be unimpeachable, but I have considerable difficulty in understanding Mr Prosser's views. I rather think that he began the correspondence under an erroneous impression as to Mr Martin's position. He evidently thought that Mr Martin's view was that as he had taken over the defender's engagements the pursuer was bound to continue in his service. I do not think that Mr Martin took that view, but I think that he assumed, as the pursuer's conduct at the time of the transfer entitled him to assume, that the pursuer was willing to continue to be manager of the newspaper under him, and that the only question was whether there should or should not be some modification of his remuneration. Further, Mr Prosser wrote as if the pursuer could still insist upon specific implement of his contract with the defender, and was still entitled, notwithstanding the sale, to continue to manage the newspaper. Such a view, I apprehend, was altogether erroneous. The defender was entitled to sell the newspaper (although he thereby made himself liable to a claim of damages on the part of the pursuer for breach of contract), and the newspaper having been sold, the pursuer could have no possible right to force himself into the office and to manage the newspaper without the consent of Mr Martin, to whom it had been transferred.

"The negotiations between the pursuer and Mr Martin having thus been broken off, Mr Prosser put himself into communication with Mr Robson. Mr Prosser furnished Mr Robson with a copy of the correspondence which he had had with Mr Falconer, and on the 4th of October he wrote to Mr Robson a letter in which he said—'Mr Ross looks to Mr M'Farlane for implement of his agreement, being willing

to implement his part of it, I do not understand the treatment which parties are attempting to impose on Mr Ross, unless it be with the intention of getting him into a difficulty between two persons who ought together to communicate with him regarding any change but seem not inclined to do so.'

"On the 5th of October Mr Robson replied, and after referring at some length to the correspondence between Mr Prosser and Mr Falconer and to his own letter to the pursuer of 1st September, he said,—'It thus appears that what Mr Martin desires is that Mr Ross should carry out, under Mr Martin's proprietorship, his agreement to act as general manager of the *Scottish Leader*, and that Mr Ross is willing to do so, the latter's only difficulty apparently being lest by acting under Mr Martin, as now the proprietor of the paper in place of Mr M'Farlane, and taking instructions from Mr Martin in place of as formerly from Mr M'Farlane, he might prejudice any claims he may have against Mr M'Farlane under the agreement. I thought that my letter to Mr Ross of 1st September last made it sufficiently clear that this would not be the case; but as you seem to have some dubiety on this, I now state expressly on behalf of Mr M'Farlane that Mr Ross, by carrying out his existing agreement to act as general manager of the *Scottish Leader* under Mr Martin as coming in place of Mr M'Farlane, and by taking his instructions and payment of his salary from Mr Martin, shall not prejudice any claims he may have against Mr M'Farlane under the agreement. I think that this should be satisfactory.'

"That assurance was regarded by Mr Prosser as satisfactory, and he wrote to Mr Robson on 6th October, saying that,—'In reliance on what you write on behalf of Mr M'Farlane, Mr Ross will continue to discharge his duties as general manager of the *Scottish Leader* under Mr Martin's proprietorship, and I hope everything will go smoothly.'

"Mr Prosser also asked Mr Robson to communicate with Mr Falconer, and Mr Robson sent to the latter a copy of Mr Prosser's letter. On the 7th October, accordingly, Mr Falconer wrote to Mr Prosser—'I have written Mr Robson that the negotiations between Mr Martin and Mr Ross which were finally closed by my letter to you of the 1st inst. cannot be re-opened, and this being the case, I have to repeat my intimation that Mr Ross must cease his attendance at the office of the *Scottish Leader*, and I request that you should inform me when it would be convenient for Mr Ross to vacate his house.'

"The pursuer's connection with the *Scottish Leader* thus came finally to an end. Mr Martin says that by the time that Mr Prosser's letter of the 7th October was received he had made other arrangements for the management of the newspaper. I do not think that these arrangements were of such a kind as to form a serious obstacle to the pursuer's re-engagement if Mr Martin had been anxious to get him back; but on

the other hand, I have considerable sympathy with Mr Martin's unwillingness again to associate himself with the pursuer, looking to the position which the latter had taken up in the correspondence. I do not think, however, that the question of Mr Martin's reasonableness or unreasonableness in refusing to take the pursuer back is of much importance in regard to the present question.

"After his connection with the *Scottish Leader* ceased the pursuer was for a long time unable to obtain employment, but about six weeks prior to the commencement of the proof (8th June 1893) he obtained a situation with the Linotype Company in London at a salary of £300 a-year. He has since that date, as appears from the Joint Minute obtained employment as manager of the newspaper *Black and White*. The engagement is for three months, at the expiry of which period it may or may not be continued. The salary is at the rate of £400 a-year.

"I have now referred to all the evidence which appears to me to be material in this case, and the questions to be determined upon that evidence appear to me to be (1) whether the pursuer has established his claim to damages; and (2) if so, at what amount ought the damages to be assessed.

"The argument for the defender is, that the pursuer had the offer open to him of the same employment upon the same terms with Mr Martin as he had previously had with the defender, and that as he chose not to accept that offer, any loss which he has thereby sustained is due to himself and not to the defender.

"I think that it is settled law in the case of breach of contract of service, that if a servant has an offer of employment of the same kind and with the same remuneration as under the contract which has been broken which a reasonable man would accept, he cannot reject the offer and claim damages for loss on account of breach of contract.

"Now, I think that the offer which the pursuer had from Mr Martin was one which it was reasonable that he should accept. At the same time the circumstances were very peculiar, and it seems to me that the pursuer was not to blame for seeking to have his right of recourse against the defender clearly defined and recognised before finally accepting service with Mr Martin. The pursuer knew that Mr Martin had taken over all the defender's obligations to his employees, and if he had accepted Mr Martin's offer without having his claims against the defender reserved, he might, in the event of the stoppage of the *Scottish Leader*, have found that he had lost his right to make any claim against the defender, and this was an important consideration, because unless Mr Martin succeeded in making the newspaper pay better than the defender had been able to do, the chances were that it might be given up long before the expiry of the pursuer's engagement.

"But the pursuer obtained the assurance, which it was important for him to

have, from Mr Robson, on the 1st of September; and if he had asked the same assurance from the defender, I do not doubt that he would have got it. I therefore think that the pursuer was himself very much to blame for what occurred.

"I am, however, of opinion that the defender was to blame, in that the natural inference from his letters was that he did not take the same view of his liability as Mr Robson did, but held that the pursuer had agreed to relieve him and to take service with Mr Martin as coming in his place.

"The defender thus not only disabled himself from fulfilling his contract, but by his subsequent conduct misled the pursuer, and is to a certain extent responsible for the pursuer's loss of the situation.

"The result appears to me to be that the defender having broken his contract, having by his letters induced the pursuer to believe that he repudiated liability, and having thereby prejudiced the pursuer in his negotiations with Mr Martin, is liable in damages; while, upon the other hand, the pursuer, by taking up an untenable position in his correspondence with the defender and with Mr Martin, materially contributed to the discontinuance of his employment as manager of the *Leader*, and is therefore not entitled to the full amount of damages which he could have claimed if there had been no fault on his part. In other words, I think that damages are due, but that the amount of damages is a jury question, to be determined in view of the whole circumstances of the case; so dealing with it, I assess the damages at the sum of £800."

The defender reclaimed, and argued—
(1) There was here no practical breach of contract. Technically there might be a breach, practically there was none. The essence of the contract was that the pursuer was to be manager of a certain paper, at a certain salary, for a certain time. If the paper had been stopped, or if his salary had been reduced, or if he had been degraded from his position of manager to that of a clerk, then a breach of contract would have been committed, but none of these things had happened. The personal element in the contract was subordinated to the official element, and *delectus personæ*, if present at all, was only so to the most trifling extent. It distinctly appeared that the defender after selling the paper took up the position—"I have now nothing to do with the proprietorship or mode of, conducting the paper, but if the contract is broken I am still bound." The pursuer had two distinct matters weighing on his mind (1st) as to his remuneration. *The question as to remuneration*—This matter was settled satisfactorily by Mr Robson's letter to the pursuer; he was quite satisfied with the explanation therein contained, and in his subsequent letters to the defender he never referred to the question of salary. (2nd) *As to his duties*—This was the matter which formed the subject of the correspondence between the pursuer and the defender. The pursuer objected to

serve under Mr Martin, but as long as he was continued in the position of manager of the paper he had no right to object. In short, it was this unwarranted objection of the pursuer to serve under Mr Martin which led to his dismissal and the present action. (2) Even if it was held that there had been a breach of contract on the part of the defender, no damages, or at least nominal damages only should be awarded to the pursuer. Where there was fault on the part of the employer and wrongous dismissal of the employed, damages were given to the latter for loss of reputation. That element did not enter here. If it was assumed that there was breach of contract the pursuer was bound to accept equivalent employment if he could get it. Here he did get an offer of similar employment from Mr Martin. But by reason of groundless apprehensions, he took up, as the Lord Ordinary admitted, an untenable position which led or at least materially contributed to his dismissal. He was therefore entitled to no damages for the same reason that a person materially contributing to his own injury was entitled to none—*Florence v. Mann*, December 17, 1890, 18 R. 247.

Argued for the pursuer—Under the terms of the contract it was made matter of specific agreement that he was to serve under the defender. It was a personal contract, and *delectus personæ* entered into it. The relationship of master and servant existed between the proprietor and general manager of a newspaper. The pursuer knew that the defender was a man possessing substantial means, and he entered into the contract on the condition that he remained his employer. Therefore when the defender sold the paper to Mr Martin he committed a breach of contract—*Fraser on Master and Servant*, p. 122; *Macdonell on the Law of Master and Servant*, 242; *Addison on Contracts* (7th ed.), p. 311; *Harkins v. Smith*, March 11, 1841, F.C.; *Robson v. Sharpe & Drummond*, May 2, 1831, 2 B. & A. 303; *Beckum v. Drake*, July 26, 1849, 2 H. of L. Cas. 579, opinion of Mr Justice Erle, p. 606; *Emmens v. Elderton*, August 12, 1853, 4 H. of L. Cas. 624, opinion of Mr Justice Compton, p. 646; *Hole v. Bradbury*, June 17, 1879, L.R., 12 Ch. D. 886; cases collected in *Lamleigh v. Braithwaite*, 1 Smith's Leading Cases, 151. The bankruptcy or death of the defender would have dissolved the contract—*Fraser on Master and Servant*, pp. 168 and 328. The pursuer was entitled to refuse to accept Mr Martin's employment until he had got the defender's guarantee that his claims against him would not be prejudiced by his doing so. If the pursuer had accepted Mr Martin as his employer without getting the sanction of the defender to the arrangement, the defender's liability under the contract would have come to an end—*Skene v. Greenhill*, May 20, 1825, 4 Shaw 26, Lord Glenlee's opinion. The matter stood wholly on the correspondence, and the correspondence showed (1) that the pursuer was apprehensive that his claims against the defender for salary would be prejudiced if

he entered into an arrangement with Mr Martin without the defender being a party thereto; and (2) that the purpose of the defender was to get rid of his liabilities to the pursuer under the contract by getting him to enter into an arrangement with Mr Martin. The letter of Mr Robson to the pursuer did not bind the defender, it only contained a statement of Mr Robson's opinion.

At advising—

LORD JUSTICE-CLERK—The pursuer was in 1888 engaged by the defender, who was then proprietor of the *Scottish Leader* newspaper, to act as manager of that journal. The agreement was in writing, and was in these words—"I hereby accept your offer to serve me as general manager of the *Scottish Leader* for two years, at the annual salary of £400." The pursuer thus plainly entered into a contract to serve the defender as his manager of the newspaper owned by him. The engagement was renewed for a subsequent term of five years on 1st January 1890, on somewhat different terms as to emolument which it is unnecessary at this stage to enter into, but the actual appointment is thus expressed—"We have to-day arranged your reappointment as general manager of the *Scottish Leader* on the following terms," and it is signed both by the pursuer and defender. It was therefore a renewal of the contract of service by the pursuer to the defender. The nature of the employment was in no way altered. The pursuer was personally to serve the defender in the position agreed upon. I concur, therefore, with the Lord Ordinary in thinking that there was no obligation on the pursuer to continue in the office of manager of the *Scottish Leader* if the defender should cease to be connected with it, and so necessarily make it impossible for the agreed-on service to be rendered. The defender by selling the newspaper made it impossible for him to implement his part of the contract. That is clear, and indeed was conceded by the defender's counsel.

On 20th August 1892 the defender informed the pursuer that he had sold the *Scottish Leader* to Mr Martin, a gentleman who had been sub-editor of the newspaper for some time previously, but the pursuer was only informed of this in general terms, and the particulars of the arrangement between the defender and Martin were not disclosed to him. The pursuer and Martin then conferred as to the former remaining on the staff of the paper, and this the pursuer was willing to do. But after consulting a friend he proceeded to take steps to have his position in the matter made definite, feeling probably that under his agreement with the defender his financial position was safe, but that if he was dependant on Mr Martin only, or on undisclosed proprietors behind him, and let go his hold of the defender, he might suffer financially later on if the newspaper should fail. He was therefore not prepared to agree to any arrangement

which should simply transfer his services to Mr Martin, without the position being made definite, that he did so with defender still bound, so that what he might fail to get by doing work under Mr Martin during the unexpired part of the term of his agreement, he could exact from his original employer. He was afraid that he might be held to have given up all claims upon the defender if he engaged under Martin without the defender's distinct consent. Accordingly, the pursuer wrote to Mr Robson, the defender's agent, on 1st September—[*His Lordship read the letter as quoted by the Lord Ordinary*]—He thus at the outset stated very distinctly that he must have implement of his agreement, or a sufficient guarantee for implement. To that letter Mr Robson replied—[*His Lordship read the letter as quoted by the Lord Ordinary*.] Mr Robson communicated these letters to the defender.

The pursuer was not satisfied with Mr Robson's letter, and was dissatisfied with the action Mr Martin was taking in the *Leader* office, and being still in ignorance of what the defender and Martin had arranged, was confirmed in his intention of insisting upon a definite arrangement before in any way recognising any alteration of the position as regarded himself and the defender. Accordingly, he wrote on 9th September to the defender direct, and in that letter he mentions his ignorance of the arrangement, and what Mr Martin is doing in the office, and then says—[*His Lordship read the passage quoted by the Lord Ordinary*]—To that letter the defender replied on 10th September, and after referring to various verbal communings between him and the pursuer, concludes thus—[*His Lordship read the letter quoted by the Lord Ordinary*]—To that letter the pursuer replied on the same date and said—[*His Lordship read the passage quoted by the Lord Ordinary*].

I pause here to say that in my opinion these letters made one thing perfectly plain, viz., that the pursuer and defender were not at one as to any understanding or arrangement between them beyond or in any way modifying the existing agreement between them, and that the pursuer held by his rights under that agreement until it should be displaced by some other binding written contract between him and the defender and Martin. The pursuer's letter of 12th September is most definite, and the defender could not be under any mistake as to its meaning.

The defender's answer is curt, and takes no notice of the pursuer's stipulation that a new arrangement must be made definitely in writing if there is to be any alteration of his position by his serving under Martin as the new proprietor. He says—[*His Lordship read the letter*]—To this the pursuer replies on 15th September—[*His Lordship read the letter*]—The defender being absent on holiday writes postponing his answer, and the pursuer again writes on 21st September—[*His Lordship read the letter*]—And to that letter the defender's final reply is on

the 23rd—[His Lordship read the letter].

I have gone over these letters in detail, because they appear to me to contain the kernel of the whole matter, and I do not think that any correspondence which took place afterwards between the agents of the pursuer and Martin, or any parole evidence can affect the position established by them in any way. I think they make it plain—

1. That the pursuer was willing to work on the *Scottish Leader* after it was sold by the defender, and so relieve the defender to the extent to which he might be remunerated by the new proprietors, provided he was made secure in writing that he did not lose the benefit of his agreement with the defender if his new work failed to yield him the same emolument absolutely or partially.

2. That the pursuer made it plain to the defender that without written agreement he would hold to his rights under the agreement already existing.

3. That the defender intentionally declined to notice the pursuer's stipulations, and endeavoured to make out that Martin had taken over the pursuer, and suggested to the pursuer to make any bargain he liked with Martin.

4. That he intentionally declined to say anything which would admit that he was still bound by his contract, or to give a consent to a new arrangement so as to protect the pursuer from an after repudiation, on the allegation of an alteration in the pursuer's legal position, should occasion arise for the pursuer demanding that the defender should make good any loss which might follow the change.

5. That the defender so acted in the hope and belief that the pursuer would be persuaded to act without consent or guarantee and that he might thus escape from his liability.

Matters so remained during a protracted correspondence between the pursuer's agent and Mr Martin's agent, but when at last the former believed that what his client insisted upon was to be admitted by the defender, Martin declined to allow the pursuer to enter the premises of the newspaper, or to do any duty in connection with it. To that the pursuer had to submit, for he was not under any contract with Mr Martin, and could not claim anything against him.

In these circumstances I concur with the Lord Ordinary in holding that there was here breach of agreement. Indeed, as I before stated, it was practically admitted at the debate that there was a technical breach of agreement. The pursuer was engaged by the defender for a term. The defender has not fulfilled the engagement. But the defender's counsel, Mr Comrie Thomson, argued that for that non-fulfilment the damages should only be nominal. I am unable to see how that should be so. The pursuer was of course not entitled to sit idle and make no effort to obtain suitable employment. He must fairly and reasonably exert himself to earn his living, and can only come against the defender for the loss he sustains from inability to secure a

position as good as that which was agreed upon with the defender. The Lord Ordinary thinks that he has not been in default in this, and I am of the same opinion. He has obtained a situation bringing him a substantial salary in his own line of life, although not such a high salary as he was entitled to by the agreement in question. But taking that into full consideration, the Lord Ordinary has come to the conclusion that his loss has amounted to £800. I see no reason to hold that his Lordship's verdict on the damages is in any way excessive, and indeed the amount was not seriously impugned by the defender if it should be held that the pursuer was entitled to more than nominal damages.

I would therefore move your Lordships to adhere to his interlocutor.

LORD YOUNG—This is an action of damages for breach of contract, the contract being one in writing between the proprietor of a newspaper and the pursuer that the latter should act as manager of the newspaper for a period of five years, and it is very necessary to have regard to the nature of that contract. It is not a mercantile contract, but a contract between the proprietor of a paper—who might be a lady living in London or Paris or anywhere else—and a gentleman to act as manager for a period of five years. Within the five years the proprietor of the paper, who contracted with the pursuer, found it expedient to sell the paper, and he sold it accordingly to Mr Martin, who had been editor of it, but with an agreement between him and Martin that the latter should take over the staff and fulfil all M'Farlane's obligations to all the members of the staff including the pursuer, the manager. It seems to be thought by the pursuer—and this is indeed the foundation of the action—that by selling the paper to Martin, although with a stipulation that the buyer should take over the staff of the paper, a breach of contract with the pursuer was committed. I am clearly of opinion that that was no breach of contract. It was no part of the contract with the pursuer, expressed or implied, that Mr M'Farlane should continue to be the proprietor of the paper for five years and that he should not sell it. He might have ceased to be proprietor of the paper by death. He did not contract to live for five years. If he had died and the paper passed to his heirs, would there have been any breach of contract there? I am of opinion that there would not, and that there was just as little in the present case. The defender acted with perfect propriety in arranging with the new proprietor that he should take over the pursuer as manager under the contract with him. I have said nothing hitherto to imply anything to the effect that Mr M'Farlane did not remain bound to see that the contract with the pursuer was implemented. My opinion is that the contract would be completely performed by a new proprietor just as much as it would be performed by the old proprietor continuing the pursuer

in the position of manager and requiring him to perform no duties except those which fell within the true meaning and import of the contract, and paying him his salary according to its terms. I am of opinion upon the evidence that Mr Martin did take over the pursuer as manager of the paper, and did agree to satisfy the whole of his rights under the contract. There is nothing in the evidence to show that the pursuer was ever required to do anything which was not within his duty as manager under the terms of the contract, or further, that the payments due to him under the contract for his services were ever withheld to the extent of a sixpence. I cannot therefore hold that there was here any breach of contract.

I do not care very much to refer to the letters, which I think are quite unnecessarily numerous, and some of them unnecessarily long, and not expressed with that distinctness which in a business correspondence would have been desirable, but I am satisfied upon the evidence that the pursuer's real grievance was being put under Mr Martin as his master. He preferred Mr M'Farlane. That was what touched and irritated him, but I can give no effect to that irritation. I think it sufficiently proved that the untenable nature of the position of objecting to being put under a new proprietor occurred very strongly to the pursuer, because he said in his evidence that he was willing to act as manager under Mr Martin, but that he desired only an assurance that he would be paid. Mr M'Farlane said—and I believe him thoroughly—that if that assurance had been asked he would have given it, but his position was that he was under obligation to see the contract fulfilled, and he did not require to express his obligation in writing to make it effectual against him. His agent expressed it in writing, but it would have been as binding had he not done so. Mr M'Farlane was under that obligation, and if the pursuer had gone on to perform his duties under Mr Martin—not being asked, as he never was asked, to do anything that was not incumbent upon him, and being paid his salary—there would have been no necessity for any recourse against Mr M'Farlane. I am therefore of opinion that the defender should be assolvied.

LORD RUTHERFURD CLARK—The counsel for the defender conceded that in selling the newspaper the defender had broken his contract, and that the only question before the Court was a question of damages. I am not disposed to examine a position which was assumed after full deliberation. But so far as I can judge they are right in their view of the law. When the defender by the sale disabled himself from fulfilling his contract, he was I think in breach of it.

But the point is not of much importance. The defender in any view was responsible for the due fulfilment of the contract. He arranged with Mr Martin that the pursuer should be continued as manager under him. If he consented that the pursuer should assume that position without prejudice to

his rights under the existing contract, it might be that there would be no breach of contract, or if the sale was a breach the damages might be merely nominal.

It cannot be doubted that the pursuer had a material interest to see that the defender was not discharged. Mr Martin had no means. He bought the newspaper with borrowed money. Nor so far as we can see had the pursuer any guarantee from the success of the undertaking. It seems to have been disastrous to all concerned.

As I understood the argument, the case was presented by both parties on this issue, Did the defender give or withhold the necessary consent? The defender was bound to give it if he was to plead that the arrangement with Mr Martin was a due fulfilment of his contract, or that the pursuer's claim was reduced to nominal damages. For it was essential that the pursuer's claims against the defender should be preserved, and if he entered into the employment of Mr Martin without the pursuer's consent the defender would have been liberated. At least there would have been a risk of that result, and the pursuer was not bound to run any risk. Nor do I think that I am stating any proposition which the defender disputes. He professes that he was all along ready to give the requisite consent, and that in fact he gave it.

From the first the pursuer took up a distinct position. He would not enter into a contract with Mr Martin without the consent of the defender. On the other hand he was willing to become the manager for Mr Martin if that consent was given. He may have been annoyed that he should be placed under one who had been formerly his subordinate, and who proposed to conduct the newspaper in a manner of which he did not approve. But he did not betray his feelings. Mr Martin himself says that up to the time when the pursuer left the office "the relations between me and the pursuer were entirely harmonious and cordial."

Mr Martin on his part was desirous that the pursuer should continue to act as manager, but on the condition that he entered into his employment. In his letter of 16th September Mr Falconer, as Mr Martin's agent, asked for a definite reply to the question "whether Mr Ross is or is not willing to carry out the agreement with Mr Martin." In a question with Mr Martin the pursuer could expect nothing more. He could not be continued in his office on any other footing than as the servant of the owner of the newspaper. He refused the offer because he could not obtain the defender's consent. He was definitely dismissed by Mr Falconer's letter of 1st October, inasmuch as he had declined "the employment offered to him by Mr Martin on the footing expressed in my letters." The pursuer could do nothing but submit. He had no contract with Mr Martin.

If the defender desired to fulfil his agreement with the pursuer, or to escape with nominal damages on the theory that he was in breach of it, he was, as I have said, bound to give his consent to the pursuer's

acceptance of Mr Martin's offer. I go further. I think that he was bound to make it perfectly clear that he was not in any way relieved of his contract; for it was by his act that the position of the pursuer was altered. He was, I think, bound to give the pursuer a full assurance that he would not be injured nor incur risk of injury thereby. Nor can I imagine why anyone who was willing to fulfil his agreement should have any hesitation in giving such an assurance. The strange thing in this case is that the defender maintains that he was always willing to give his consent, and yet that the negotiations between the pursuer and Mr Martin proved abortive for the want of it. I think that the defender was not willing to give his consent, and that it was the refusal of that consent which caused the dismissal of the pursuer. To my mind this is quite clear from the correspondence between the pursuer and defender. I quote only three passages. By a letter dated 12th September the pursuer very distinctly defined his position. He said—[*His Lordship read the passage quoted by the Lord Ordinary*]. On 23rd September the pursuer again wrote to say—[*His Lordship read the passage quoted by the Lord Ordinary*]. The defender's answer on the 23rd was—[*His Lordship read the passage quoted by the Lord Ordinary*].

The defender is asked for his consent. His answer is that the pursuer may make the agreement without it. The pursuer did not require or desire any such information. I can put no other construction on his letter than that the defender refused to give his consent. I have stated what I conceive to have been his duty in this respect. I am satisfied that his duty was not discharged. He gave the pursuer no assurance that he would not suffer prejudice by entering into an agreement with Mr Martin without his consent, and his conduct forces on my mind the belief that he was trying to induce the pursuer to transact with Mr Martin on that footing, with a clear perception of the benefit which would thence arise to himself.

But it is said by the defender that a full consent was given by the letter of Mr Robson dated 1st September 1892. I do not think so, nor did the defender. If he had been of that mind he would have had no hesitation in giving his consent when the pursuer asked for it. He would be doing nothing more than repeating an act of which he had previously approved. But Mr Robson does not deal with the subject. He merely points out three things—(1st) That the defender could not be liberated from the agreement without the pursuer's consent; (2nd) that such a consent had not been asked; and (3rd) that Mr Martin had taken over all the engagements with the staff. He says nothing about the defender's consent nor of the necessity of that consent to preserve the rights of the pursuer. Probably he was under no duty to enter on any such matter. I cannot, however, read his letter as meaning that the pursuer might contract with Mr Martin without forfeiting his claims against the defender.

But the just construction of the letter is really a matter of no moment, for the defender refused to act up to the interpretation which he now puts upon it.

A copy of the letter had been forwarded to the defender. He says—"Your reply is admirable." It seems to me a very ordinary letter unless it had a meaning which is not apparent on the surface. I think that the defender believed that it might throw the pursuer off his guard and lead him to accept, without the defender's consent, the employment which Mr Martin was likely to offer.

After the pursuer's dismissal by Mr Martin, Mr Robson wrote a letter to Mr Prosser, the agent for the pursuer, on 5th October. It is a remarkable letter, and I think it right to quote from it—[*His Lordship read the passage quoted by the Lord Ordinary*].

How Mr Robson thought that he had expressed in the first letter what he expresses in the second I cannot comprehend. But his letter had no practical effect, for Mr Martin refused to recede from the position which he took up on the 1st October, and the pursuer's dismissal remained a fact. It is not, however, without importance. If it expresses the true sentiments of the defender, they were strangely concealed. The defender did not act in conformity with them. He was repeatedly asked to give his consent and as often he refused or failed to give it. I am surprised to think that the defender, who wrote the letter of 23rd September, can pretend that Mr Robson's letter is an accurate expression of what he was willing to do. I am persuaded that it did not become an accurate expression until he knew that the pursuer had been definitely dismissed.

I am of opinion that the defender has not implemented his agreement. If the sale was not a breach he was bound to enable the pursuer to enter Mr Martin's employment without sacrificing or prejudicing his rights under the agreement. In no other way could he implement his contract. If the sale amounted to a breach he was equally bound to follow the same course if he was to escape with nominal damages.

LORD TRAYNER—I concur in the opinion of Lord Rutherford Clark.

The Court adhered.

Counsel for the Pursuer—Dickson—Salvesen—Crabb Watt. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Defender—Comrie Thomson—Guthrie. Agents—Millar, Robson, & M'Lean, W.S.