1939 *Present :* **Wijeyewardene J.**

UTTUMCHAND & CO., LTD., Appellant, *and* THE TIMES OF CEYLON CO., LTD., Respondent.

87—C. R. Colombo, 44,881.

Contract—Contract for inserting advertisements in newspaper for a fixed period —Termination before expiration of period—Damages recoverable.

The defendant contracted with the plaintiff company for the insertion of some of his advertisements twice a week in a newspaper owned by the plaintiff company.

Under the contract it was agreed that space should be reserved in the newspaper at a fixed rate for a period of two months and that if the advertiser failed to utilize the entire space contracted for within the specified period it should be competent for the plaintiff company to charge, at their discretion, "either for the total space contracted for at the contract rate or for the space utilized at the non-contract rate."

The defendant terminated the contract without just cause before the expiration of the specified period and after the insertion of only three advertisements.

Held, that the defendant was liable to pay at the casual rate, and not at the contract rate, in respect of the three advertisements.

APPEAL from a judgment of the Commissioner of Requests, Colombo.

J. R. Jayewardene, for the defendant, appellant.

E. F. N. Gratiaen, for the plaintiff, respondent.

Cur. adv. vult.

September 7, 1939. WIJEYEWARDENE J.—

This is an action arising out of a contract made by the defendant with the plaintiff company for the insertion of some of his advertisements in an evening paper called the *Times of Ceylon* owned by the plaintiff company. Under the contract, it was agreed that the defendant should pay Rs. 2.50 per single column inch for the reservation of a space of six inches single column for an advertisement to appear in Wednesday and Friday issues of the newspaper for a period of two months commencing from June 1, 1938. The contract was made subject expressly to a number of conditions three of which were as follows :—

Condition 3.—"All space contracted for will become due for payment in full accordance with the terms set out below and will be definitely reserved for the advertiser, whether used or unused, in which latter case the space may, at the discretion of the Times of Ceylon Co., Ltd., be filled with any other matter".

Condition 4.—" When the advertiser fails to utilize the entire space contracted for within the period specified in the contract, it shall be competent for the Times of Ceylon Co., Ltd., to charge, at their discretion, either for the total space contracted for at the contract rate or for the space utilized at the non-contract rate ".

Condition 7.—" Change of 'copy' to be allowed as often as desired but advertisement 'copy' must reach this office two clear days before the due date of insertion, failing which the previous copy will be reproduced. If any advertisement cannot be set in the type or style requested, the setting shall be such as, in the opinion of the Times of Ceylon Co. Ltd., most nearly correspond thereto and the advertisement will be inserted without submission of proof unless a proof is requested on the face of the advertisement 'copy'."

The plaintiff company published advertisements on account of the defendant in their issues of June 1, 3 and 8 of the *Times of Ceylon* but discontinued any further publication in view of the defendant's letter P8.

Giving credit to the defendant for a sum of Rs. 45 paid by him, the plaintiff company sued the defendant in this case for a sum of Rs. 135 alleging liability on the part of the defendant to pay at the casual rate of Rs. 10 per single column inch for the three advertisements published by them.

The defendant denied his liability :—

(*a*) to pay for the advertisement published on June 3 and 8, and

(*b*) to pay at casual rates in respect of any of the advertisements. He claimed, in reconvention, a sum of Rs. 30 on the footing that he was liable to pay only for the first advertisement and the amount payable was only Rs. 15 at the contract rate of Rs. 2.50 per column inch.

The defendant sent the plaintiff company the advertisement D1 which was duly published in the issue of June 1. On the morning of June 3, the defendant sent a new advertisement P3 in place of D1. The plaintiff company, however, published not the new advertisement P3 but the old advertisement D1 in their issue of June 3. The defendant, thereupon, wrote P8, stating that he " cancelled " the contract as the plaintiff company wrongfully failed to publish the advertisement P3 on June 3. This letter reached the plaintiff company on June 8. The new advertisement P3 appeared in the issue of June 8.

The defendant denied the liability to pay for the advertisements on June 3 and 8 on the grounds :—

(*a*) that the plaintiff company should have published P3 and not D1 in their issue of June 3.

(*b*) that the plaintiff company should not have published P3 in their issue of June 8, in view of his letter P8.

The defendant ignores the clear provisions of condition 7 of the contract in putting forward this contention. Moreover, the plaintiff company has led evidence to show why it was not possible for them to substitute

P3 for D1 on June 3, and to withdraw P3 from the issue of June 8 at short notice. That evidence stands uncontradicted and has been accepted by the Commissioner of Requests. I hold, therefore, that the defendant fails in his plea that he is not liable to pay for the advertisements on June 3 and June 8.

There remains the further question to be considered whether the defendant is liable to pay at the casual rate as claimed by the plaintiff company. The defendant wrote P8 "cancelling" the contract on the ground that the plaintiff company acted wrongfully in failing to insert the advertisement P3 in their issue of June 3. This is an untenable position as the action of the plaintiff company is justified by condition 7 of the contract and, therefore, the defendant had no right to terminate the contract. The plaintiff company wrote P9 intimating that the contract could stand cancelled but that the defendant would have to pay at the casual rate under condition 4 of the contract.

It will be noted that if condition 4 is applicable to the present case, it was competent for the plaintiff company to charge the defendant Rs. 270 on the basis that the defendant had become liable to pay at the contract rate for the whole space contracted for. The plaintiff company has chosen to charge the defendant only Rs. 180 on the footing that payment should be made at the casual rate for the actual space utilized by the defendant. It will thus be seen that in making the present claim the plaintiff company has exercised the discretion given to them by condition 4 in favour of the defendant. I may add also that the Commissioner of Requests has found that the defendant was well aware of the casual rate at the time he entered into the contract and I am unable to say that the Commissioner's finding is erroneous.

The defendant's Counsel urges that the plaintiff's claim is in the nature of a penalty and relies strongly on a decision of this Court in *Wijewardene v. Noorbhai*[1]. The plaintiff in that case, a newspaper proprietor, sued the defendant on a contract whereby the plaintiff was to publish advertisements of the theatre owned by the defendant for a period of one year from May 28, 1924, at a rate set out in the contract. The contract provided that in the event of its being terminated before the expiration of the contract period through any fault of the defendant the plaintiff should be at liberty to charge for all the advertisements published under the contract at the usual rates which should not exceed Rs. 2.50 per inch. About the end of January, 1925, the defendant transferred his theatre to one Fernando. He discontinued from February 3, 1925, the advertisements in the newspaper and paid the plaintiff at contract rates for the advertisements sent by him. Fernando himself, however, entered into a contract with the plaintiff to advertise the theatre in the plaintiff's newspaper for a period of three months which, in fact, formed part of the twelve months during which the defendant's contract was to run. The plaintiff sued the defendant charging him at Rs. 2.50 per column inch for the advertisements from May 28, 1924, to February 3, 1925. It was held by this Court that the plaintiff's claim

[1] *(1927) 28 N. L. R. 430.*

was in the nature of a penalty, and that the plaintiff was not entitled to get more from the defendant than he would have received had defendant duly completed the contract. The District Judge was directed to assess the plaintiff's claim on the basis :—

(*a*) that the defendant was liable to pay at the contract rates for the days during which there were no advertisements from the defendant or Fernando.

(*b*) that the defendant must make good the loss incurred by the plaintiff owing to the fact that Fernando's contract provided for a lower rate of payment than the defendant's contract.

Now, in the present case, there is evidence to show that right through the contract period of two months the space contracted for remained reserved for the defendant. Therefore even if the defendant's plea is upheld, the plaintiff could claim on the basis of assessment as adopted in *Wijewardene v. Noorbhai* (*supra*) a sum of Rs. 225 as that would be the amount the defendant would have had to pay at the contract rate for the period during which no advertisement appeared in the *Times of Ceylon.*

There is, however, a later decision of this Court in *The Associated Newspapers of Ceylon, Ltd. v. Hendrick*[1] where Macdonell C.J. and Poyser J. took the view that the provisions for the payment of a higher rate in a contract between a newspaper proprietor and an advertiser, in the event of the advertiser failing to utilize the entire space contracted for, should be regarded as an agreement to pay liquidated damages and not as penalty. With reference to the earlier case of *Wijewardene v. Noorbhai* (*supra*) Macdonell C.J. said :—

> "I think, however, that the case can easily be distinguished on the facts. There the contract stated that if advertisements totalling a smaller space were sent in by the defendant within the time given him, then the newspaper was to be entitled to charge for all advertisements published under the contract at the casual rates which should not exceed Rs. 2.50 per column inch. In other words, the amount which the plaintiff newspaper could charge under that contract was not a fixed and ascertained sum. It was left to it to charge what it pleased provided the sum charged did not exceed Rs. 2.50 per inch column".

In spite of the distinction drawn by the learned Chief Justice between the two cases I find it difficult to say that the principles underlying the two decisions are not somewhat irreconcilable. But it is not necessary for the purposes of this case to decide which of the two decisions should be followed, as neither decision will help the defendant to reduce the claim made by the plaintiff in this case.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

[1] *(1935) 37 N. L. R. 104.*