SCHUMACHER & STRAUMANN - *Appellants* 14th February, 1922.

v.

EMILE SENN - - - - - - *Respondent.*

Wrongful dismissal—Measure of damages—Compensation for injured feeling of servant—Taking into account failure of dismissed servant to seek other employment in assessing damages—Covenant in restraint, in agreement.

The Respondent who was employed by the Appellants for a certain term of years under an agreement, providing for six months' notice, was summarily dismissed. The agreement contained a penalty clause restraining the Respondent from taking any other employment in the Colony.

Judgment was given in the Supreme Court for £204 for loss of wages for the unexpired term of the agreement, and for an additional sum of £200 for the anxiety and humiliation which he had suffered.

Held that the omission by Respondent to ignore the penalty clause as to other employment, or to invite the Appellants to waive it, was no ground for reducing the £204 damages.

Held also, on the authority of Addis *v.* Gramophone Co., that the judgment be reversed as to the additional £200 damages for injured feelings, and that, the Appellants having acted oppressively, judgment should be without costs, both in the Supreme Court and the Court of Appeal.

Appeal from a judgment of Purcell, C.J., in the Supreme Court of the Colony of Sierra Leone.

Wright for Appellants cites:—

Halsbury, Laws of England, Vol. X., p. 339.
Mayne on Damages, 8th Edition.
Reid *v.* Explosive Co., 19 Q.B.D. 264.
Brace *v.* Calder (1895), 2 Q.B. 253.
Smith's Master and Servant, 6th Edition, p. 149.
Addis *v.* Gramophone Co. (1909), A.C., p. 488.

Boston for the Respondent cites:—

Halsbury, Vol. XX., pp. 112 and 113.
Hochster and Delatour, 22 L.J., Q.B., p. 455.
Addison on Contracts, 10th Edition, p. 871.

Wright in reply cites:—

Lake and Campbell, 5 L.T., p. 582.
Ansett and Marshall, 22 L.J., Q.B., p. 118.
Halsbury, Vol. X., p. 307.
Baker *v.* Denkera Ashanti Mining Corp., 20 T.L.R., p. 37.

SAWREY-COOKSON, J.

The material facts in this appeal are the following:—

The Plaintiff entered the service of the Defendants in the capacity of some sort of joint-manager of their (Defendants') Hotel in Freetown for a certain term of years under an agreement which provided (*inter alia*) for 6 months' notice of Plaintiff's intention to terminate that agreement. No such notice was given but he found himself, after having served for a little over a year, summarily dismissed from his employment.

The learned Chief Justice (as trial Judge) found that such dismissal was wrongful and awarded damages in as full measure as he deemed possible.

The first ground of appeal here is that the damages are excessive, *i.e.*, more than would and should have been awarded had the learned Chief Justice not misdirected himself as to the proper measure of damages in cases of wrongful dismissal. Now it is evident from the language used by the learned Chief Justice in regard to the item of £200 awarded as part of such damages that he regarded it as something further than the ordinary measure of damages, for towards the end of his judgment he uses these words, " It is obvious to my mind that in addition to the damages that I have already discussed, the Plaintiff is entitled to further damages which will include all the consequences of the breach of this contract. . . . .He has been forced owing to the circumstances of the case to be the recipient of another man's bounty and to undergo an amount of anxiety and humiliation which one hardly likes to contemplate and under that head I award him £200." And if it were necessary to show more clearly the reason for awarding such further damages it is only necessary to refer to another passage earlier in the judgment which is as follows:—

> " The consequence of all that has happened in connec-
> " tion with this unfortunate transaction has been disastrous
> " so far as the Plaintiff has been concerned and to those of
> " any experience it only needs to be stated that he found
> " himself stranded in a place like Freetown, Sierra Leone."

From those passages there can, I think, be no doubt that the learned Chief Justice considered that there had been an aggravation of the injury in consequence of the manner of the dismissal and that the Plaintiff was entitled to be compensated further for the harsh and humiliating conduct of the Defendants towards him.

If this be so, there is equally no doubt that Addis *v.* Gramophone Co., Ltd. (1909) A.C. 488, where the facts and circumstances were very similar to those of the present case and which appears never to have been brought to the learned Chief Justice's notice at the trial, is conclusively in the Appellants' favour as far as this item of £200 is concerned. There Maw *v.* Jones (1890) 25, Q.B.D. 107, was very distinctly overruled by five out of the six eminent Lords of Appeal, it being the only case (according to Lord Atkinson) " in which any countenance is given to the notion that a dismissed employee can recover in the shape of exemplary damages for illegal dismissal. . . . ."

There (in Addis *v.* Gramophone Co., Ltd.) the law as to the correct measure of damages for wrongful dismissal was fully considered, but I propose to quote only a few passages from the judgments, as follows:—

Lord Loreburn, L.C. (after stating what the rule is for damages in case of wrongful dismissal) says (*inter alia*) " I cannot agree that the manner of dismissal affects these damages. Such considerations have never been allowed to influence damages in this kind of case . . . . . if there has been a dismissal without notice the employer must pay an indemnity but that indemnity cannot include compensation for the injured feelings of the servant."

And after going on to admit that there is a class of case, such as a refusal by a banker to honour cheques when he has funds in hand and adding that that class of case has, however, always been regarded as exceptional, he says " . . . . the rule as to damage in wrongful dismissal has always been I believe what I stated . . . . it is too inveterate to be now altered even if it were desirable to alter it." And Lord James of Hereford says that the case " raised a question whether in an action of contract there can be such damages as those to which I referred " (viz: damages on the ground that there has been an aggravation of the injury in consequence of the manner of dismissal) " I do not see either from authority or from the reasoning which is to be found in that judgment (of Lord Collins, who alone dissented) that such damages can be recovered in an action of contract." And he adds, " when I was a junior of the bar, when I was drawing pleadings, I always strove to convert a breach of contract into a tort in order to recover a higher scale of damages, it having been then as it is now, I believe, the general impression of the profession that such damages cannot be recovered in an action of contract as distinguished from tort and, therefore, it was

useless to attempt to recover them in such case . . . . that view . . . . remains true to this day."

As already indicated, therefore, in so far as this sum of £200 is concerned, this appeal must be allowed.

I turn now to the further question which arises for our decision, viz., as to the £204 which no doubt represents the greatest amount that the learned Chief Justice could award as being the full extent of the damage suffered by reason of the breach and flowing naturally and probably therefrom, and such as was or should have been in contemplation of the parties to the agreement. In this connection it has been very ably and indeed plausibly argued by Appellant's Counsel, Mr. Wright, that inasmuch as it is undoubtedly well established law that a person wrongfully dismissed shall not be allowed to sit down and fold his arms after such dismissal but shall do all possible to obtain further employment, and inasmuch as such person in this instance took no such steps at all, that sum of £204 should be reduced.

Many cases were cited by Mr. Wright in support of this proposition and he contended, when reminded of the clause in the agreement of service which distinctly prohibits the Respondent from being employed at all in this Colony under heavy penalty, that the Respondent should at least have warned the Appellants that he considered himself at liberty to ignore that penalty clause, or if he did not approach them in that spirit, at any rate he should have solicited their waiver of that clause; and according as he adopted the one or other of these courses he would have put himself in the right, whether the Appellants had sought to enforce their rights under that clause, or had declined to waive the rights which it gave them and which they endeavoured to maintain in their counterclaim, from which, however, they eventually decided to withdraw.

Now the point is of interest, and if sustainable, amounts to this, viz., that the authorities relied upon by Mr. Wright go as far as to say that when there has been, as here, a serious breach of contract of service, the party suffering from such breach, however humiliated by the breach (and as has been shown above, he may not be compensated for that humiliation), must in every case put his feelings aside and at once do all in his power to render the person responsible for his loss and suffering liable to pay him as little compensation as possible.

But can it be said that these cases go so far? Must a man, according to them, in every case be at pains to mitigate as far

as in him lies the amount of damages that his wrong-doer shall pay him so as to restore him, as far as money can do it, to the position he would have enjoyed but for the breach? Now there is often a thin dividing line between actions for damages founded in tort and those founded in contract and it is clear at any rate in this connection from the dissenting judgment of Lord Collins in Addis *v.* Gramophone Co., Ltd., that many eminent judges besides himself have maintained the principle that the first and foremost concern of the law is to compensate as fully as possible rather than to make the compensation as light as possible. I should, therefore, hesitate considerably before coming to the conclusion that, on the facts and circumstances which were before the learned Chief Justice in this case the Lords of Appeal who disagreed with Lord Collins in Addis *v.* Gramophone Co., Ltd., would have held that what the Respondent failed to do here and because he failed to do it, should be reason for frittering away the compensation awarded. I think they would have distinguished a case of this kind from the fortunately more ordinary kind in which servants or employees find themselves dismissed, and would have held that while it is perfectly true as a general proposition of law that in ordinary circumstances fresh employment should at once be sought, yet there may well be circumstances where it is not incumbent upon the person suffering from the breach to take the steps necessary to obtain such employment. And I think they would have held that there was here just such a set of circumstances disclosed, viz., a foreigner smarting under the injustice done him and probably more aware, and if he took advice rendered still more aware, of the prohibiting or penalty clause in this agreement than of any other.

January.

SAWREY-COOKSON, J.

Such a proposition of law, moreover, was meant, I think, to apply in cases where employment of a nature similar to that of which a person had been wrongfully deprived is much more readily to be found than the Respondent would have found it here, and where all surrounding circumstances were far different from those obtaining in the present case.

Further, there is no evidence that the employment obtainable, had any been sought by the Respondent, would have been of a kind that the law would say he should have accepted so as to reduce the damages payable by the Defendant.

This part of the appeal accordingly fails, and is dismissed with costs.

SCHUMACHER & STRAUMANN v. SENN. — SAWREY-COOKSON, J.

In regard to the question of the £200 already disposed of, inasmuch as it was awarded for reasons very similar to those for which a portion of the damages was not allowed to stand in Addis *v.* Gramophone Co., Ltd., although the appeal in this regard must be allowed it will be so without costs for reasons also similar to those which justified the Appellant's Company being deprived of their costs in that case, where it was held that having acted oppressively and the Plaintiff having succeeded in recovering a substantial sum, the judgment in his favour should be without costs there and below.

The concluding passage in the judgment of Lord Shaw of Dumfermline is enlightening on the *ratio decidendi* here, and there, but I specially adopt it as being also particularly applicable (as to its first line or two) to the facts of this case.

> " A certain regret that accompanies the conclusion
> " which I have reached on the facts of this particular case
> " is abated by the consciousness that the settlement by Your
> " Lordship's House of the important question of principle
> " and practice may go some length in preventing the intru-
> " sion of not a few matters of prejudice hitherto introduced
> " for the inflation of damages in cases of wrongful dismissal
> " and now definitely declared to be irrelevant and inad-
> " missible on that issue."

PURCELL, C.J.

I concur.

McDONNELL, Acting J.

I concur.