[IN THE COURT OF APPEAL.]

C. A.
1895
Feb. 28;
May 30.

BRACE *v.* CALDER AND OTHERS.

Master and Servant—Wrongful Dismissal—Partnership, Dissolution of—Nominal Damages.

The defendants, a partnership consisting of four members, agreed to employ the plaintiff as manager of a branch of their business for a certain period. The plaintiff entered into their service under the agreement, but, before the period had expired, two of the partners retired, and the business was transferred to and carried on by the other two. The continuing partners were willing to employ the plaintiff on the same terms as before for the remainder of the period, but he declined to serve them:—

Held, in an action for wrongful dismissal, by Lopes and Rigby L.JJ., Lord Esher M.R. dissenting, that the dissolution of the partnership operated as a wrongful dismissal of the plaintiff, but that he was only entitled to nominal damages.

APPEAL from the judgment of Wright J., at the trial before him without a jury. The facts were as follows:—

By an agreement made on December 23, 1892, between the four defendants, who were at that time carrying on business in partnership as Scotch whisky merchants, and the plaintiff, it was agreed in substance as follows: (1.) that certain existing agreements between the plaintiff and the defendants should be cancelled; (2.) that the plaintiff should during the term of two years, from November 1, 1892, be the manager of the office part of the business of Scotch whisky merchants then carried on by the defendants in the city of London and the surrounding districts, and should receive for his services, as from November 1, 1892, the salary of 300*l.* payable monthly, together with all travelling expenses which he might incur, not exceeding 25*l.* for each period of three months in each year of the engagement; (3.) that the plaintiff might, down to December 31, 1892, but not afterwards, devote so much of his time and attention to a business then carried on by him as might be necessary for winding it up, but should give until that date such reasonable time and attention to the defendants' business as might be necessary for its proper conduct; (4.) that from and after

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January 1, 1893, the plaintiff should give his whole time and attention during business hours to the defendants' business, and should not during his engagement, directly or indirectly, actively engage in any other business, whether alone or jointly with, or as manager, factor, agent, or clerk, or on behalf of any other person or firm; (5.) that the defendants should be at liberty to terminate the agreement at any time during the said period of two years on giving to the plaintiff one calendar month's previous notice in writing of their desire so to do, but should in such case pay to the plaintiff a sum equivalent to the salary he would have received if he had been retained as manager for the full period of two years from November 1, 1892.

The plaintiff entered into the defendants' service under the agreement, and continued to serve them until May 6, 1893, when the partnership between the four defendants was dissolved, and two of the partners retired, the business being transferred to the other two, who continued to carry it on under the old firm's name. No notice of the dissolution was then given to the plaintiff, who in ignorance of it continued to act as manager as before until the end of July, 1893.

In a letter written under the firm's name to the plaintiff on July 26, 1893, mention was made of a transfer of the business, and on July 28 the plaintiff wrote to the firm saying that he noted from their letter that they were about to transfer their business, and should be glad to hear from them in regard to himself, as of course he could not be handed over as a chattel, and that his contract was with certain individuals, neither of whom he could release from their obligations until the conditions of their contract with him were fulfilled. On July 29 the firm wrote to the plaintiff informing him of the retirement of two of the partners. On July 31 the plaintiff wrote to the firm stating that he had not consented to transfer his contract from its original subscribers in any way. Further correspondence took place, in which the continuing partners asserted their right to the services of the plaintiff under the agreement of December 23, 1892, but the plaintiff declined to recognise their right to his services or to act as their servant. The plaintiff was paid his

salary under the agreement to the end of May, 1893, but had not received any salary since that time.

On December 22, 1893, the plaintiff brought his action against the defendants. In the statement of claim the plaintiff alleged that by the dissolution of partnership on May 6, 1893, the defendants had made it impossible for the plaintiff to serve the defendants as agreed, and by so doing terminated the agreement, whereby a sum became payable by the defendants to the plaintiff equivalent to the salary which the plaintiff would have received if he had been retained as manager for the remainder of the full agreed period of two years. Alternatively the plaintiff claimed that, if the agreement was not terminated as aforesaid, the same was valid and subsisting, and that, having always been ready and willing to perform his part of the said agreement, he was entitled to be paid his salary under the agreement up to the time of action brought. By way of further alternative, he alleged that the matters before stated were a breach of the agreement whereby the plaintiff lost the amount of the agreed salary from the date of the said breach to the end of the agreed period, and that by reason of that breach the plaintiff became entitled to the said amount as and by way of liquidated damages, or alternatively to damages.

The learned judge gave judgment for the defendants on the ground that the change of the firm did not operate as a breach of the contract by the defendants to employ the plaintiff, and the plaintiff was bound under the agreement to continue serving the continuing partners.

Feb. 28. *Cock, Q.C.*, and *Clavell Salter*, for the plaintiff. The four defendants jointly contracted with the plaintiff that he should serve them in their business for a period of two years from November 1, 1892. By dissolving partnership and ceasing to carry on that business the defendants broke that contract and prevented the plaintiff from serving in pursuance of it, which he was always ready and willing to do. The plaintiff was not bound under the contract to serve the continuing partners. If he had consented to serve them, it would have been a service under new masters in a new business. There would have been

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in truth a novation of the contract, that is to say, a new contract in substitution for the old one. Having regard to the nature of this contract the plaintiff is entitled under it to recover the amount of the salary which he would have earned if he had continued to serve for the remainder of the two years. The plaintiff was giving up an existing business of his own, and it is submitted that, having regard to the terms of the contract and especially clause 5, the intention was that the defendants should either employ the plaintiff for the full period of two years at a certain salary, or, if they did not, should at any rate pay him his salary for that period.

[LORD ESHER M.R. Clause 5 applies only if notice was given under it.]

Secondly, it is contended in the alternative that, if the dissolution of partnership is not to be treated as a dismissal of the plaintiff, the contract still subsisted, and the plaintiff is entitled to his salary from the end of May, 1893, up to the date of action brought. He actually served till the end of July not knowing of the change of the firm, and was always ready and willing to serve the four partners. Thirdly, it is contended that the dissolution of partnership operated as a wrongful dismissal of the plaintiff, for which he is entitled at any rate to nominal damages. [They cited *Tasker* v. *Shepherd* (1); *Lloyd* v. *Blackburn*. (2)]

Willis, Q.C., and *T. Willes Chitty*, for the defendants. With regard to the suggestion that the plaintiff is entitled to salary for the two months prior to the end of July, he did not shape his claim in that way either in the statement of claim or at the trial, and ought not to be allowed to do so now. His claim was that he was entitled to the whole amount of his salary for the remainder of the two years. Clause 5 of the agreement is inapplicable, for no notice was ever given under it. The sole question really is whether there was a wrongful dismissal of the plaintiff by the defendants, and, if so, to what damages he is entitled. There are two views of the case, in either of which the plaintiff fails. Either the contract to employ was conditional on the business of the partnership continuing to be carried on,

(1) 6 H. & N. 575. (2) 9 M. & W. 363.

and there was no undertaking to continue the business: [They cited in support of this contention *Tasker* v. *Shepherd* (1); *Aspdin* v. *Austin* (2); *Rhodes* v. *Forwood* (3); *Stirling* v. *Maitland* (4); *Hamlyn & Co.* v. *Wood & Co.* (5); *In re English and Scottish Marine Insurance Co., Ex parte Maclure* (6)]: or, alternatively, the service was not put an end to, and the contract continued unbroken notwithstanding the dissolution. The defendants never assumed to dismiss the plaintiff, and, if he had been ready and willing to serve the continuing partners after the dissolution, as it is submitted he ought to have done, he would have been entitled to his salary as against all four defendants. The contract is really that he shall be employed for a certain time to serve in a certain business. It cannot be that because one partner in a firm retires there is a wrongful dismissal of all the servants of the firm. The business is substantially the same after the dissolution as it was before. The continuing partners were for this purpose authorized by the retiring partners to continue to carry it on. The plaintiff was not entitled to refuse to take any orders except from all the four partners. The employers can give instructions through any person to their servant. The plaintiff would have been bound under the agreement before the dissolution of partnership to take orders from the two partners who afterwards continued to carry on the business; and in the same way he was under the agreement bound to obey their orders after the dissolution. He refused to do so, and therefore he was not ready and willing to perform his part under the agreement. If he had been, he would have been entitled as against all the four defendants to performance on their side. [They cited on this point *Dobbin* v. *Foster* (7); *Hobson* v. *Cowley*. (8)] Assuming, however, that there was a wrongful dismissal of the plaintiff, at the most he is only entitled to nominal damages, because in estimating the damages for a wrongful dismissal the fact that the plaintiff might have obtained other employment must be taken into consideration; and here it is proved that the

(1) 6 H. & N. 575.
(2) 5 Q. B. 671.
(3) 1 App. Cas. 256.
(4) 5 B. & S. 840.
(5) [1891] 2 Q. B. 488.
(6) L. R. 5 Ch. 737.
(7) 1 C. & K. 323.
(8) 27 L. J. (Ex.) 205.

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plaintiff could have had employment on the same terms from the new firm and, if he had accepted it, he would have suffered no damage.

Clavell Salter, in reply.

Cur. adv. vult.

May 30. LORD ESHER M.R. In this case the plaintiff had agreed with the defendants, a firm consisting of four partners, that he should serve them in their business for a term of two years. Before the two years had expired two of the partners retired, the two other partners continuing to carry on business. Thereupon the defendants offered to the plaintiff that he should serve the new firm for the remainder of the two years upon the same terms and at the same rate of remuneration as before. He, however, said that the new firm were not the masters he had contracted to serve, and he declined to serve them, which I apprehend he had a right to do. He thereupon brought this action. It was argued in the end that the plaintiff was entitled to damages as for a wrongful dismissal. It was also suggested that there was a contract to employ the plaintiff for a period of two years, and to pay him wages for that period, which had been broken. The plaintiff did in fact serve for a period of two months after the old firm was dissolved, and he has been paid no wages in respect of that service. But the plaintiff did not bring the action in respect of that, and did not rest his case at the trial upon it. If he had shaped his claim in that way, it is obvious that the defendants would have been allowed to pay money into court to meet that claim. It appears to me that, for the purposes of the present appeal, the Court ought not to take any notice of that service for two months, though I understand from what was said during the argument that the defendants are willing to pay the plaintiff in respect of it. With regard to the claim for wrongful dismissal, the defendants did not assume to dismiss the plaintiff. What they did was to alter the constitution of the firm. The old firm ceased to carry on its business, and the business became that of the new firm. For the present purpose it is just the same as if the firm had simply ceased to carry on business. The question is whether that

amounted to a wrongful dismissal of the plaintiff. In my opinion it did not, and I think the authorities support that view. There is no dismissal in such a case in the ordinary sense of the term. It is simply that the firm ceases to carry on business, it might be for the very valid reason that the business could not be carried on except at a loss. I do not think that is a wrongful dismissal. It does not appear to me that there is any contract on the part of the employers that they will carry on the business. There is no express stipulation in this contract that the defendants will carry on the business to the end of the period mentioned, and I do not think that any such stipulation can properly be implied, because the Court has no right to imply a stipulation, unless it is perfectly clear to every reasonable man that such a stipulation is what both parties must have intended. I do not think it is true to say that the employers intended to undertake to carry on their business although it should be at a dead loss. I am therefore of opinion that the plaintiff was not entitled to recover as for a wrongful dismissal. But it was argued alternatively that there was a breach of a contract that the plaintiff should be employed and paid for two years, and he is therefore entitled to succeed as upon a breach of that contract. Assuming that there was such a breach of contract, I think it is obvious that in estimating the damages for it the possibility of the plaintiff's getting other employment equally good for the remainder of the two years must be taken into account. In this case it appears that he could have got such employment: and therefore, if there is such a contract as is alleged and a breach of it, the damages are only nominal. In my opinion, however, there is no breach of any such contract. The contract is that the defendants will employ the plaintiff as their servant in the business for the period of two years, but there is no undertaking in the contract that they will continue to carry on the business. The breach of contract relied on must be that they did not carry on the business for the period of two years. But they never undertook to carry it on. The real contract, in my opinion, is that they will employ the plaintiff for the time mentioned as their servant in the business, if they carry it on. If they do not carry it on,

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there is no service for him to perform. The contract is not for payments to be made to him independently of service but as wages for service in the business. The business ceasing to be carried on there is no service for him to perform.

In my opinion, whether the case be put as one of wrongful dismissal or as breach of a contract such as I have mentioned, the plaintiff has no cause of action, and therefore the judgment in favour of the defendants is right, and this appeal should be dismissed. As, however, my learned brothers are of opinion that the judgment should be entered for the plaintiff for nominal damages, the appeal will be allowed, but without costs either in this Court or in the Court below.

LOPES L.J. This is a case of some difficulty, and it appears to me to be material to refer briefly to the terms of the agreement between the plaintiff and the defendants. By the terms of that agreement the plaintiff was, for the term of two years from November 1, 1892, to be the manager of the office part of the business of Scotch whisky merchants, carried on in the city of London and surrounding districts by the defendants, who were a firm consisting of four partners, and he was to receive for his services as and from November 1, 1892, the salary of 300*l.* payable monthly, together with all travelling expenses incurred by him not exceeding 25*l.* for each period of three months in each year of the engagement. It was provided by clause 5 of the agreement that the employers should be at liberty to terminate the agreement at any time during the period of two years on giving to the plaintiff one calendar month's previous notice in writing of their desire so to do, but should in such case pay to him a sum equivalent to the salary he would have received if he had been retained as manager for the full period of two years from November 1, 1892. Before the two years for which the agreement was to last had expired, two of the partners retired, the other two continuing to carry on business. Till July, 1893, the plaintiff continued to act as manager, not knowing of the change. The continuing partners were then willing to retain him in their service on the same terms as before; but he declined to serve them. The plaintiff claims in this action his whole

salary for the remainder of the period of two years mentioned in the agreement. The question is, what was the effect of the dissolution of partnership? Did it operate as a wrongful dismissal of the plaintiff or a breach of the contract between the plaintiff and the defendants? There is authority to the effect that by the death of one of a firm of masters the servant is discharged unless the contrary is stipulated by the terms of the contract: see *Hoey* v. *McEwan* (1) and *Tasker* v. *Shepherd*. (2) I express no opinion, however, on the question what effect the death of one of the partners would have had. What took place here was that there was a dissolution of partnership by reason of the retirement of two of the partners, and the business was transferred to the other two who continued to carry on business. That seems to me a stronger case than that of the death of a partner, and, according to my view, it constituted either a wrongful dismissal of the plaintiff or a breach of the contract to employ him for two years. I do not know that it matters much for the purposes of this case in which way it is put. There is nothing in this agreement which indicates that in any event, except that mentioned in clause 5, the employment was not to be for the period of two years. On the contrary, the provision contained in clause 5 of the agreement appears to me strong to shew that there was an express agreement to employ the plaintiff for two years. It appears to me therefore that the plaintiff was discharged by the defendants and was entitled to damages either on the ground that he was wrongfully discharged, or that there was a breach of a contract to employ him for two years. But, in estimating the damages, it must be taken into consideration that the continuing partners were willing to keep him on in their service till the end of the two years at the same salary as before; but he declined to serve them, and therefore it was his own fault that he suffered any loss. Consequently, the damages resulting from the breach of contract would be nominal. It is true that, as the Master of the Rolls has pointed out, he did continue to serve till the end of July, and would have been entitled to claim for that service; but the action was not brought in respect of that. If it had been,

(1) 5 Court Sess. Cas. 3rd Series, 814. (2) 6 H. & N. 575.

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the defendants might have paid into court a sum sufficient to cover that claim. Therefore I do not think that the plaintiff is entitled now to avail himself of it. In the result I am of opinion that there was a breach of the agreement; but the plaintiff is only entitled to nominal damages in respect of it, because in point of fact he did not suffer any loss through it; and the appeal must therefore be allowed and judgment entered for the plaintiff, but only for nominal damages, and with the result as to costs mentioned by the Master of the Rolls.

RIGBY L.J. read the following judgment:—In this case the plaintiff entered into an agreement on December 23, 1892, with the defendants, who were then partners in a business of whisky dealers, to act as their agent for a term of two years as from November 1 of that year at a fixed salary of 300*l.* a year; and there was a clause entitling the employers to determine the agreement altogether before the expiration of the two years on giving a month's notice and paying the unpaid amount of his agreed salary for the unexpired residue of the two years' term. If that clause had been acted upon the agreement would have been brought entirely to an end, and the plaintiff would have had no cause of complaint. What took place was that, before the expiration of the two years' term, that is to say on May 6, 1893, the partnership between the four defendants was put an end to and the business transferred to two of them, who continued to carry on a business under the same firm name. No notice of this dissolution of partnership was given to the plaintiff, and he continued to act as agent in the business as he had done before, until the end of July, 1893. In a letter of July 26 from the firm of Alexander & Macdonald, which was the old firm's name, mention is made of a transfer of the firm's business. In a letter of July 28 the plaintiff says that he shall be glad to hear in regard to himself, as he cannot be handed over as a chattel, and adds that his contract was with certain individuals, neither of whom he can release from their obligations until the conditions of their contract with him are fulfilled. On July 29 the firm write to the plaintiff, giving express notice of the retirement of two of the defendants from the partnership, and the plaintiff replies by

stating that he has not consented to transfer his contract from its original subscribers in any way. Further correspondence then took place in which the two transferees of the business insisted on their right to the services of the plaintiff under the agreement of December 23, whilst the plaintiff refused to recognise their right to claim such services, and declined to act as the agent of the two transferees.

The question now arises as to the rights, if any, of the plaintiff.

Numerous cases were cited with reference to the construction of the agreement; but in the result I am of opinion that the only principle to be derived from them is that the contract is to be construed according to its express terms, and that no term is to be implied which is not rendered reasonably necessary to carry out the plain intention of the parties. In accordance with this principle it seems to me impossible to imply a term that the partnership business shall be conducted by the partners during the two years' term. On the other hand, I think it equally impossible to imply a term that the employers may get rid of their contract by a simple dissolution of partnership, or that the contract implies that, in the event of the retirement of any of the employers, which retirement altogether puts an end to the existing partnership, the defendants' contract may be transferred to the new partnership formed to continue the business. A contract to serve four employers cannot without express language be construed as being a contract to serve two of them. In my judgment the dissolution of the partnership operated as a dismissal of the plaintiff not authorised by law. The clause as to dismissal on a month's notice not having been acted upon, the plaintiff cannot recover as liquidated damages the unpaid part of his salary for the two years' term. On the other hand, the defendants are liable to him for the usual damages for a dismissal without due cause. The plaintiff brought his action on December 22, 1893, before the two years' term came to an end. In my judgment the defendants are entitled in mitigation of damages to put forward the offer of an engagement on the same terms made by the continuing partners. I see nothing in the evidence to shew that this in a pecuniary sense

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would have been of a less value to him than his engagement to serve the four defendants. So far it would seem that the plaintiff's damages would be nominal. He did, no doubt, actually continue to render services until the end of July, and, as his salary had only been paid up to the end of May, he would be entitled to the amount of two months' salary, which at the rate of 300*l.* a year would be 50*l.* But I quite agree that that was not the way in which he shaped his case. He framed his claim on a wrong construction of the contract, and, if he had limited it to 50*l.*, the whole of the cost of this litigation would probably have been rendered unnecessary. I therefore concur in the view of Lopes L.J. that the appeal should be allowed and judgment entered for the plaintiff for nominal damages, and that there should be no costs either of the appeal or in the Court below.

Appeal allowed.

Solicitor for plaintiff: *W. H. Dale.*

Solicitors for defendants: *Hatchett-Jones & Co.*

E. L.

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[IN THE COURT OF APPEAL.]

In re NORTH. *Ex parte* HASLUCK.

Bankruptcy—Act of Bankruptcy—Computation of Time—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 1.

By the Bankruptcy Act, 1890, s. 1, a debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods, and the goods have been held by the sheriff for twenty-one days:—

Held, that the sheriff must hold the goods for twenty-one whole days, in the computation of which the day on which the seizure is made is to be excluded.

APPEAL from the decision of Vaughan Williams J. upon an application by the trustee in bankruptcy for an order calling upon the execution creditor and his solicitor to pay over to the trustee the proceeds of an execution against the bankrupt's goods, on the ground that at the time of the sale they had notice of a prior act of bankruptcy on the part of the bankrupt. The facts