

W. E. HICKS, PLAINTIFF AND APPELLANT, VS. MANILA HOTEL COMPANY, DEFENDANT AND APPELLEE.

G.R. No. 9973. November 06, 1914

Ponente: MORELAND, J.

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MORELAND, J.:

This is an appeal from a judgment of the Court of First Instance of the city of Manila dismissing upon the merits after trial plaintiff's action to recover damages alleged to have been sustained through defendant's breach of a stipulation to renew for a second year a written contract for the exclusive five-passenger automobile privilege of the defendant hotel.

It seems that, on the 9th of November 1912, plaintiff and defendant entered into a written contract by which the defendant ceded to the plaintiff the exclusive right to serve its patrons with five-passenger automobiles for a period of one year from the date thereof, with certain rights with respect to a renewal of the contract for a second year.

Plaintiff entered on the performance of his duties under the contract and successfully discharged them during the first year. When about half of the first year had expired, and about June, 1913, the defendant company, disregarding, as plaintiff claims, the terms of its agreement with him, invited proposals from various garages for its five-passenger automobile privilege for the ensuing year, that is, from November, 1913, to November, 1914, the time covered by the second year of plaintiff's contract. Under these proposals various garages competed for the privilege, including that of George E. Brown, and, after certain negotiations with the latter, his offer was accepted by the defendant company and a written contract made with him for the exclusive right to the five-passenger automobile privilege during the year beginning November 9, 1913. This contract with Brown was executed some months prior to the termination of the first year of plaintiff's contract.

Upon the termination of the first year of the contract the defendant company having, as we have seen, already entered into a contract with Brown relative to the matter included in plaintiff's contract for the period representing the second year thereof, refused, over plaintiff's objections and protests, to permit him to continue for the second year, deprived him of the privilege which the contract conferred, and evicted him from the hotel where, under the terms of the contract, he was entitled to have and did have an office.

This action was brought to recover damages for breach of contract.

The contract between the parties hereto contains a clause which forms the subject matter of this litigation. It is as follows: "This agreement to remain in effect for a period of one year from date, with preference over others of renewing for a further period of one year."

There are two questions involved.

The first one is whether that portion of the agreement just quoted gave the plaintiff an enforceable right to renew the contract for a second year.

The second is whether the plaintiff, even though he had that right, did, by his acts and conduct, waive that right and thereby exempt the defendant from the liability, if any, which it incurred by its eviction of plaintiff and the refusal" to permit him to enjoy the privilege for the second year.

As to the first question:

Counsel for the defendant company contend that the clause quoted gave the appellant no right to renew the contract sued upon for the second year. They assert that it did nothing more than give to plaintiff the right to compete with others in obtaining defendant's five-passenger automobile privilege for said second year, with preference to him to be engaged over his competitors in case his offer was equally profitable to the defendant hotel. They further contend that the competition into which he was thus thrust did not relate exclusively to the contract in which the clause is found or to the terms and conditions of that contract ; but that it referred to any contract which the defendant hotel offered to make or could make with any person, whatever its terms and conditions might be.

On the other hand, plaintiff claims that the contract gave him a right to renew and that the stipulation for a renewal did not contemplate other or different terms than those embraced in the contract to be renewed and that by entering into the Brown contract and evicting the plaintiff from the premises the defendant violated its' obligation to grant the plaintiff a renewal of his contract for a second year.

We are constrained to agree with plaintiff's contention.

It must be remembered that the contract relating to the five-passenger automobile privilege was a complete contract, whereby the plaintiff was. required to furnish a certain number of five-passenger automobiles and to attend faithfully and fully to the requirements of the patrons of the hotel, for which he was to receive a stipulated compensation. The construction placed upon the clause by defendant deprives the plaintiff of any right or interest in that particular contract or any renewal thereof and relegates him to a scramble to obtain not the same contract for a second year but an entirely different contract for one or more years. By this contention the clause in question is torn from the agreement in which it was placed by the parties and made to do service not with relation to the contract in which it is found but with relation to another contract different in every conceivable term.

It would seem, other things being equal, that a clause in a contract should be construed with reference to the contract in which it is found, and if it accords a privilege to one party or the other, it should be in connection with the contract to which it refers. The contract in which the clause is found was, generally speaking, one whereby the plaintiff was to furnish a certain number of five-passenger automobiles, attend faithfully to the needs of the patrons of the hotel, to continue his service for a period of one year and to receive as compensation all the proceeds of the business less, say, 10 per cent to be paid to the defendant for the privilege. This, with other details, is the contract in which the clause is found and to which it refers. That clause was, in our judgment, not intended to do duty with reference to a contract, such as the hotel company made with Brown, already referred to, by which the latter was to have the five-passenger automobile privilege of the hotel, as well as all other automobile and carriage privileges, upon the payment to the hotel of a flat sum of, say, P10,000 annually. According to the defendant, the clause in question simply concedes to plaintiff the privilege over Brown, if he desired it, of taking and accepting the contract which the hotel made with Brown. In other words, defendant here contends, and the court below found, that the clause in question did not confer a certain, enforceable right upon the plaintiff with reference to the contract in which the clause was found, but simply gave him the preference over others to make with the defendant company any contract which the latter might be able to make with any other person. As stated in the brief of counsel in the trial court the stipulation for a renewal conferred upon the plaintiff only the right to make "as satisfactory an offer as any other person," and that since plaintiff failed to make as favorable an offer as

did Mr. Brown, that is, since plaintiff would-do no more than propose a renewal of the old contract, the hotel company had a right to contract with Brown,

Manifestly the clause "with preference over others of renewing for a further period of one year" was inserted for a purpose. It was intended to confer a right either on the plaintiff or upon the defendant. That it was not intended to confer a right on the defendant is conceded. It must have been intended, therefore, to do something favorable to the plaintiff. What was it?

While it is conceded that the clause quoted confers no right on the defendant company, the latter, nevertheless, contends that it conferred no right on the plaintiff. Even though the clause, as claimed by defendant, gave the plaintiff a preference over others with respect to some other contract, a contract which might be entirely distasteful to the plaintiff in, every term and which, with his limited resources, he would be unable to accept at all, such preference would not be a substantial right. In fact, it would be a right the effect of which would be not only problematical but as likely to be injurious as beneficial. If the clause conferred no right upon either the plaintiff or the defendant, then it has no meaning to which the law attaches importance. That this was intended we cannot believe. We are confident that it was placed in the contract for the purpose of conferring upon the plaintiff an enforceable right and one which related to the very contract in which it was placed. This clause sets out with sufficient clearness an agreement for a renewal of the contract for a second year. It cannot have any other significance in language. The grammatical construction of the stipulation precludes the legal construction given it by the court below. The clause "with preference over others of renewing for a further period of one year" does not modify anything preceding it. It must be construed as a separate and independent sentence whose subject is suppressed. Should we supply the words omitted by the draftsman, apparently with a view to brevity, the stipulation would be plain; it would clearly appear that it was intended to be a stipulation in favor of the plaintiff.

Nor is the contention made by the defendant relative to the phrase "with preference over others" sufficient to destroy that construction. It is asserted that this phrase deprived the plaintiff of the right of renewing the existing contract and relegated him to the barren right of accepting at the end of the first year the best terms that defendant might be able to secure from other persons for the exclusive concession to which the contract refers, thereby transforming the stipulation for renewal in favor of the plaintiff to one in favor of the defendant. As already pointed out, the grammatical structure of the stipulation shows both that the thing to be renewed was the agreement in force the first year and that the party who possessed the right to renew was the plaintiff.

The construction of the phrase "with preference over others" contended for by the defendant and found by the court below not only overthrows the grammatical structure of the stipulation but nullifies the meaning of the essential term in the stipulation, namely, the word "renew." The meaning of that word, wherever applied with respect to real or personal rights, is not a matter of discussion and, unless the stipulation to renew expressly provides for variations in the terms of the contract to be renewed, the clause of renewal always relates to the contract in which it is found. To attribute to the words "with preference over others" a meaning that nullifies an essential word of common usage and conventional signification is to vary an elementary rule of construction. While the use of the phrase "over others" after the noun "preference," which means the act of preference or the state of being preferred or chosen before others, is not altogether elegant English and is somewhat ambiguous with respect to its reference, the clause succeeding it, namely, "of renewing for a further period of one year," relieves that phrase of so much of its ambiguity as to make its presence clearly unnecessary for a perfect understanding of the agreement. When one party to a contract gives the other an enforceable right, then certainly the one to whom the right is conceded has preference over all others with respect to that right, including the other party to the contract; and if the party conceding the right adds to the contract a phrase "with preference over others" with respect to that right, it adds nothing to the contract and those words may be stricken out without

altering its natural or legal sense. Thus, in the contract before us, if the defendant company, by the clause in question, conceded to the plaintiff an enforceable right, then the plaintiff received preference over all others with respect to that right and the adding of the Words "with preference over others" did not serve to deprive the plaintiff of the right thus conceded, and those words should not be so construed as to effect that end. They were useless and redundant and could have had no force or effect without destroying the very purpose for which the clause itself was inserted. If this construction were not followed, we would be obliged, as already intimated, to declare that the phrase "of renewing for a further period of one year" would have no adequate significance. The construction contended for by the defendant wipes these words from the contract and leaves it in that respect the same as if they had not been inserted. No such construction can be permitted, as it takes from the contract words of the most material signification. If, in the construction of a contract, one of two clauses must be eliminated, it must be that one the influence of which upon the essentials of the contract is the least. As we have shown, the words "with preference over others" are of no substantial significance. On the other hand, the phrase providing for a renewal is of very great materiality and importance and carries into the contract an idea which would not have been there if it had not been used.

As to the second question:

What appears to be, perhaps, the main contention of the defendant in this case is that plaintiff never made a request for the renewal of the contract for the second year but, instead of so doing, sought to make other and different arrangements with the hotel and with Brown, to whom, as we have seen, the hotel conceded the privilege which is the subject of this action, thereby indicating an intention to abandon his right, if any he had, to a renewal of the contract for the second year. It is asserted by counsel for the defendant that in July plaintiff attempted to enter into a partnership agreement with the hotel relative to the privilege in question for the period covering the second year of plaintiff's contract, and that, failing in that, and believing that Brown would secure the privilege from the hotel, he thereupon sought to make a contract with Brown by which he could assist him in fulfilling his contract with the hotel. It is even contended by defendant that plaintiff actually did enter into an agreement with Brown relative to that matter.

A careful reading of the testimony in this case leads us to differ with counsel for the appellee as to the real facts of the case and constrains us to differ materially from the conclusions drawn by counsel for the defendant from the acts of the plaintiff as set out in the record.

As to the facts, we may say that the evidence does not sustain the contention that plaintiff entered into a contract with Brown. The proof discloses that the plaintiff sought to make arrangements with the hotel of a nature different from those contained in the contract under consideration and also that he had negotiations with Brown looking to an agreement with him whereby he might assist him in handling the five-passenger automobile business under the privilege which it appeared the hotel would concede to him. No contract, however, was made with either and the plaintiff at no time found himself under any obligation to the defendant or Brown by reason of the acts which appellee makes the basis of its argument.

To us the important fact is that before the plaintiff entered into negotiations or made any offers with respect to the five-passenger automobile privilege either with or to the defendant or Brown, the hotel had impliedly denied the plaintiff's rights with respect to the contract before us, had refused to recognize the clause for a renewal of the contract for a second year as binding upon it, and, as a result, as early as June, 1913, had, according to its brief in this court "invited proposals from various garages for its automobile service for the ensuing year." In other words, the defendant had, prior to the negotiations and offers of plaintiff, repudiated its contract with him so far as it related to the renewal for the second year and was preparing itself to make a contract with any person with whom it might secure the most advantageous terms.

Not only did the defendant advertise for bids or offers concerning its automobile privilege for the period embraced in the second year of the contract under consideration, but sometime before the first year of that contract had expired the defendant had actually made a contract with Brown by which it had conceded to him said privilege for the period embraced in the second year of the plaintiff's contract. Thus, when the first year of plaintiff's contract terminated, he found that the defendant had rejected its obligation under the renewal clause, had let the contract to another person, and when he sought, as he did seek, to continue in the performance of his contract for the second year, defendant evicted him from the premises and denied him the right which he sought to exercise.

We are of the opinion that, when a person who is under an obligation to another to perform certain acts upon the demand of that person, repudiates that obligation prior to the time when the demand for its fulfillment is necessary, the person to whom that obligation runs is not required to sit down, fold his hands and calmly await the disaster which the violation of the obligation entails. We believe that, under such circumstances, he is entirely within his rights and, therefore, waives nothing, when he seeks other employment or the same or similar employment with others, or attempts to make other arrangements relative to the same subject matter even with the person or corporation which owed him the obligation repudiated. So long as it appears with fair clearness that his purpose is to protect himself against the results of the repudiation, his acts do not constitute a waiver of his rights under the obligation repudiated, nor do they estop him from making a claim by reason of its breach. The waiver will not be presumed; and, if the intention to waive or release is denied, such waiver or release must be proved by the party alleging it by a preponderance of the evidence.

The legitimate object of a demand is to enable the party upon whom it is made to perform his contract and discharge his liability agreeable to the nature of it without a suit at law; and whenever such party wholly denies the right of the other to assert title in himself or unqualifiedly refuses performance of the obligation, a demand is made useless, and therefore unnecessary, since *lex neminem cogit ad vana*. For the same reason and upon the same principle the failure to make a demand before suit may be cured by proof that the defendant could not have complied with the demand if it had been made; as where a person contracts to assign his interest in certain lands to another within a specified time upon payment of consideration therefor, and the vendor prior to the stipulated time assigns his interest to a stranger. In such case a request by the vendee for the performance of the contract is unnecessary. The rule stated otherwise is to the effect that where a party bound to the future performance of a contract puts it out of his power to perform it, the other party may treat this as a breach and sue him at once, having thus an immediate right of action for breach of the contract by anticipation.

It may not be amiss, perhaps, to note that the defendant company was in no way injured by the acts of the plaintiff complained of. There resulted no damage directly nor did the company change position to its disadvantage by reason of his affirmative acts or of his neglect, if there were such, to demand a renewal prior to the termination of the first year under the agreement.

It may be noted also that the plaintiff was under no obligation to defendant with respect to a renewal of the contract. The obligation was wholly on the side of the defendant. Therefore, in doing whatever he did to obtain other employment, he was not violating any obligation which he owed to the defendant and, therefore, gave it no legal reason for complaint. The plaintiff had a right to look about for a better situation and to seek to improve his condition with respect to the period embraced within the second year referred to in the contract. We do not believe that the contract should be construed to deny plaintiff the ordinary opportunities which men have for the betterment of their condition, especially after the other party to the contract has repudiated it. Even though one is engaged in the performance of a contract which he has with another, that fact does not require him to stand still and refrain from all attempts to improve his condition, after the termination of the contract which he is engaged in

performing, for fear that such activities will preclude him from enforcing obligations which the other owes' him. At the time of the activities of the plaintiff complained of the time had not yet arrived when plaintiff was bound to exercise his option, if it may be called an option, with respect to the second year referred to in the contract. Defendant was in no way misled and in no way injured by plaintiff's activities.

The remaining question relates to plaintiff's damages.

The plaintiff claims his damage to be P10,800, basing that claim upon the profits which he would have received if he had continued the business for the second year.

The appellee makes no objection to this amount, the question of the amount of damages not having been referred to in its brief. It is the practice of this court, in case of reversal of a judgment dismissing the complaint on the merits, to examine the evidence and enter or order entered the judgment which the inferior court should have rendered; and, where the action is for a sum of money or damages, to find from the evidence the amount due or the damages suffered and to render or order the trial court to render judgment for that amount. We assume that that practice is thoroughly understood and that if appellee had had any objection to urge as to the amount of damages which should be awarded to the plaintiff in case judgment should be found for him in this court, it would have presented it in its brief.

The only damages claimed relate to profits. Articles 1106 and 1107 of the Civil Code read as follows:

"Indemnity for losses and damages includes not only the amount of the loss which may have been suffered, but also that of the profits which the creditor may have failed to realize, reserving the provisions contained in the following articles.

"The losses and damages for which a debtor in good faith is liable, are those foreseen or which may have been foreseen, at the time of constituting the obligation, and which may be a necessary consequence of its nonfulfillment.

"In case of fraud, the debtor shall be liable for all those which clearly may originate from the nonfulfillment of the obligation."

Under these provisions we are required to determine the amount of profits which plaintiff failed to realize by reason of the refusal of defendant to permit him to continue under the contract for the second year and which were foreseen or which might have been foreseen at the time the contract was made and which were a necessary consequence of the breach. Plaintiff testified that he made P11,000 profit the first year and that he would unquestionably have made a net profit of P1,200 a month if he had been left to enjoy the second year of the contract. There is no evidence contradicting this, and while the estimation of profits lost has, in most cases, some of the elements of speculation, it is inherent in the nature of the subject matter and not in its manner of treatment. As was said in the case of *Ft. Smith & W. R. Co. vs. Williams* (30 Okla., 726):

"This has ever been looked upon and treated by the courts as a vexed and difficult question. It has been, and will always be, impossible to lay down any fixed and definite rule correctly applicable in all cases. There has never been a rule established which was decisive and universally followed by the courts in all cases, but the inclination of the earlier authorities to hold that contemplated profits per se were improper elements of damage has given way under the riper wisdom of jurisprudence, and, instead of holding to the earlier inclination, the weight of authorities in modern jurisprudence either holds or concedes that, where a loss of profits is not too remote or conjectural to be susceptible of computation with reasonable accuracy, they are proper elements of damage.

"This rule is recognized with approval by each and all of the following authorities cited by counsel for plaintiff in error in support of his first proposition: *Strawn vs. Cogswell* (28 111., 461); *Frazer vs. Smith* (60 111., 145);

Galveston H. & S.A. R. Co. vs. Jessee (2 Willson Civ. Cas. Ct. App., sec. 405), and authorities cited; People's Sav. Bank of Waterloo vs. C. F. Transit Co. (118 Iowa, 740, 92 N. W., 691); Bartow vs. Erie R. Co. (73 N. J. L., 12, 62 AtL, 489); H. & T. C. R. R. Co. vs. Hill (63 Tex., 381, 51 Am. Rep., 462); Western U. Teleg. Co. vs. Crall (39 Kan., 580, 18 Pac, 719) ; Moulthrop vs. Hyett (105 Ala., 493, 53 Am. St. Rep., 139,,17 So., 33); Williams vs. Island City Mercantile and Mill Co. (25 Ore. 573, 37 Pac, 51) ; Brigham & Co. vs. Carlisle (78 Ala., 244, 56 Am. Rep., 28) ; Gas Co. vs. Glass Co. (56 Kan., 622, 54 Am. St. Rep., 598, 44 Pac, 621) -Cutting vs. Miner (30 App. Div., 457, 52 N. Y. Supp., 288); Griffin vs. Colver (16 N. Y., 489, 69 Am. Dec, 718); Western Gravel Road Co. vs. Cox (39 Ind., 263); Florida Northern R. Co. vs. Southern Supply Co. (112 Ga., 1, 37 S. E., 130); Bell vs. Reynolds (78 Ala., 511, 56 Am. Rep., 55) ; Pollock & Co. vs. Gantt (69 Ala., 373, 44 Am. Rep., 519) ; Witherbee vs. Meyer (155 N. Y., 446, 50 N. E., 58).

* * * * *

"None of the above authorities have held against the justness of the rule of applying profits as a measure of damages, but have merely held it inapplicable to the cases decided. There is more or less inaccuracy in every action for damages for breach of contract, but in order to justify a recovery in any case, assuming that a breach has been committed, there are two necessary elements to be considered: One that a damage has been done; the other that such damage is the result of the breach. The amount of the one should be computed with reasonable accuracy. The fact of the other must be determined with reasonable certainty. A less degree of accuracy is required in the former than of certainty in the latter, but neither is required to be absolute or beyond conjectural possibilities. Where it reasonably appears that a party has been damaged, and that such damage is the direct result of the breach, then a recovery is justified. The next step is to ascertain how much will reasonably compensate the injured party. This should be computed by the plainest, easiest, and most accurate measure which will do justice in the premises, and if from the conditions in the contract, and the nature of the breach, it reasonably appears that the extent or amount of damages may be more readily, easily, correctly, and justly ascertained by applying the loss of profits as a measure, if it is evident that profits were lost and the amount thereof can be calculated with reasonable accuracy, then such profits are the true measure to be applied. In such cases, however, it should appear evident that profits were lost. The amount may be estimated with only reasonable accuracy; but the fact that profits were lost should require stricter proof. This doctrine is deduced from a vast weight of authorities, both American and English, including 2 Joyce on Damages, and authorities; 1 Sutherland on Damages (3 ed.) and notes and cases cited; 1 Sedgwick on Damages (8th ed.); 8 Am. & Eng. Enc. (2 ed.) and authorities cited in notes, 13 Cyc. and cases cited; Bryson vs. McCone (121 Cal., 153; 53 Pac, 637) ; Blagen vs. Thompson (23 Ore., 239; 18 L. R. A., 315; 51 Pac, 647); Dart vs. Laimbeer (107 N. Y., 664; 14 N. E., 291); Brown vs. Hadley (43 Kan., 267; 23 Pac, 492); Hoge vs. Norton (22 Kan., 374); Hadley vs. Baxendale (9 Exch., 341; 2 C. L. R., 517; 23 L. J'Exch. N. S., 179; 18 Jur., 358; 2 Week. Rep., 302; 26 Eng. L. & Eq. Rep., 398; 5 Eng. Rul. Cas., 502; a leading case both in England and America); Tootle vs. Kent (12 Okla., 674; 73 Pac., 310); Choctaw Ry. Co. vs. Jacobs (15 Okla., 493; 82 Pac, 502); Mace vs. Ramsey (74 N. C., 11); Butler vs. Manhattan ft. R. Co. (143 N. Y., 417; 26 L. R. A., 46; 42 Am. St. Rep., 738; 38 N. E., 454); Bluegrass Cordage Co. vs. Luthy (98 Ky., 583; 33 S. W., 835); Simpson vs. London etc. R. Co. (I. Q. B. Div., 274; 45 L. J. Q. B. N. S., 182; 53 L. T. N. S., 805; 24 Week. Rep., 294)."

In the case before us there seems to be as little speculation in determining the profits which the plaintiff might have recovered as is usual in cases where the time for which the profits are to be recovered extends over a considerable period of time. It is undisputed that the business was a very profitable one the first year and that the second year would have been more profitable than the first. While the estimate of the amount of profits for the second year is an estimate of necessity, it is one which is based upon facts testified to by the plaintiff, which were within his knowledge and which appear to the court to sustain his contention. While the evidence is not as conclusive as in cases where the damages are certain and capable of accurate statement, we are satisfied with its sufficiency, particularly in view of the fact that all that courts may require of litigants is the production of the best evidence of which the case is susceptible.

As to whether or not the plaintiff in an action of this character may recover only that portion of the profits which had accrued up to the time of bringing the action, or whether he may sue for all the damages resulting from the breach in a single action, even though that action is begun long before the period during which the profits will accrue has expired, we may say that, in our judgment, the weight of authority is to the effect that the plaintiff need bring but one action and that he may recover the damages sustained for the whole period even though it be by anticipation.

The principle on which the case of *Pierce vs. Tennessee Coal, Iron and Railroad Co.* (173 U. S., 1) is decided is, in our judgment, applicable to the case at bar. That was a case in which the plaintiff, while employed as a machinist in the defendant's coal mine in Alabama, was seriously hurt under circumstances which the plaintiff claimed, and the defendant denied, rendered it liable to him in damages. The parties were desirous of settling and compromising plaintiff's claim for damages for the injuries and, after repeated negotiations, they made an agreement by which the defendant was to pay to the plaintiff regular wages while he was disabled, to furnish him with such supplies as he might choose to get from the commissary, to give him coal and wood for fuel at his dwelling house and the benefit of a garden belonging to the defendant. The agreement was carried out by the defendant for some time and then it discharged the plaintiff from its employ before his disability ceased.

After discussing certain phases of the contract and declaring its nature and purpose, the court said:

"It appears to us to be equally clear that the Circuit Court of the United States erred in excluding the evidence offered by the plaintiff, in restricting his damages to the wages due and unpaid at the time of the trial, and in declining to instruct the jury as he requested.

"Upon this point the authorities are somewhat conflicting; and there is little to be found in the decisions of this court, having any bearing upon it, beyond the affirmance of the general propositions that 'in an action for a personal injury the plaintiff is entitled to recover compensation, so far as it is susceptible of an estimate in money, for the loss and damage caused to him by the defendant's negligence, including not only expenses incurred for medical attendance, and a reasonable sum for his pain and suffering, but also a fair recompense for the loss of what he would otherwise have earned in his trade or profession, and has been deprived of the capacity of earning by the wrongful act of the defendant,' and, 'in order to assist the jury in making such an estimate, standard life and annuity tables, showing at any age the probable duration of life, and the present value of a life annuity, are competent evidence' (*Vicksburg & M. Railroad Co. vs. Putnam*, 118 U. S., 545, 554); and that in an action for breach of contract 'the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken' (*Benjamin vs. Hilliard*, 23 How., 149, 167).

"But the recent tendency of judicial decisions in this country, in actions of contract, as well as in actions of tort, has been towards allowing entire damages to be recovered, once for all, in a single action, and thus avoiding the embarrassment and annoyance of repeated litigation. This especially appears by well considered opinions in cases of agreements to furnish support or to pay wages, a few only of which need be referred to."

The court, after discussing *Parker vs. Russell* (133 Mass., 74), *Schell vs. Plumb* (55 N. Y., 592), *East Tennessee V. & G. R. Co. vs. Staub* (7 Lea, 397), holding the doctrine just quoted, further said:

"These cases appear to this court to rest upon sound principles, and to afford correct rules for the assessment of the plaintiff's damages in the case at bar. * * *

"If these facts were proved to the satisfaction of the jury, the case would stand thus: The defendant committed an absolute breach of the contract, at a time when the plaintiff was entitled to require performance. The plaintiff was not bound to wait to see if the defendant would change its decision, and take him back into its service; or to resort to successive actions for damages from time to time; or to leave the whole of his damages to be recovered by his personal representative after his death. But he had the right to elect to treat the contract

as absolutely and finally broken by the defendant; to maintain this action, once for all, as for a total breach of the entire contract; and to recover all that he would have received in the future, as well as in the past, if the contract had been kept. In so doing, he would simply recover the value of the contract to him at the time of the breach, including all the damages, past or future, resulting from the total breach of the contract. The difficulty and Uncertainty of estimating damages that the plaintiff may suffer in the future is no greater in this action of contract than they would have been if he had sued the defendant, in an action of tort, to recover damages for the personal injuries sustained in its service, instead of settling and releasing those damages by the contract now sued on.

"In assessing the plaintiff's damages, deduction should, of course, be made of any sum that the plaintiff might have earned in the past or might earn in the future, as well as the amount of any loss that the defendant had sustained by the loss of the plaintiff's services without the defendant's fault."

From the amount of damages proved in the case at bar there would have been deducted, if there had been any proof to that effect, whatever profits plaintiff had gained up to the time of the action or might reasonably be expected to gain during the period sued for. No evidence, however, has been introduced on that subject and we do not find it necessary to go into that question. We are of the opinion that the great weight of authority is to the effect that the opportunity to earn wages or profits in reduction of the damages claimed will not be presumed but must be affirmatively shown by the defendant. (Van Winkle vs. Satterfield, 68 Ark., 617, 623, 25 S.-W. Rep., 1113, 23 L. R. A., 853; Kelley vs. Louisville & N. R. Co., 49 111. App., 304; Fish vs. Glass, 54 111. App., 655; Hamilton vs. Love, 152 Ind., 641, 53 N. E. Rep., 181, 71 Am. St. Rep., 384; Pennsylvania Co. v. Dolan, 6 Ind. App., 109, 32 N. E. Rep., 802, 51 Am. St. Rep., 289; Farrell vs. School District, 98 Mich., 43, 56 N. W. Rep., 1053; Allen vs. Whitlark, 99 Mich., 492, 58 N. W. Rep., 470; Chisholm vs. Preferred Bankers' L. Assur. Co., 112 Mich., 50, 70 N. W. Rep., 415; Boland vs. Glendale Quarry Co., 127 Mo., 520, 30 S. W. Rep., 151; Bassett vs. French, 10 N. Y. Misc., 672, 31 N. Y. Supp., 667; Heyer vs. Cunningham Piano Co., 6 Pa. Super. Ct., 504; Winkler vs. Racine Wagon & Carriage Co., 99 Wis., 184, 74 N. W. Rep., 793; Mathesius vs. Brooklyn Heights R. Co., 96 Fed. Rep., 792; Rosenberger vs. Pacific Coast Ry. Co., Ill. Cal., 313, 43 Pac. Rep., 963; Pinet vs. Montague, 103 Mich., 516, 61 N. W. Rep., 876; Dearing vs. Pearson, 8 N. Y. Misc., 269, 276; 28 N. Y. Supp., 715, citing the text; Babcock vs. Appleton Manuf. Co., 93 Wis., 124, 67 N. W. Rep., 33; Dunn vs. Daly, 78 Cal., 640, 21 Pac. Rep., 377; Brown vs. Board of Education, 29 111. App., 572; School Directors vs. Kimmel, 31 111. App., 537; Miller vs. Boot & Shoe Co., 26 Mo. App., 57; Koenigkraemer vs. Missouri Glass Co., 24 Mo. App., 124; Saxonia Mining & R. Co. vs. Cook, 7 Colo., 569, 4 Pac. Rep., 1111; Ansley vs. Jordan, 61 Ga., 482; Roberts vs. Crowley, 81 Ga., 429, 7 S. E. Rep., 740; Hinchliffe vs. Koontz, 121 Ind., 422, 23 N. E. Rep., 271; Larkin vs. Hecksher, 51 N. J. L., 133, 16 Atl. Rep., 703, 3 L. R. A., 137; Fee vs. Orient Fertilizing Co., 36 Fed. Rep., 509; Costigan vs. Mohawk, etc. R. Co., 2 Denio, 609; Howard vs. Daly, 61 N. Y., 362, 19 Am. Rep., 285; Gillis vs. Space, 63 Barb., 177; King vs. Sturer, 44 Pa., 99, 84 Am. Dec., 419; Griffin vs. Brooklyn Ball Club, 68 App. Div., 566, 73 N. Y. Supp., 864; Chamberlain vs. Morgan, 68 Pa., 168. See Gazette Printing Co. vs. Morss, 60 Ind., 153; Williams vs. Chicago Coal Co., 100 111., 149; Sedgwick on Damages, vol. 2, sec. 667; Labatt's Master and Servant, sec. 399.)

The cause is returned to the Court of First Instance whence it came with instructions to enter a judgment in favor of the plaintiff and against the defendant for the sum of P10,800, with costs in that instance but without costs in this.

Arellano, C. J., Torres and Araullo, JJ., concur.

CARSON, J., concurring in the reversal of the judgment of the trial court, but dissenting from the final disposition of the case:

While I agree with the majority in reversing the judgment in the court below and concur in the rulings upon which the reversal is founded, I think that the record should be remanded for a new trial, wherein evidence as to the amount of damages can be taken in the light of our rulings that plaintiff is entitled to recover in a single action for all the damages resulting from the breach of the contract, and that where the loss of profits in a case of this kind is not too remote or conjectural to be susceptible of computation with reasonable accuracy, it is a proper element of damage.

The trial judge was of opinion that plaintiff could recover no damages in this action and no evidence seems to have been introduced as to "profits plaintiff had gained up to the time of the action or might reasonably be expected to gain during the period sued for" notwithstanding the breach of the contract. The majority opinion admits that such profits if proven, should be deducted from the amount of damages allowed by the judgment. I think that the judgment of the trial court having been reversed on the ground that the trial judge erred in his rulings as to the right of plaintiff to recover any damages at all, and this court having recognized plaintiff's right to recover and at the same time announced the doctrine which should be applied as to the measure of the damages, and the form in which proceedings should be maintained for their recovery, the case should be remanded to the trial court and evidence taken as to the true damages which should be allowed in this action, so that judgment may be rendered on proof not only as to the amount of the anticipated profits under the contract, but also as to the amount, if any, which should be deducted therefrom because of "profits plaintiff had gained up to the time of the action or might reasonably be expected to gain during the period sued for" notwithstanding the breach of the contract.

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