# ORIGINAL CIVIL.

*Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Macpherson.*

MACGILLIVRAY *v.* THE JOKAI ASSAM TEA COMPANY.

1876
*Sept.* 5, 6,
& 14.

*Master and Servant—Suit for damages for wrongful dismissal—Incompetence—Rendering free and just accounts—Warranty.*

The plaintiff, having obtained recommendations as a tea assistant in the defendant company's garden in Assam, came out to Calcutta, and, after some interviews with the defendants' agents there, entered into an agreement with the defendants to enter into their service as assistant in their tea gardens for a period of three years. The agreement stipulated that the plaintiff should, "when required to do so, render just and true accounts, and give every other particular and information of all moneys, &c., entrusted to him, or that may come into his possession, power, or custody or under his control;" and it was also agreed that the defendants should "be at liberty to annul this agreement at any time for wilful misconduct of the plaintiff in not fulfilling the terms and conditions to be observed by him, or if he shall be prevented by reason of continued illness from attending to, or be hindered thereby in the performance of, his duties, or by reason of the bankruptcy, insolvency, or dissolution of the defendant company," and in those cases the salary was to cease, and the plaintiff be discharged from the defendant company's service. The plaintiff proceeded to Assam, worked for a short period in the defendants' garden, and was then dismissed from the company's service, on the ground of his incompetence. In an action brought for damages for wrongful dismissal, the Judge of the Small Cause Court was of opinion that, under the circumstances, there was no implied warranty in the part of the plaintiff of his competence, and the grounds for dismissal having been expressly stated in the agreement, the defendants were not justified in dismissing him on another ground, and therefore should not be allowed to give evidence of his incompetence. *Held*, on reference to the High Court, that the plaintiff, having expressly undertaken to render true and just accounts, his incompetence to do so would, if proved, be an answer to the action, and therefore the defendants ought to have been allowed to give evidence that he was incompetent. "True and just accounts" meant such accounts as an inexperienced assistant in a tea garden might reasonably be asked to render, and were not to be interpreted merely as an undertaking that the plaintiff would act honestly by his employers. *Held* also, that the agreement expressly stating the grounds of dismissal did not preclude the defendants from dismissing the plaintiff for incompetence.

CASE referred for the opinion of the High Court, under s. 7 of Act XXVI of 1864, by H. Millett, first Judge of the Calcutta Court of Small Causes.

1876

MACGILLIVRAY v. THE JOKAI ASSAM TEA COMPANY.

"This suit is brought by the plaintiff, to recover Rs. 1,000, after abandoning all excess, as damages for wrongful dismissal and breach of contract. The defendant company pleaded that they had dismissed the plaintiff for incompetence, and, when the case was called on on the 24th June 1876, Mr. Macrae, the Counsel for the defendants, applied for a commission to examine Dr. O'Brien, the manager of the garden in Assam, and also Dr. White, one of the largest shareholders in the company, who resides near the garden, in order to prove the incompetence. This application was opposed by the other side, on the ground that such evidence would not be material, as the plea of incompetence could be no defence to the suit, and this in fact is the real question to be decided.

"All the facts, except as regards the incompetence, are practically admitted, and are as follows:—Messrs. Balmer, Lawrie & Co., who are the agents of the defendant company (and who for the purposes of this reference may be considered as the defendants), received a letter from Mooltan, dated 26th July 1875, from a Mr. MacBean, who seems to be in some way connected with the Punjab Bank, as follows:—

GENTLEMEN,

I am anxious to get a young relative of mine on to a Tea Estate, and it has just occurred to me that, from your connections with tea gardens, you may sometimes have enquiries from the gardens for assistants. The lad I speak for is about 24 years of age, and from the life he has been brought up to is just the sort of person who would make a first-class assistant. His father is a farmer in a place called Strathnairn in the highlands of Scotland, and he has been brought up to assist on the farm. He is a strong able young man, and steadiness itself. He is quite ignorant of town life which should be all in his favor, and another point which should recommend him to you, *viz.*, that he is of a very amiable disposition and well-suited to manage the natives. If I can get a promise of a berth as assistant in a tea garden for the lad, I would send for him at once.

"The young man alluded to in this letter was the plaintiff, and he accordingly came to Calcutta, and, on the 12th January 1876, the parties executed the following agreement."

The case referred then set out the agreement by which the

plaintiff was engaged as an assistant in the defendants' tea gardens for a period of three years. The following are the only clauses material to this report:—

"And further that, during the time of such service as aforesaid, he will, whenever required to do so, render just and true accounts, and give every other particular and information of all moneys, goods, and chattels, merchandize, and other products and things entrusted to him, or that may come into his possession, power, or custody, or under his control. ..... And, lastly, it is agreed that the said company, or the directors and agents thereof, shall be at liberty to annul this agreement at any time for wilful misconduct of the said Duncan MacGillivray in not fulfilling the terms and conditions on his part to be observed, or if the said Duncan MacGillivray shall, by reason of continued illness be prevented from attending to, or be hindered thereby in the performance of, his duties, or by reason of the bankruptcy, insolvency, or dissolution of the said Jokai Tea Company, Limited. And thereupon the salary specified herein shall completely cease, and the said Duncan MacGillivray be discharged from the company's service."

The reference then continued:—

"The plaintiff subsequently went up to Assam, worked for a short period, and was dismissed finally by a letter from Messrs. Orr and Harris, the defendants' attorneys, dated the 5th April 1876.

"It was alleged that the plaintiff was clearly incompetent in so far as he was unable to write an ordinary business letter, and so far a letter of the plaintiff's shows that he is unable to write any better English than an ordinary out-door servant in England would be able to write; but, at the time of making the application, no suggestion was made that he was unable to render accounts.

"It was contended, therefore, on the authority of *Harmer* v. *Cornelius* (1), that there is always an implied representation on the part of the person taking service, that he is capable of performing the service required of him, and that the failure to afford the requisite skill so impliedly promised is a breach of legal duty, and therefore misconduct and even wilful misconduct. There is no doubt on that authority that when a skilled laborer, artizan, or artist is employed, there is an implied warranty on

(1) 5 C. B., N. S., 236.

1876

MACGILLIVRAY v. THE JORAI ASSAM TEA COMPANY.

his part that he is of skill reasonably competent to the task he undertakes; but in the judgment, Willes, J., says:—'It may be that, if there is no general and no particular representation of ability and skill, the workman undertakes no responsibility. If a gentleman, for example, should employ a man who is known to have never done anything but sweep a crossing, to clean or mend his watch, the employer would probably be held to have incurred all risks himself.' The case of the crossing-sweeper is, no doubt, an extreme case, but it means to say that there may be cases of service where there is no implied warranty on the part of the servant that he is competent to perform the duties he undertakes.

"Here the defendants employ a young man from the highlands of Scotland, whose recommendations seem to be that he is strong, able and steady, quite ignorant of town life and amiable in his disposition, and they employ him for duties concerning which he could have had only vague ideas, and in a country entirely strange to him. It may fairly be said that, if they employ a simple country youth with no better recommendations than the above, they do so at their peril, for it is not alleged as against him that there was any express representation of competency.

"But apart from this, the parties have gone out of their way to insert in their agreement the ground on which the defendants are at liberty to annul it, and those are wilful misconduct, continued illness preventing him from attending to his duties and the insolvency of the company. Looking at the position of the parties, there seems every reason that such a clause should be inserted;—nothing could be more inconvenient than for a man who had come thousands of miles to obtain a particular employment, to be discharged from such employment when obtained for any reason beyond those stated in the agreement. Looking at the fact that the defendants might, with ordinary ease, have decided the question of his incompetency before they signed the agreement, *Dickson* v. *Zizinia* (1) seems to apply here—Maule, J., saying:—'We should not by inference insert in a

(1) 10 C. B., 602.

contract implied provisions with respect to a subject which the contract has expressly provided for. If a man sell a horse and warrant it to be sound, the vendor knowing at the time that the purchaser wants it for the purpose of carrying a lady, and the horse, though sound, proves to be unfit for that particular purpose, that would be no breach of warranty. So, with respect to any other kind of warranty, the maxim *expressum facit cessare tacitum* applies to such cases. If this were not so, it would be necessary for the parties to every agreement to provide in terms that they are to be understood not to be bound by anything which is not expressly set down which would be manifestly inconvenient.'

"For the above reasons I was of opinion that the commission was unnecessary, and as it was stated on the part of the defendants that there was no other defence, and that the damages asked for could not be considered excessive, the case was practically undefended, and, after examining the plaintiff, judgment was given for him for the full amount sued for.

"But at the request of the Counsel for the defendant, I refer the following question for the opinion of the High Court:—'Whether the plea that the plaintiff was dismissed for incompetence is a good defence to this suit.'

"Contingent on the opinion of the High Court, my judgment is for the plaintiff for the full amount sued for."

Mr. *Macrae*, for the defendant, at whose request the reference had been made, commenced, and contended that the defendants ought to have been allowed to go into evidence of the plaintiff's incompetence, which would be an answer to the suit. Under the express terms of the agreement, he was bound to be competent to render just and true accounts, meaning thereby that he should be able to give to his employers in Calcutta such ordinary accounts as would be necessary for an assistant in a tea garden to keep and send in a written form to his employers. We don't contend he must be a skilled book-keeper. This the defendants have evidence to show he was incompetent to perform, and they were entitled therefore to dismiss him. The learned Counsel refered to the case of *Harmer* v. *Cornelius* (1) to show

(1) 5 C. B., N. S., 236.

1876

MACGILLIVRAY v. THE JOKAI ASSAM TEA COMPANY.

that there is in such an agreement an implied representation of competency.

Mr. *Shiell*, for the plaintiff, contended, that the grounds of dismissal stated in the agreement were the only grounds which would justify the plaintiff's being dismissed. If it had been intended that he should be liable to dismissal on other grounds, they would have been stated: not having been stated, they could not, on the principle of the maxims *expressio unius exclusio alterius* and *expressum facit cessare tacitum*, be now implied; see Broom's Legal Maxims, 651, 5th ed., and *Aspdin* v. *Austin* (1).

The clause relating to the "true and just accounts" did not mean that the plaintiff was to be able to keep written accounts, or understand accounts at all, but refers to his honesty in everything that should be entrusted to him. [MACPHERSON, J.—We must treat this as if it were an argument on demurrer and assume he was incompetent, as no evidence was allowed to be called.] Even if he were unable to satisfy that clause of the agreement in the strict sense contended for by the defendants, that would not go to the root of the agreement so as to avoid it: he would not thereby become liable to be dismissed. The clause as to rendering accounts is restricted by that stating the grounds of dismissal in which the parties have specified what should be good cause, and which cannot be extended by implication; see *per* Denman, C.J., in *Aspdin* v. *Austin* (2). It is said competence must be implied in a case of this kind, but wilful misconduct would of itself have been a ground for dismissal, yet that is specified in the agreement, as would incompetence have been expressed if it had been intended to be a ground of dismissal. In *Harmer* v. *Cornelius* (3) there were no specified grounds of dismissal. The services contracted for in that case moreover were skilled services, and in case of skilled persons competence for the work in which they profess to be skilled is implied. Here there was nothing

(1) 5 Q. B., 671.
(2) *Id.*, at p. 684.
(3) 5 C. B., N. S., 236.

of that kind; the defendants knew the plaintiff could know nothing about a tea garden, and they did not engage him until they had seen him and had an opportunity of judging of his capabilities—thus they took the risk on themselves as put by Willes, J., in *Harmer* v. *Cornelius* (1). [MACPHERSON, J.—Willes, J., says, that failure to perform what has been promised is misconduct, which would justify a servant's dismissal.] The principle which governs cases in which skilled services are guaranteed do not apply to the present case. It is submitted that the principle of *caveat emptor*, which applies in ordinary cases of sale of goods, has some bearing on this case. [GARTH, C.J.—Here there is an express warranty as to fitness to render accounts.] Where parties have purchased with their eyes open they take the risk. There is no implied warranty on the part of the vendor. From that view fitness would not be implied at all; it is a case similar to the defendants having purchased goods after inspection.

Mr. *Macrae* in reply.—We take rendering accounts in the common and ordinary meaning of that term. If we are driven to a strict interpretation of the contract, *Harmer* v. *Cornelius* (1) is an authority for saying that if a servant is unable to perform work he has undertaken to do, it is misconduct, and would justify his dismissal; it does not matter whether he cannot, or will not, do it. If this is taken as an argument on demurrer, and the plaintiff treated as incompetent, as must be done, how would he allege his readiness and willingness.

*Cur adv. vult.*

The opinion of the High Court was as follows:—

GARTH, C.J.—We are of opinion that, with reference to the express terms of the written agreement entered into on the 12th of January 1876, the plaintiff distinctly undertook that he would, "whenever required to do so, render just and true accounts, and give every other particular and information of all moneys, goods, and chattels, merchandize, and other products and things entrusted to him, or that might come into his possession, power, or custody, or under his control;" and we think

(1) 5 C. B., N. S., 236, see p. 246.

1876

MACGILLIVRAY v. THE JOKAI ASSAM TEA COMPANY.

that the defendant company ought to have been allowed to go into evidence to show that the plaintiff was not reasonably competent to the task which he undertook. In deciding thus, we act in accordance with the principle laid down in the case of *Harmer* v. *Cornelius* (1). The passage as to the crossing-sweeper, quoted by the Judge of the Small Cause Court from the judgment of Willes, J., has no application to the present case. The crossing-sweeper is stated to have been known to his employers as a person who had never done anything but sweep a crossing, and, under such circumstances, must necessarily have been known to be incompetent for the task which he undertook, and, moreover, he is not supposed to have made any express contract with his employers; whereas, in the present instance, there would appear to have been no knowledge by the defendants of the plaintiff's lack of competency, and there was an express undertaking on his part that he would render just and true accounts, &c.

It has been contended by Mr. Shiell that this undertaking does not refer to any rendering of accounts in the sense of keeping what are technically called "books;" or, in other words, that it was merely an undertaking that the plaintiff would act honestly by his employers; but we do not think that this is the true meaning of the agreement. We consider that the plaintiff undertook that, in the event of moneys, &c., coming under his control, he would duly account for them, and furnish all such reasonable information and particulars as might be expected from a person in his position. We by no means construe it as an undertaking that the plaintiff was a skilled accountant in the wider sense of the expression, but we think that he undertook to keep and render such accounts as an inexperienced assistant in a tea garden might reasonably be asked to keep and render.

We further think that the learned Judge of the Small Cause Court is wrong in holding that the last clause of the agreement means that the plaintiff shall in no case be dismissed, except for such wilful misconduct as is there described, or by reason of continued illness, or the dissolution of the defendant company, &c. The agreement does not say that the defendant company shall

(1) 5 C. B., N. S., 236; S. C., 28 L. J. C. P., 85.

1876

MACGILLIVRAY v. THE JOKAI ASSAM TEA COMPANY.

not have the right to dismiss the plaintiff for any other cause than those specified. It merely reminds the plaintiff that he may be dismissed for the misconduct which is there specified; but it in no way affects or alters the right which the defendant company had to dismiss the plaintiff for absolute inability to perform what he had undertaken.

The Judge of the Small Cause Court must, therefore, proceed to deal with the case on the merits. Each party will pay his own costs of this reference.

Attorneys for the plaintiff: Messrs. *Chauntrell, Knowles,* and *Roberts.*

Attorneys for the defendants: Messrs. *Orr* and *Harris.*

## APPELLATE CIVIL.

*Before Mr. Justice Kemp and Mr. Justice Birch.*

DEEN DOYAL LALL (PLAINTIFF) *v.* HET NARAIN SINGH AND OTHERS (DEFENDANTS).*

1876 *March* 20.

*Mortgage Bond—Interest after due date, Rate of.*

In a suit brought to recover the principal and interest due upon a written security given for the payment of the principal money on a day specified, with interest at a stipulated rate up to such day, the Court may, in its discretion, award interest on the principal sum from due date at such rate as it thinks fit, and is not bound to award such interest at the stipulated rate.

The principle laid down in *Cook* v. *Fowler* (1) followed.

SUIT on a mortgage bond, dated the 28th of Assin 1269 (Fuslee), corresponding with the 17th October 1861, for payment of the principal sum of Rs. 2,600 and Rs. 5,488-8-6 interest, computed at the rate of 18 per cent. per annum, as specified in the bond, from date of the execution of the bond to the 28th Bysack 1281, corresponding to the 29th April 1874.

The original mortgagors were called as witnesses for the plaintiff, and admitted the execution of the bond and the non-

* Regular Appeal, No. 38 of 1875, against a decree of the Subordinate Judge of Zilla Gya, dated the 19th of September 1874.

(1) L. R., 7 H. L., 27.